*The Geneva Papers on Risk and Insurance,* 14 (No. 51, April 1989), 120-148

# Insurance Issues Associated with Cleaning up Inactive Hazardous Waste Sites

by Leslie Cheek *

**Abstract**

While the ultimate cost of cleaning up the nation's inactive hazardous waste disposal sites may be beyond the resources of corporate American and its liability insurers, their ongoing contributions to this task can be assured only if they can predict and plan for these outlays.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) deprives both potentially responsible parties (PRP's) and their insurers of predictability essential to business planning. CERCLA's liability rules and cleanup standards impose costs so potentially ruinous as to compel PRP's and their insurers to expend millions in efforts to shift or evade them.

On the assumption that neither Congress nor the Supreme Court is likely to resolve the escalating PRP-insurer fight over insurance coverage for cleanup obligations, this paper argues that only a voluntary resolution of their differences will permit PRP's and their insurers to bring efficiency, fairness and predictability to the process of financing an important national objective. It proposes some principles and procedures around which a settlement of the coverage disputes, and a predictable, "pay-as-you-go" system for financing cleanups, might be built.

## 1. Introduction

In December, 1987, the General Accounting Office (GAO), Congress' investigative arm, released a report[1] whose Executive Summary states matter-of-factly:

> While still not fully understood, the extent of the nation's potential hazardous waste problem appears to be much larger than is indicated by EPA's [Environmental Protection Agency] inventory of sites. GAO now estimates, largely on the basis of EPA data, that as many as 425,000 sites may need to be evaluated, compared with

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*A paper prepared by Leslie Cheek, III Senior Vice President-Federal Affairs, Crum & Forster Insurance Companies, for a Conference on Risk Assessment and Risk Management Strategies for Hazardous Waste Storage and Disposal Problems sponsored by The Geneva Association and The Risk and Decision Processes Center, The Wharton School, University of Pennsylvania, Philadelphia, Pennsylvania, May 18-19, 1988.

about 27,000 in CERCLIS [Comprehensive Environmental Response, Compensation, and Liability Information System], of which a small portion is expected to become NPL [National Priorities List] sites.[2]

Although the report notes EPA's belief that "only a small portion of the estimated number of sites will actually be found to require cleanup,"[3] the nearly 16-fold disparity between the EPA's CERCLIS list and GAO's inventory is a shocking reminder of how enormous the waste cleanup task may be.

The Congressional Office of Technology Assessment (OTA) estimated in 1985 that cleaning up the 22,000 *inactive* sites then on the CERCLIS list would cost as much as $ 100 billion, and that the task would take 15 years to complete.[4] Another GAO study also released in December, 1987,[5] concluded that the process of cleaning up active sites permitted under the Resource Conservation and Recovery Act (RCRA) would not be complete until fiscal year 2025,[6] and would cost up to $22.7 billion.[7]

While it would be inappropriate to extrapolate to the GAO's estimate of the number of sites that may require cleanup (425,00) the OTA estimate of cleanup costs for 22,000 CERCLIS-listed sites, it seems clear that the cleanup process will last well into the next century and will entail several *hundreds* of billions of dollars.

Indeed, factors other than the sheer numbers of sites suggest that even estimates of this magnitude may be too low.

First, the average cost of cleaning up an inactive site will increase by between *three* and *five* times as a result of the cleanup standards[8] mandated under the Superfund Amendments and Reauthorization Act of 1986 (SARA). A prominent consulting firm estimated in March, 1986, that under the standards which ultimately became law, "(s)ite cleanup costs could be expected to rise by at least a factor of 2.6, and possibly a factor of five or higher."[9] As a result of these more stringent standards, the study concluded:

> Total Superfund program costs could jump from $ 16 billion, as estimated in the CERCLA 301 (a) study, to $ 39-81 billion. The estimated number of sites capable of being addressed by a $ 16 billion program would fall from 1,800 assumed by EPA to 300-700 sites...[10]

Congress chose to ignore the reduced number of sites capable of being cleaned up under its new standards; indeed, it established a series of timetables that is forcing EPA to vastly accelerate the multi-step cleanup process. Section 116 of SARA ordered EPA to complete preliminary assessments for all sites on the CERCLIS list as of October, 1986, by year-end 1987; to complete all necessary inspections a year later, and all evaluations two years later; and to complete evaluations of all sites listed in CERCLIS after October, 1986, within four years of their listing.

In addition, Congress directed EPA to complete remedial investigations/feasibility studies (RI/FS) for NPL sites according to the following schedule:

- 275 sites by October 17, 1989;
- a total of 450 sites by October 17, 1990; and
- a total of 650 sites by October 17, 1991.

Finally, Congress directed EPA to begin remedial action at a minimum of 175 sites by October 17, 1989, and at another 200 sites by October 17, 1991.[11]

Second, and more important, the types of facilities currently finding their way onto the NPL pose progressively more complex issues of liability, remedy, and transaction costs than do earlier additions to the List, and therefore are likely to require progressively greater expenditures of both public and private resources. Most numerous among these types of facilities are the so-called "nonhazardous" waste facilities regulated under subtitle D of RCRA. Here is what the GAO said about these facilities in late 1987:

> The estimates of nonhazardous waste, or subtitle D, facilities that may require cleanup are far less precise, although there appear to be more than were reported in 1985. Altogether, there are reported to be 261,930 nonhazardous waste facilities in the United States, both active and closed. These do not have to have EPA permits to operate, however, and only half of the 227,127 operating facilities are subject to any state permitting requirements. Although 58 percent of subtitle D operating facilities are reported to have inspections at least once a year, only about one-third were actually inspected in 1984, and only 5 percent had groundwater monitoring systems. Many of these facilities existed before hazardous waste disposal was regulated, and any of them could be receiving hazardous wastes from companies or households that generate unregulated small quantities. EPA and the states have already found serious contamination problems at some of these types of facilities, including 184 subtitle D landfills on the NPL.
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> For these reasons, EPA and state officials suspect that hazardous waste may be present, in some amount, at virtually all of the estimated 261,930 subtitle D facilities. Of these, 70,419 facilities, by their nature, have a high likelihood of being hazardous waste sites. As of 1984, 35,622 facilities, received hazardous wastes from small quantity generators, i.e., those facilities that generated 1,000 kilograms of hazardous waste or less a month. Another 32,941 were establishments (locations that include one or more facilities) that were reported closed as of 1984, and therefore, because of their age, were most likely accepting hazardous wastes before the disposal of hazardous waste was regulated. In addition, 1,856 are facilities that EPA classifies as open dumps because they pose a reasonable probability of adverse effects on health or the environment.[12]

These "nonhazardous" facilities include most of the nation's municipal landfills, some of which contain enormous volumes of waste. Cleanup actions at these sites will involve hundreds, if not thousands of PRP's; entail remedies of staggering cost; and require litigation of stupefying complexity.

While the GAO study makes it clear that there is no way of predicting how many "nonhazardous" facilities will ultimately end up on the NPL, the fact that nearly one out of every five sites *currently* on the NPL is a nonregulated landfill suggests that the number will be huge.[13]

The current average cleanup cost per CERCLA site is already more that $ 10 million, when EPA and PRP legal expenses and other transactions costs are added to the $ 9.2 million average EPA remedy cost.[14] If, as has been responsibly estimated, the SARA cleanup standards boost this average by anywhere from three to five times the current per-site cost, each NPL site cleanup in years to come will cost between $ 30 million and $ 50 million.

If, out of a universe of 425,000 potential NPL sites, a mere 15,000 are ultimately listed for cleanup, the resulting cost will range form $ 675 *billion* to more than $ 1 *trillion*.

It strains credulity to believe that Congress will force American business to incur liabilities on this scale to deal with an environmental problem that ranks nowhere near the top of any rational set of public health priorities. However, until public policy makers recognize the need to allocate resources in a cost-beneficial manner, business will be saddled with a growing bill for cleaning up inactive hazardous waste disposal sites.

The immediate challenge to business in these circumstances is to make the best of a bad situation. In enacting SARA, Congress emphatically rejected the business community's argument that it makes little sense to finance the biggest public works project in the nation's history on a case-by-case basis, utilizing what has been termed in other contests as the most complicated, expensive, arbitrary and unpredictable legal system ever devised. At least until the next reauthorization of CERCLA/SARA, and perhaps beyond then, business must live with the fact that every non-tax dollar that ultimately find its way into the cleanup process must be pressed through a legal and bureaucratic sieve that pits government against its business taxpayers, business against business, business against its insurers, and insurers against their reinsurers, leaving behind a sorry residue of huge legal fees, vast wastage of judicial time and resources, interminable delays, and venomous cynicism.

While conflict is inherent in the adversary nature of CERCLA'S liability scheme, the intensity of that conflict has steadily escalated as both PRP'S and their insurers have recognized the ruinous costs that CERCLA, as amended by SARA, could impose on them. For many corporations and their insurers, the fight to avoid or shift CERCLA liability is, quite literally, a fight for corporate life. As will be seen within, the stakes in CERCLA are so huge that both PRP's and their insurers have taken to launching preemptive legal strikes against each other, in attempts to learn, in advance of any legal determination of CERCLA liability, who will be required to pick up the tab.

The mega-trial already under way in the *Shell* waste cleanup coverage case is but a faint harbinger of what is to come. In their complexity, their expense, and their waste of time, the coverage suits are, by themselves, a compelling argument for change. Regardless of their outcomes, they demonstrate beyond cavil that there has to be a better way to fund the costs of cleaning up America's hazardous wastes.

## 2. Armageddon now: Waste cleanup coverage litigation

When the Federal 8th Circuit Court of Appeals ruled on February 26, 1988, that standard form Comprehensive General Liability (CGL) insurance policies do not provide coverage for waste generators who must reimburse EPA for CERCLA cleanup costs or are ordered to do the job themselves,[15] the American Insurance Association (AIA) characterized the decisions as "a victory of major importance."[16] Said AIA President Robert E. Vagley:

> The federal courts have now made clear that industrial polluters are not going to be allowed to shift the cost of cleaning up their hazardous waste under the Superfund programs to their insurers.
>
> Insurance companies did not agree to accept hazardous waste generators' burdens of complying with environmental requirements, did not charge premiums for that risk, and entered into contracts that clearly did not cover this kind of expense. Two federal appeals courts have confirmed those conclusions. We believe the issue should now properly be regarded as settled.[17]

While it is true that the *NEPACCO* decision adopted the analysis of the only other Federal Circuit Court decision on the issue, *Maryland Casualty Co. v. Armco, Inc.,*[18] and that the Supreme Court refused to review that decision, the issue is far from "settled." A review of *state* court decisions on the identical issue reveals only that insurers and PRP's have achieved the judicial equivalent of a Mexican standoff.

Moreover, the Supreme Courts refusal to grant *certiorari* in *Armco does not necessarily mean that the high court approves of the result in that case. The best proof of this caveat lies in the court's serial refusals to review the widely divergent Circuit Court results in three major asbestos disease coverage cases in the early 1980's.*[19]

*Indeed, it appears from the escalating proliferation of huge, preemptive declaratory judgement actions relating to insurance coverage for waste cleanup obligations that the issue is not only unsettled, but is fast becoming the PRP-insurer answer to the regional lottery.*[20]

*The opening paragraph of a February 1, 1988, Business Insurance* magazine article headlined, "Superfund Unleashes Flurry of Coverage Suits," announced that attorneys for both policyholders and insurers agree that "litigation over insurance coverage for government-ordered hazardous waste site cleanups may rival asbestos-related coverage lawsuits in terms of time, expense and complexity."[21]

At this writing, the most recent of the mega-declaratory judgement actions was that filed in December of 1987 in Massachusetts Superior Court by United Technologies Corp. (UTC) and six of it subsidiaries 240 of their first-party property and third-party liability insurers from the past 37 years. The UTC suite seeks defense and indemnification coverage for 102 off-site pollution cleanup claims and 36 on-site claims in 26 states.

The other major actions include Westinghouse Electric Corp's May, 1987, New Jersey claim against more than 140 of its insurers for coverage of cleanup costs at 74 hazardous waste sites and the costs of defending hundreds of bodily injury claims by customers alleging exposure to toxic substances in the company's products; and Shell Oil Co.'s 1983 suit against 270 of its liability insurers for coverage costs at waste sites in Colorado and California.

Of the mega-suits, only the Shell case has gone to trial. But enough other mini-actions have been decided to make it anyone's guess as to how the larger actions will turn out.

About all that can be said for current state case law on the cleanup coverage issue is that jurisdictions noted for the generally pro-plaintiff bias of their jurisdictions noted for the generally pro-plaintiff bias of their judiciaries have tended to side to with policyholders,[22] while states with more conservative legal traditions have tended to support insurers' views.[23] A recent review of developments in this burgeoning field accurately noted that "liability for past handling, transportation, storage, treatment and disposal of hazardous wastes at currently inactive facilities (is) the most controversial environmental law issue of the decade."[24]

Indeed, the controversy is already so well-developed that the major players have established institutions to enhance their positions on coverage issues: EPA's PRP demand letters now contain boiler-plate requests for information on the recipients' insurance coverage for the preceding 50 years; site-specific PRP steering committees are as happy to oversee coverage warfare with their insurers as to do battle with EPA over the apportionment of cleanup liability; the carriers have organized the Insurance Environmental Litigation Association (IELA) to assure nationwide coherence of position among insurers and provide *(amicus curiae)* support in key coverage cases; and the Chemical Manufacturers Association (CMA) recently established its own coverage litigation unit.

The environmental coverage litigation community is now large enough to support a thriving trade press and a booming conference business. And law firms with both PRP and insurance defense clients are bidding up the prices of experienced coverage litigators.

In other words, a new industry has been born, ready to serve a widening circle of customers as the CERLCA net is cast ever more broadly and the stakes at issue grow daily larger. A future paved with never-ending legal fees stretches toward a horizon that grows more distant with each addition to the NPL.

Given the theoretical coverage litigation possibilities inherent in EPA actions at multi-generator NPL sites, it is small wonder that the legal fraternity is bullish on this corner of environmental practice. It is not at all outlandish to picture the following scenario developing out of the cleanup of an NPL-listed urban landfill used by 1,000 PRP's for ten years:

If each of the PRP's had only three primary liability insurers during the landfill's life, as many as 3,000 insurers could become defendants (or plaintiffs!) in coverage actions; they would face litigation involving as many as 10,000 individual insurance contracts.

If each of the primary carriers had but five excess limits, umbrella, or reinsurance carriers on these 10,000 risks, as many as 50,000 additional suits might result from disputes among these entities, which in turn might face litigation involving *their* retrocessionaires!

The ten-year period could span the years during which the insurance industry modified its CGL policies form an "accident" to an "occurrence" basis, and added the "pollution exclusion" to the latter form, thereby injecting the mind-numbing possibility of as many as 100 *million* separate cross-claims among the primary carriers alone, as the insurers of all 10,000 involved contracts each seek to pin liability on the underwriters of policies other than their own.

If the excess limits or reinsurance carriers refuse to "follow form" as a result of decisions in these cases, the number of potential lawsuits climbs quickly into the *billions*, all as a result of the cleanup of one of hundreds or perhaps thousands of similar landfills.

What is to prevent the different (or perhaps many of the same) parties to cleanup at other landfills from repeating the same pattern of litigation, in the hope of different outcomes? The recent history of both tort and insurance contract law suggests strongly that no American common law precedent, no matter how hoary with age or tradition, has a half-life longer than it takes a trial court judge to write an opinion overruling it.

From the standpoint of insurers, the volatility of the common law was most startlingly demonstrated in the trio of cases arising out of the cleanup of a Jackson Township, New Jersey, landfill[25] and in the February, 1987, decision of a New Jersey Superior Court in *Summit Associates, Inc. v. Liberty Mutual Fire Insurance Co.*[26]

Until the *Summit Associates* case, the most alarming precedents for insurers were those growing out of the contamination of wells serving 97 families by seepage of hazardous wastes from a landfill owned and operated by Jackson Township, New Jersey. In combination, these decisions destroyed the efficacy of the CGL's pollution exclusion; converted the CGL's per *occurrence* policy limit into a per *claim* policy limit; and overturned centuries of common (and insurance contract) law by awarding damages for the mere *possibility* of future harm. Only the last of these decisions has been modified on appeal.

New Jersey's courts have simply written the word "sudden" out of the phrase "sudden and accidental" in the CGL pollution exclusion, thereby eliminating the *temporal* distinctions

that underlie the exclusion and converting it into a matter of the insured's *intent* in performing the act that gave rise to the pollution incident. The *Jackson Township* court dismissed the key phrase in the exclusion as follows:

> When viewed in the light of the case law cited, the clause can be interpreted as simply a restatement of the definition of 'occurrence' that is, that the policy will cover claims where the injury was 'neither expected nor intended.' It is a reaffirmation of the principle that coverage will not be provided for intended results of intentional acts but will be provided for the unintended results of an intentional act.

Having found insurance coverage for a transparently non-sudden occurrence under contracts patently intended to deal with sudden *and* accidental events, New Jersey jurists next went to work on the application of the term "occurrence" to the facts in the Jackson township case. The *American Home* court found that the "occurrence" was not the seepage of wastes form the landfill that contaminated the wells, but rather the separate contamination of *each* of the wells. Looking at the language in the "occurrence" definition stating that "continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence," the court found that each of the 97 plaintiff families had been exposed to different conditions, in that "they ingested different quantities of contaminated water; different V.O.C's, at different times, and each family's duration of exposure varied..." Thus, with a stroke of the judicial pen, the insurer's liability went form X to 97X.

The *Ayers* court did to the CGL's coverage of "bodily injury" what the *American Home* court did to the definition of "occurrence": it ignored it, and awarded $ 13.4 million in damages to the 360 individual plaintiffs, not one of whom even alleged bodily injury, as follows: $ 8.2 million for the creation of a medical surveillance trust fund; $ 5 million for "loss of quality of life;" and $ 200,000 for "emotional distress." (The court also awarded more than $ 2 million to cover the cost of hooking the plaintiffs' houses up the municipal water supply system.) On appeal, only the $ 8.2 million in medical surveillance funds was deleted from the award.

Happily, not all courts have dealt so cavalierly with insurers' efforts to enforce the temporal aspects of the pollution exclusion. In *Great Lakes Container Corp. v. National Union Fire Insurance Co.,* 727 F.2d 30 (1st Cir. 1984), for example, the court found no ambiguity in the exclusion:

> We agree with the District Court that when the policy is read against the complaint, there is no ambiguity and exclusion (f) applies. The government has alleged that Great Lakes is liable because pollution and contamination of the soil, surface and subsurface waters has taken place as a concomitant of its regular business activity. Property damage resulting from such activity falls squarely within the language of exclusion (f). There is no "occurrence" within the meaning of the policy alleged, nor any allegation of a sudden and accidental discharge.

Similar results were reached in *American States Insurance Co. v. Maryland Casualty Co.,* 587 F. Supp. 1549 (E. D.. Mich. 1984) and *Barmet of Indiana, Inc. v. Security Insurance Group,* 425 N.E. 2d 201 (Ind. App. 1981).

The ability of courts to paralyze the will of the insurance industry to provide environmental liability coverage in the future by reinterpreting or, worse, totally ignoring, the plain language of past contracts between insurers and insureds was best illustrated in the *Summit Associates* case.

Summit Associates, Inc., purchased a piece of property in Edison Township, New Jersey, unaware that it had previously been used by the township as a sewage treatment facility. When workmen discovered toxic wastes on the property, Summit was ordered to remove 150 tons of sludge and 50,000 gallons of liquid waste from the ground, at a cost of some $438,600. Summit filed a claim with its commercial multi-peril insurer, Liberty Mutual, for its cleanup and removal costs.

Liberty denied the claim on the basis of two explicit exclusions in its contract – one precluding coverage of any pollution damages unless the occurrence giving rise to those damages is both "sudden and accidental," and the other precluding claims for damage to property owned by the insured.

The New Jersey court declared both exclusions "ambiguous," and thereby found a way to construe them "liberally in favor of the insured." "Sudden and accidental," said the court, really means "neither expected nor intended from the standpoint of the insured," and thus the pollution exclusion is inapplicable. As for the owned property exclusion, the court reasoned as follows:

> ...the underlying Public Policy in this area is quite clear when the potential for damage to the health, safety and welfare of the people of this State must outweigh the express provisions of the insurance policy in issue. As a result, the exclusion clause in the policy which pertains to excluding coverage where the damage is to the policy holders [*sic*] land, must be held inapplicable where the danger to the environment is extreme.

Not only did the court cite no precedent whatsoever in support of this proposition, it also went on to explain why it had chosen to vitiate a contract heretofore found perfectly consonant with "public policy":

> ...The question that arises is what party will bear the burden of the cost of the clean-up in a situation where the landowner does not have the resources to pay for the cost of the clean-up? Certainly, to impose such cleanup costs on government agencies would certainly created an undue burden on taxpayers, who should not be forced to assume such a burden in cases involving private landowners...
>
> ...A precedent must be set to provide coverage for the case where the private landowner is ordered to undertake the necessary clean-up. Thus, exclusions denying coverage for damage to property owned by the insured should not be applied under these circumstances...
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> This policy must control over the plain meaning doctrine in situations such as that presented by this case, because of the nature of the case, the potential damage which may result, and the cost which may be imposed upon a landowner.

Consistent with this whole-cloth formulation, the court, ordered Liberty to reimburse Summit for all its cleanup costs, prejudgment interest, *and* $ 37,000 in attorneys' fees.

What the New Jersey court really said was this: "We don't give a damn what an insurance policy negotiated in good faith between two contracting parties says when somebody other than the insurer might have to pay a loss plainly excluded from the policy's coverage. We're going to make the insurer pay whenever we find a 'public policy' rationale for doing so."

No insurer's lawyer reading this decision is ever going to recommend that his client write commercial multi-peril policies for New Jersey risks with even the remotest potential

for pollution loss, because there would be no assurance whatsoever that the terms and conditions on which the decisions to insure and the prices of the coverage were based would be respected by the state's courts.

From the standpoint of PRP's, however, the *Jackson Township* and *Summit Associates* cases must appear as beacons in a landscape benighted by decisions like those in the *Nepacco*, *Armco* and *Great Lakes Container Corp.* cases.

The fact that there are strongly-worded precedents for both camps' views, and the fact that many of these precedents reversed earlier or lower court holdings, have simultaneously heightened both camps' anxiety and provided new incentives to litigation. The absence of a clear trend in these cases has given both sides no choice but to continue, like Iran and Iraq, a war whose original cause has become pointless in the escalating bloodshed.

### 3. Apocalypse tomorrow: The socio-economic fallout from unchecked waste cleanup coverage litigation

Just as neither Iran nor Iraq will "win" their conflict, neither PRP's nor insurers will "win" the war over the insurance coverage of waste cleanup obligations. Indeed, the consequences of either side "winning" are so frightening as to make the current stalemate, frustrating though it may be, preferable to a decisive outcome.

If the majority of courts were to decide that waste cleanup costs are covered by CGL policies (with or without pollution exclusions), the resulting exposure would almost certainly bankrupt every major liability insurance carrier in this country, and many of their foreign reinsurers as well.

By the same token, if that majority were to rule that waste disposal is not the sort of fortuitous event insurance was intended to deal with, then thousands of businesses would face huge and wholly unanticipated retroactive liability for decades of routine and entirely lawful commercial practice. Many of these businesses would be forced to close, others would have to assume crippling debt, all would be hamstrung in their ability to compete.

The American property-casualty insurance industry is so huge (with annual premiums in excess of $ 160 billion, assets of more than $ 374 billion, and some 500,000 employees working for more than 3,500 companies)[27] and so universally unpopular (insurance comes into play only when things go wrong) that it is not hard to understand why some courts have assumed, niceties of contract languages to the contrary notwithstanding, that insurers can more easily absorb the costs of Congress' *post hoc* remedy for 200 years of unsafe hazardous waste disposal than the business and governmental entities that make up the community of PRP's.

Nor is it particularly surprising that some courts seem to assume that insurers have virtually limitless reserves that can be tapped for unforseen liabilities, even those as large as cleanup costs under CERCLA as modified by SARA.

The irony of these assumptions is that the insurance business is no more clairvoyant than any other business, and, like all other enterprises, prices its products and projects its reserve needs on the basis of past experience extrapolated into the future, using reasonable loss development and inflationary trend factors.

Upon closed analysis, it is illogical to assume that insurers of general liability contracts written in the decades prior to CERCLA's 1980 enactment could have foreseen that enactment and its attendant economic consequences and built these costs into their prices

and reserve calculations. It is beyond credulity to believe that liability insurers were any better prepared than the rest of the American Business for Congress' decision to cram retroactive joint and several liability for waste cleanup down their collective throat.

The simple fact is that prior to the most recent policy years, insurers had *no* experience whatsoever with waste cleanup costs, and thus had *no* reserves for CERCLA liabilities established under any policy written prior to its enactment.[28]

Under normal circumstances, anticipated reserve requirements are built into the prices insurers charge in given lines of insurance, and actual reserves are established on a case-by-case basis, with the amounts involved taxed against the premiums collected during the year in which the accident giving rise to the case occurred. In this manner, the industry is usually able to determine, reasonably soon after the fact (three years in such "short-tail" lines as automobile and homeowners', five or more in the "long-tail" general liability line and its medical malpractice and product liability sublines) whether its original anticipated reserve requirements were accurately calculated.

If these requirements were not correctly estimated, neither past nor future policyholders can be taxed for the deficiencies involved.

Insurers cannot go back to holders of occurrence-based policies long ago presumed closed and say, "Because recent changes in the law made your premiums 600 percent inadequate, we are now billing you for the balance." These policyholders would rightly say (and, indeed, repeatedly have argued in their coverage briefs) that they paid their money precisely to relieve themselves of the burden of such unanticipated liabilities. Some have gone even further, arguing that even though insurers could not have foreseen the enactment of CERCLA, they nevertheless intended to cover the liabilities that statute created.

Nor would insurance regulators or the imperatives of competition permit insurers to say to future claims-made policyholders, "Because retroactively-imposed liabilities made the prices we charged for occurrence-based policies in the 1960's and 1970's too low, you will have to make the shortfall." As noted above, state-approved rating and statistical plans permit only limited reflection of past rate inadequacy in future insurance prices. And even if full recoupment were permitted, insurers seeking it would quickly lose market share to carriers without such burdens from the past. Finally, the entire point of claims-made policies is to bring their pricing closer in time to the loss and expense experience of the insured class by eliminating the endless retroactive effect of the occurrenced based policy form. Claims-made insureds would rightly reject pricing practices that incorporated experience from an occurrence-based past.

Similarly, rate regulatory statutes require that future insurance prices be based primarily on actual loss and expense experience of current and recent insureds, not on speculation about losses and expenses that may arise under policies from the distant past. Here again, the exigencies of competition for ongoing business would supplement regulatory strictures against speculation in insurance pricing practices.

Given the regulatory and practical restraints on insurers' ability to reach either backward or forward to accumulate reserves for huge unanticipated exposures, the industry would have but two means of attempting to fund these costs – profits form its ongoing business and the surplus built up during its tow hundred-year history. Neither alternative, nor the two in combination, would come close to meeting the potential exposure; worse, either would doom many of the industry's major competitors.

In a growing economy, insurance capacity must increase in order to keep pace with the demand for coverage of new lives, enterprises, homes and possessions, and with the steady increase in the cost of goods and services for which insurance pays. Increased capacity is a function of the capital a free enterprise market is willing to commit to the insurance function. The insurance business can attract and retain capital only if it can provide a competitive return on invested funds. If its profits are eliminated or radically curtailed to create reserves for unmeasurable CERCLA exposure, capital will be withdrawn from the business.

The resulting shrinkage of insurance surplus would first create escalating shortage of needed coverage, and price increases as demand exceeded supply and insurers sought to rebuild surplus through improved profitability. Higher prices would accelerate the flight of superior risks to such alternatives to commercial insurance as captive insurers and risk retention groups. This adverse selection process, in turn, would exacerbate insurers' loss and expense experience, thereby precipitating still more availability problems and still higher prices.

As was the case during the aftermath of the 1980-84 commercial insurance price war, insurers would tend to reduce their writings in their least profitable lines first. Recently, the least profitable lines have been those covering the commercial, professional, and governmental entities most profoundly affected by continuing rapid changes in common law tort liability. The capacity recovery after the price war has restored market stability in most of these lines. An ongoing shortage of capacity in these lines would create severe dislocation in the provision of vital goods and services, as many providers could not risk operating without insurance protection.

As profits disappeared, the stock prices of investor-owned insurers would decline, and these insurers would find it both difficult and expensive to raise additional capital. Mutual insurers would have to finance any additions to surplus entirely out of policyholder premiums and dividends.

Should CERCLA-related losses and expenses exceed any funds diverted from profits and additions to surplus, insurers would be required to dip into surplus, a step with profound implications for insurance availability and cost. For every dollar withdrawn from surplus, an insurer must curtail its premium writings by at least two dollars, in order to maintain an appropriate ratio between premiums and surplus.[29] If invasion of surplus were to become widespread within the industry, severe shortages of capacity would soon become evident even in relatively profitable lines.

Invasion of surplus is an insurer's last and most dangerous defense against insolvency. If only ten percent of an insurer's surplus is invaded in a given year, it must reduce its premium writings by 20 percent, 30 percent or more, thereby sharply curtailing its cash flow and further limiting its profit-making potential. A series of years of similar surplus impairments can bankrupt an insurer in less than five years.

The surplus of the entire property-casualty insurance industry is currently about $ 110 billion. As large as this figure seems in the abstract, it is the foundation upon which the industry's $ 200 billion in premiums is written, not just for contracts that may be called upon to respond to CERCLA-related claims, but for every other policy the industry writes as well. Expropriation or erosion of this surplus would threaten the entire industry, and deprive millions of Americans of the protection they need in their personal and professional activities.

In an individual case involving perhaps a few hundreds of thousands or even several millions of dollars, a judge who is determined to ignore insurance contract language denying a policyholder coverage for a CERCLA-related claim might find it easy to rationalize the small chip his decision to find coverage will take out of the edifice of the American insurance business. But because, in virtually all states, insurance contract law is judge-made (as opposed to statutory) law, that single decision may be dispositive of hundreds of other cases and thousands of pending claims. Furthermore, the decision may be adopted as precedent by other jurisdictions, compounding its effect on insurers' exposure. Thus, a single decision can easily create literally billions of dollars in unanticipated and unreserved exposure for hundreds of liability insurers.[30]

Of course, as earlier noted, insurers appear to be winning as many of these cases as they lose (perhaps more), meaning that the unanticipated liabilities at issue in those cases may have fallen on enterprises or governmental entities as ill-prepared for them on an individual basis as the insurance industry is in the aggregated. Indeed, for some individual policyholders, these liabilities may have been catastrophic.

Over time, however, the ostensible disparity in economic power between insurers and policyholders may lead a majority of courts to shift cleanup costs to insurers, particularly as the profile of the typical PRP changes.

The very early CERCLA cost recovery cases (*e.g.*, Conservation Chemical Co.) were brought for sites at which the PRP's were well-heeled members of the Fortune 500. Only now are these cases reaching the second tier of CERCLA-spawned litigation: EPA and the PRP's have settled the differences between and among them, and the PRP's are in the process of trying to hand the legal and cleanup bills to their insurers.

In these cases, with giant industrial corporations squaring off against huge insurers, their is less temptation for the courts to take the David vs. Goliath position that the insurance policies at issue were "contracts of adhesion" forced on helpless policyholders by omnipotent insurers; or that sophisticated corporate risk managers had a "reasonable expectation" that their policies would cover waste cleanup costs.

But the current generation of CERCLA cases is sweeping progressively smaller entities into the PRP net, and future generations of cases, involving vast urban landfills, will bring the wonders of CERCLA liability to every "mom and pop" entity that ever disposed of hazardous wastes. What impact will the changing demography of the PRP community have on judicial trends in waste-related coverage litigation?

In a colloquy published recently in the *Docket*, the journal of the American Corporate Counsel Association, the author of this paper and Washington environmental attorney David B. Graham debated this question as follows:

> GRAHAM: ...Think about the future: Congress has given the cleanup of hazardous wastes its highest environmental priority, with what poll after poll shows to be overwhelming public support. You and I both know how expensive the cleanup job will be, and we both know that only a fraction of the necessary money will come out of the Federal treasury and from the Superfund taxes imposed on industry. Where is the balance to come from?
>
> Do you believe that the majority of judges, who read the same polls and newspapers that we do, are going to let words in insurance forms that numerous courts have found

to be ambiguous stand in the way of mobilizing funds for a popular cause? Do you think that these judges will allow PRP's to file for bankruptcy when there is any plausible basis for finding insurance coverage for the PRPs' Superfund obligations?

CHEEK: These judges are sworn to uphold the law, not to ponder notions of what is or is not a worthwhile reason to find insurance where none exists.

Moreover, assuming for the sake of argument that judges make decisions on the basis of socio-economic, rather than legal considerations, the state law equivalent of bankruptcy is also available to insurers, who not only provide jobs but also play a vital role in protecting the economic security of millions of households and businesses. I have to believe that judges understand that they cannot indefinitely pluck feathers from the insurance goose without threatening its survival, regardless of the popularity of the case at issue.[31]

In many jurisdictions, trial and even appellate judges are elected public officials, and since, in such common law fields as insurance contracts, the law is what the latest decision says it is, at least a strong possibility that locally-elected trial judges (and locally-selected juries) will tend to side with local employers who provide jobs to local voters in contract disputes with large insurers domiciled elsewhere.

But while elected local, and perhaps appellate, judges may have no political choice but to side with local employers, appointed state supreme court justices and Federal District and Circuit Court judges are in positions in which they can consider both unpalatable prongs of the Hobson's choice CERCLA has spawned; which is it to be: the serial destruction of every local economy in America or the piecemeal dismemberment of the nation's property-casualty insurance industry?

It is this writer's view that either extreme, and any point in between these extremes, is unacceptable. The cleanup of hazardous waste is a worthwhile objective, but as this analysis makes clear, continued reliance on the judicial branch of government to finance history's costliest public works project on a case-by-case basis, using the most transaction cost-intensive legal system in the world to extract billions of dollars in retroactive taxes form entities who could not have foreseen them and thus will be bankrupted by them, will become increasingly dangerous to the this nation's economy.

### 4. False hope: judicial or legislative resolution of insurance coverage issues

Rationality suggests that neither the courts nor Congress will permit the Apocalypse described above to occur. Politics suggests otherwise. It is this writer's considered opinion that the Supreme Court will not inject itself into a judicial fray revolving around entirely state law issues, and that, for Congress, environmental politics, like love, means never having to say you're sorry.

Most businessmen are conservative, and have instinctively welcomed the current administration's attacks on "judicial activism" and its careful appointments of "strict constructionists" to the Federal bench. Under normal circumstances, PRP's and insurers alike would likely cheer for less Federal judicial intervention in State law matters, and would wholeheartedly embrace the notion that there is no Federal common law.[32]

The impending Apocalypse in hazardous waste-related coverage litigation, however, may remind both insurers and policyholders of Tom Wolfe's epigram: "A liberal is a

conservative who's been arrested."[33] Both may find themselves longing for a single, definitive United States Supreme Court ruling on what is and is not covered under insurance contracts in waste cleanup actions, issues historically governed entirely by State, not Federal, law.

Such judicial relief is unlikely, for a number of reasons. First, the Supreme Court has already had, and has wordlessly declined, several opportunities to rule on quite similar issues in the key asbestos disease coverage cases of the early 1980's.[34] These cases had enough procedural "hooks" for a grant of *certiorari* – a split among the Circuits being chief among them -- but were missing the substantive "hook" – a question of Federal law. All of the cases had arisen under State law, and the Federal Courts had taken the cases under their "diversity of citizenship"[35] rather than "Federal question"[36] jurisdiction. Although the Supreme Court did not articulate its reasons for denying *certiorari* in the asbestos disease coverage cases, the absence of a Federal question was undoubtedly a crucial factor.

Second, as a general matter, the Supreme Court has been reluctant to override State law in the absence of Federal legislation on the same issues.[37] Thus, it is unlikely, in the absence of any Federal statute dealing directly with insurance contract interpretation, that the Supreme Court would be willing to craft, out of whole cloth, a Federal common law of insurance contract interpretation.[38]

Third, even if the court were to fashion a Federal rule in a particular case, that rule would not necessarily dictate a similar outcome in a case involving another state law with contrary provisions.[39]

Fourth, were Congress to attempt to resolve the problem by statue, its rules would not be given preemptive effect by the Supreme Court unless Congress were specifically to override all State insurance contract law. The Court has held that preemption of State law cannot be implied from a Federal statute dealing with the same matter.[40]

Finally, the Court is as politically sensitive as the other branches of the Federal Government, and would undoubtedly welcome any excuse to avoid having to choose between the two horns of the Hobson's dilemma that the waste cleanup coverage issue represents. A definitive rule on the issue would mean economic ruin on a spectacular scale regardless of which choice the Court made.

The same political considerations, and others, militate against a legislative resolution of the coverage issue, short of a redrafting of CERCLA that would relieve individual PRP's of the retroactive liability imposed under the original 1980 statue.[41]

It is a truism that Congress, as an essentially reactive institution, will not act on a particular problem until it is forced by circumstance to do so. And when Congress does act, it does so by doing the bare minimum necessary to placate the interests involved. With the Apocalypse of waste cleanup coverage litigation some years down the road, the crisis that typically moves Congress to action has yet to occur.

Moreover, Congress tends to act only when a political consensus has been reached on both the need for action and the nature of the action needed. With the outcomes of the current waste cleanup coverage cases looking more or less like the judicial equivalent of a Mexican standoff, a consensus on the need for legislative intervention, much less a consensus on what form that intervention should take, is obviously remote.

Consensus itself implies a middle ground, with all affected interests surrendering some of their objectives in order to achieve the most important of their goals. The current "scorched earth," all-or-nothing approach to the cleanup coverage issues by both PRP's and insurers, illustrated most vividly by the dozens of preemptive mega-suits now taxing judicial resources across the land, suggests that it will be a long time before the affected interests will be able or willing to reach a compromise on their differences that they could present to the Congress for legislative endorsement.

And if consensus among the affected interests in indeed an essential prerequisite for Congressional intervention, it would seem unlikely, under current circumstances, that any legislative solution would provide either PRP's or insurers with the relief that both ultimately desire – predictable, finite obligations that can be factored into their business planning without undue hardship. This is so because PRP's and insurers are not the only parties necessary to a viable consensus.

Meeting PRP's and insurers' ultimate objective would entail throttling back on the engine that is driving the cleanup coverage litigation – CERCLA's tort law-based liability scheme. The business community's lack of success in tempering either the original 1980 enactment or the 1986 reauthorization of CERCLA suggests, if anything, that the political momentum behind CERCLA may be impossible to halt, much less reverse.

First, although what many PRP's did in decades past could hardly have been described as "pollution" under then - prevailing definitions, and the CERCLA tax system is inconsistent with it, there is an undeniable rough justice in the principle ostensibly underlying CERCLA: the polluter pays. Any proposed legislative resolution of he cleanup coverage disputes that even appears to be at odds with this principle will earn the immediate opposition of the professional environmental organizations and their legions of highly-motivated supporters.

Second, for reasons of institutional pride alone, it would be extremely difficult for Congress to effectively admit that it erred in both 1980 and 1986, as it would be forced to if any relief were to be granted to PRP's and their insurers. Having twice embraced a fault-based approach to the funding of a societal need, Congress would find it hard to concede that it made the same mistake twice, even if the evidence to this effect were overwhelming.

Third, as a purely fiscal matter, Congress would be hard pressed to justify giving the cleanup of hazardous wastes a higher priority for general revenue funding. The continuing Federal budget deficit has already forced Congress to reduce its commitment to national objectives of far greater political importance than waste cleanup; Congress would be unlikely to voluntarily exacerbate its serious resource allocation problems solely to provide relief to politically unpopular segments of society.

Fourth, but for their cataclysmic socio-economic implications, it would be easy for the opponents of change in CERCLA to argue that the PRP-insurer disputes are nothing more than private quarrels whose resolution is not necessary to the public interest. Just as many state legislators look upon the debate over the future shape of American tort law as but another round in the fight between plaintiffs' lawyers and defendants' insurers, so might Congress be convinced that waste cleanup coverage litigation is nothing more than an internecine squabble among members of the business community whose outcome is irrelevant to the goals of CERCLA.

Fifth, until the ranks of the PRP community are swollen with the small businesses, school boards, sanitary districts, counties and municipalities who will increasingly feel the sting of CERCLA liability, the interests advancing reform – mostly large corporations and major insurers – would be unable to overcome the combination of inertia and environmental political power behind the *status quo*.

Finally, Congress has already rejected one major effort to overhaul CERCLA (AIA's 1985 proposal)[42] and an attempt by a small group of insurers to resolve the coverage issues through an amendment to SARA.[43]

AIA's proposal was condemned by the business community for its substitution of higher taxes for CERCLA liability at NPL sites, excoriated by the Administration for its insistence on fair apportionment of post-1980 CERCLA obligations, and attacked by the environmental community for its fault-blind approach to dealing with the consequences of pre-1980 waste disposal. Indeed, the storm of criticism was so loud that the AIA was unable to find a Congressional sponsor for its draft legislation.

The insurers' proposed amendment to SARA, developed after the broader AIA proposal died a premature death, was never formally introduced. Then-chairman Robert T. Stafford (R-Vt.) of the Senate Committee on Environment and Public Works, who was sympathetic to the amendment, was unable to persuade any other member of the Committee to co-sponsor it and decided that it would be wiser, under those circumstances, not to offer the amendment than to propose it and risk having its rejection used by its opponents to further their contrary interests.

Assuming, *arguendo*, that the foregoing analysis is correct, and that neither judicial nor legislative resolution of the waste cleanup coverage disputes is either feasible or imminent, their remains the third branch of the Federal government, the Executive, whose power in this context resides with EPA. What prospect is there for relief through the administration and bureaucratic interpretation of CERCLA and SARA?

At this writing, EPA is showing encouraging signs that it actually wants to make CERCLA and SARA work. The agency has aggressively utilized its authority to enter "mixed funding" (fund and PRP resources) agreements to expedite cleanup,[44] and has instructed its Regions not to make the perfect the enemy of the good in fashioning cleanup remedies.[45]

But EPA is subject to Congressional oversight, and the Senate Environment and Public Works Subcommittee on Superfund & Environmental Oversight, chaired by Senator Frank R. Lautenberg (D-N.J.), last year held a hearing to attack EPA for failing to require attainment of Maximum Containment Level Goals (MCLG's), rather than the less stringent and, of course, vastly less expensive to achieve, Maximum Containment Levels (MCL's) under The Safe Drinking Water Act in selecting remedial actions. In a blatant attempt to establish a *post hoc* legislative history for SARA's cleanup standards, the Subcommittee Chairman attacked EPA's statutory defense of its choices (adequate protection of human health and the environment; cost-effectiveness) as inconsistent with Congressional intent.

The same Subcommittee recently held another hearing during which it was suggested that EPA was spending too much of its CERCLA tax revenue on remedial actions, and not recovering enough form PRP's.

The tenor of both hearings suggests that some Members of Congress do want CERCLA/SARA to work, and that they see their political interests being better served by hamstringing EPA's efforts to make the system work than by encouraging them. Obviously, EPA's insistence on gold-plated cleanups to MCLG standards would increase PRPs' willingness to litigate the choice of remedy, and thereby slow down the cleanup process. Similarly, EPA's refusal to commit its own resources to fund "orphan shares" at NPL sites would increase the reluctance of PRP's to settle with the Agency.

Should hearings of this nature dissuade EPA from exercising what little discretion Congress has left it,[46] as little relief can be expected from the Executive Branch as from Congress and the Supreme Court. And should Congressional bullying prevent EPA from making the best of a flawed system, the ensuing bureaucratic failures will almost certainly be used to justify still more Draconian legislation when CERCLA is reauthorized again in 1990 or 1991.

And even if EPA succeeds in administering the system flawlessly, there are limits to the role it can play in resolving PRP-insurer conflicts. Certainly, expedited and rational cleanups would reduce initial transaction costs for both PRP's and their insurers on matters of mutual concern (*e.g.*, apportionment of liability and selection of the remedy), but they would also accelerate the pace of secondary litigation while doing nothing to resolve PRP-insurer differences, which arise under an entirely different body of law over which EPA has no jurisdiction.[47]

Finally, from insurers' perspective, EPA has effectively exacerbated the PRP-insurer conflict by including in its PRP demand letters requests for information on the past 50 years of the recipients' insurance coverage. The effect of these requests has been to encourage PRP's (who hadn't already decided to do so) to seek insurance coverage of their CERCLA obligations.

### 5. Peace in our time: Toward a voluntary solution

Both PRP's and their insurers have a vital economic stake in the prompt cleanup of hazardous waste disposal sites: the faster these threats to public health and the environment are removed or neutralized, the fewer the claims that members of the public have been or will be harmed by exposure to them.

As expensive as cleaning up these sites may prove to be, these potential costs pale in comparison to the possible economic consequences of the revolution now under way in the nation's courts in "toxic tort" cases. Consider these recent examples from both State and Federal courts:

> An Illinois jury awarded only $ 1 in compensatory damages each to plaintiffs alleging a variety of injuries form the spilling of a spoonful of dioxin in a tank car derailment, but nevertheless slapped the defendant with 16.2 million in punitive damages.[48]
>
> A Federal Circuit Court, allegedly interpreting Mississippi law, held that plaintiffs who can demonstrate a greater than 50 percent medical probability that they will contract cancer from exposure to asbestos may recover damages for their risk of future disease.[49]
>
> The same court upheld an award for a plaintiff's fear of getting cancer in the future, even though there was no proof of a "medical probability" that he actually would develop the disease.[50]

As extraordinary as the outcomes in these cases are, they are but the forerunners of a vast new toxic tort jurisprudence founded on the "expert testimony from a small group of professional witnesses who call themselves 'clinical ecologist,' despite the fact that their views have been repudiated by the medical establishment."[51]

Yale Law School Professor E. Donald Elliott recently described the impact of "clinical ecology" on toxic tort cases as follows:

> Only several years ago, most knowledgeable lawyers thought that it would be very difficult to win chemical exposure cases under traditional principles of tort law; except where exposure to a toxic substance causes a rare disease with virtually no other known causes, conventional science generally cannot make the showing traditionally required by tort law: namely, that it is more likely than not that a particular plaintiff [']s illness was caused by exposure to a particular substance.
>
> Testimony form the clinical ecologists has effectively overruled this rule of law, dramatically changing the balance of advantage between plaintiffs and defendants in toxic tort cases. For a price, certain clinical ecologists will testify that exposure to even very small amounts of a wide range of chemicals suppresses the immune system, thereby weakening the body's ability to ward off disease and making the plaintiff vulnerable to virtually all disease known to humankind, including many such as "nervousness" and "malaise" that present only subjective symptoms.
>
> The opinions of the clinical ecologists on these matters are generally rejected by conventional scientists, who question their methods and also emphasize the natural variability and reserve capacity of the immune system. Both the American Academy of Allergy and Immunology and the California Medical Association have issued official statements repudiating clinical ecology as unscientific.
>
> Despite its marginal status as science, clinical ecology is increasingly important in toxic tort litigation because it gives plaintiffs' lawyers important strategic and economic advantages. The economic value of a toxic tort case to a plaintiffs' lawyer is heavily influenced by the number of claimants in the case, since the "going rate" for settlements is from $ 10,000 to $ 100,000 *per plaintiff*. If a plaintiffs' lawyer bases her case on conventional science, the number of claimants who can be joined in the suit is limited to the small subset of exposed persons who actually suffer from the particular diseases that the chemical in question has been shown to be capable of causing in animal tests or epidemiological studies. With a clinical ecologist on board as an expert, however, the plaintiffs' lawyer can sue, and probably get to the jury, on behalf of everyone who was (or conceivably might have been) exposed to the substance, on the theory that whatever happens to ail them was probably caused by the suppression of their immune systems by chemicals.[52]

As the number and pace of CERCLA cleanups accelerate,[53] so will the number of private suits alleging harm from exposure to the chemicals at the sites involved. And to the extent that larger numbers of courts are willing to admit into evidence what Professor Elliott tactfully calls "marginal science,"[54] the number of successful plaintiffs is certain to increase.

While the economic impact of waste-site related toxic tort suits is obviously impossible to forecast, the trend in the common law appears to be toward the elements of a "Federal

cause of action" proposed during the 1984 Congressional consideration of CERCLA reauthorization,[55] whose *annual* costs were estimated by AIA consultants at between $ 300 million and $ 56 billion.[56]

The proposed Federal cause of action for injuries resulting from the disposal of hazardous substances was defeated in the U.S. House of Representatives on August 9, 1984, by a margin of only eight votes of the 408 cast.[57] Similar provisions in what ultimately became SARA were avoided at the cost of preempting State personal injury statutes of limitation based on exposure (as opposed to discovery of the resulting harm).[58]

It is widely anticipated that proposals for a Federal cause of action will surface again when Congress turns its attention to reauthorizing CERCLA/SARA in 1990 or 1991. While the common law developments described above would suggest that codification would be unnecessary to the evolution of remedies for injuries alleged to have resulted from disposal; of hazardous substances, it will undoubtedly be argued that the benefits currently available to plaintiffs in only a minority of states ought to be universally applicable in toxic tort cases.

Also on the horizon for both PRP's and insurers are the mammoth costs certain to be involved in State and Federal *parens patriae* claims for damage to natural resources under section 107(f)of CERCLA as amended by section 107(d) of SARA.[59] Designated Federal and State officials, acting "on behalf of the public as trustees for natural resources under this Act and section 311 of the Federal Water Pollution Control Act"[60] are required to "assess damages for injury to, destruction of, or loss of natural resources"[61] and their assessments are given "the force and effect of a rebuttable presumption ...in any administrative or judicial proceeding under this act or section 311 of the Federal Water Pollution Control Act."[62]

Here again, there is no realistic basis upon which to estimate the potential economic implications for both PRP's and their insurers of CERCLA/SARA liability for natural resource damages. But to the extent that the process of cleaning up dangerous waste sites is delayed, groundwater contamination can only grow worse, and removing contaminants from groundwater can be both time-consuming and extremely expensive.

Moreover, a number of court decisions suggest that, in addition to *parens patriae* actions under CERCLA, State officials may also assert both equity and State tort claims for groundwater contamination.

For example, courts in both New Jersey[64] and Michigan[65] have held that the State's interest in its natural resources allows it to maintain actions to prevent injuries to the environment, and also to sue for compensatory damages if the environment is in fact harmed. Of concern to insurers in both cases was their additional finding that these damages constituted "property damage" within the definition thereof in the relevant liability insurance contracts.[66]

In sum, the potential liabilities for both site-related toxic tort and natural resource damage claims are certainly large enough to constitute a major incentive to both PRP's and their insurers to expedite the cleanup of dangerous waste disposal sites. The scale of these potential liabilities also suggests the wisdom of reducing the transaction costs in the cleanup process in order to conserve resources needed for defense against related tort and other claims.

Thus far, every proposal for reducing the transaction costs and unpredictability of CERCLA/SARA liability has contemplated favorable Congressional action, which, as the

analysis above suggests, is unlikely in the foreseeable future.[67] Moreover, the deep divisions within the business community over the CERCLA tax structure, and the schism between PRP's and their insurers, would doom any reform effort, even if the political conditions for change were otherwise present.

It seems reasonable to conclude, therefore, that those upon whom CERCLA/SARA liabilities now fall must first resolve their own differences if they are ever to persuade Congress that a better system is needed. It also seems reasonable to conclude that the process of *rapprochement* should begin immediately, both because of its necessary complexity and because of the likely consequences of further delay.

Although the machinery developed by asbestos producers and their insurers to resolve their differences – the Asbestos Claims Facility – now appears to falling apart,[68] the mere creation of that facility demonstrates that it is possible for businesses and their insurers to develop procedures for resolving extremely complicated coverage issues. In addition, even if the facility ultimately collapses, the lessons learned from its dissolution can be applied to the development of a means of resolving the even more complicated issues over coverage of waste cleanup liability.

The fatal miscalculations in the apparent dissolution of the Asbestos Claims Facility seem to boil down to two assumptions – first, that the character of asbestos disease claims would remain the same and would gradually decline in number; and, second, that the number of insurers, excess limits and umbrella carriers, and reinsurers initially subscribing to the facility would constitute a sufficient "critical mass" to bring carriers of the missing coverage layers aboard.

Unfortunately, both assumptions proved unfounded. The profile of claimants against the facility changed dramatically (from heavily exposed shipyard and insulation workers to lightly exposed workers from such asbestos – using industries such as tire manufacture) and sharply increased, rather than gradually decreased, in number. The missing carriers not only stayed out of the facility; at least on reinsurer has alleged that its ceding carrier's participation in the facility "materially changed the risks covered" in the reinsuring agreement and has sued to void its coverage.[69]

As complicated as the issues were in the creation of the Asbestos Claims Facility, their complexity is dwarfed by that of the issues to be resolved in the waste cleanup coverage disputes.

In the asbestos disease coverage disputes, there was no question that bodily injury had occurred in workers exposed to asbestos, and that the economic consequences of that injury were compensable under the producers' liability insurance policies. The key issue was which policies were to respond in particular cases: which insurer in the continuum from first exposure to manifestation of disease should respond to an individual worker's claim?

As costly as the decision of the Federal Circuit Court of Appeals for the District of Columbia in the *Keene Corp. v. INA*[70] case has been proven to be to insurers, the "triple trigger" theory developed by Judge Bazelon vastly simplified the process of apportioning liability among each producer's insurers: since every insurer in the continuum was theoretically fully liable for each individual worker's injury, dividing the responsibility according to the proportion that each insurer's aggregate cumulative limits bore to the particular producer's total limits of coverage was not only logical but served to spread each insurer's

exposure over a longer period of time, thereby easing potential cash flow problems and preserving assets for the payment of future claims.

Apportioning the producer's liability proved more complex, since the frequency with they had been sued; the and the duration of their presence in particular markets and regions all had to be factored into the Facility's cost-sharing formula.

As noted above, the subscriber's decision to open the Facility was predicated on two critical assumptions. While it is easy on hindsight to criticize these assumptions, the Facility's organizers had so many short-term problems to solve that it is hard to fault them for failing to anticipate all of their long-term difficulties. Moreover, their failures contain valuable lessons for any effort to resolve coverage disputes in the waste cleanup context.

Indeed, given the extraordinary complexity of the issues in the waste cleanup coverage imbroglio, it is fortunate that the effort to organize the Asbestos Claims Facility was undertaken. For in addition to all the temporal issues present in the asbestos disease coverage cases (e.g., trigger of coverage), the waste cleanup coverage disputes involve questions not present in the asbestos disease context, such as whether there was an "occurrence" giving rise to "property damage" within the scope of the coverage. This complexity is compounded by the presence of a pollution exclusion in many of the policies at issue.

However, the fact that many disputes between PRP's and their insurers are settled short of litigation or short of actual judgment in litigation suggests that, complex as they are, the issues in these disputes are not intractable. Indeed, the current prevalence of cleanup coverage litigation may in part reflect the relative inexperience of the insurance community in CERCLA litigation generally, and insurers' concomitant lack of familiarity with the cooperative efforts common in the PRP community.

At least to this writer's knowledge, insurers have yet to organize, for themselves, any counterpart to the site-specific steering committees that PRP's routinely utilize not only to apportion liability among themselves, but also to negotiate, with EPA or other enforcement agencies, the nature of the cleanup remedy.

It may be necessary for insurers to develop a sufficient level of comfort in resolving the issues that divide the insurance community before they will be willing to entertain the development of similar forms of cooperation between themselves and PRP's.

Fortunately, insurers have a tool – reservation of their rights under their policies – that would enable them to experiment both with different approaches to inter-insurer cooperation at individual sites and, ultimately, with similar approaches to insurer-PRP cooperation. As cooperative experience on a site-by-site basis is accumulated, insurers and PRP' alike might then want to establish procedures or an institution for a more generalized resolution of their disputes.

The reservation of right device effectively allows insurers to work with their policyholders in circumstances in which the insurers believe that their obligations to defend and/or indemnify their policyholders are unclear, but that cooperation with these policyholders may be in the insurers' best interests regardless of their ultimate obligations. CERCLA cleanup claims are obvious examples of the kind of situation in which the reservation of rights device would be useful, if not crucial.

Its use would enable insurers of PRP's at a given site to develop, for example, an apportionment of their potential liability, both as to defense costs among themselves, and

as to indemnity between themselves and their PRP policyholders either all without conceding that they owe those policyholders either defense or indemnity duties.

Behind their reservation of right shield, the insurers could begin to realize the efficiencies and transaction cost savings their policyholders (insured or self-insured) routinely realize through their participation in site steering committees. For example, if the site is one used by 50 PRP's for ten years, and each PRP had three different insurers during that period, a possible 150 insurers might be found to owe the PRP's a duty to defend and/or some reimbursement of their cleanup obligation.[71]

Without any kind of joint effort, the primary insurers would each have to hire counsel to deal with each other; perhaps other counsel to deal with their policyholders, excess limits and umbrella carriers, and reinsurers; and experts to advise them on the work being done by EPA or other environmental authorities and the PRP's on the cleanup remedy.

If, on the other hand, the insurers were to agree to a formula by which their potential defense and indemnity costs would be divided should they be found liable for them, they could eliminate the need of each individual company to retain counsel to deal with the PRP's;[72] and they could hire a single set of experts to monitor the technical work on the cleanup remedy. Instead of each of 150 insurers having to mount a multi-front defense at each company's cost, the insurers, assuming equal potential exposure, would be liable for only 1/150 of a joint defense.

Consider the cost savings possible in even this limited form of cooperative effort. Assume that a competent team of legal and technical consultants would cost each of the 150 insurers $ 100,000; that's $ 15 million to fight off a liability that might be imposed anyway under policies whose prices in no way contemplated that policyholder dollars would be used to fight those who paid them, rather than claimants against those policyholders!

Against this, consider each insurer's 1/150 share of the same team cost of $ 100,000 – less than $ 700 per carrier to achieve the same result, less that seven-tenths of one percent of what each carrier would otherwise have had to pay.[73] The same cost sharing formula applied to defense costs, and perhaps to indemnity, might ultimately cost the individual insurers less that they collectively might pay to resist their policyholders' claims *in toto*.

The economies of scale that insurers would experience in dealing with their common problems would, in this writer's judgement, lead naturally to a desire to further these economies through cooperation with their policyholders on matters in which both insurers and PRP's have a mutual interest, such as the apportionment of PRP liability and the nature of the cleanup remedy.

This cooperation might initially take the form of expanded steering committees, with representatives of both PRP's and their insurers, since both would have a potentially similar economic stake in low transaction costs, rational apportionment of cleanup liability, and cost-effective cleanup remedies. Moreover, those insurers ultimately found legally responsible (or willing to assume some liability without litigation would be able to avoid the additional cost that would otherwise be necessary to apportion and measure their liability, and would incur lower losses as a result of shared expenses and apportioned responsibility.

Over time, the mechanics of PRP-insurer cooperation might be reduced to formulae applied by each steering committee to the circumstances at each site; or codified in procedures administered on an ongoing basis by a neutral party trusted in both communities; or institutionalized (like Clean Sites, Inc. or the apparently ill-fated Asbestos Claims Facility).

Of course, the mechanics of PRP-insurer cooperation are much easier to picture than the legal understanding upon which joint activity would rest. And no legal understanding will be either possible or permanent unless both sides perceive it as being fair and even-handed under all circumstances. Finally, and most important, both sides will have to believe that the economic consequences of compromise will be more favorable than those of intransigence.

While the judicial picture on cleanup coverage liability issues is, and is likely to be for sometime, murky, the decisions to date suggest that there may be grounds for reconciliation on a number of fronts.

First, on the matter of insurers' obligations to defend their policyholders against the demands of environmental authorities, the courts appear to be saying that this aspect of insurers' duties is broader than the duty to indemnify. The majority rule seems to be that even if only one of a series of allegations, prayers, demands, etc. in a complaint is arguably within the scope of a policy's coverage, the insurer is obligated to defend its policyholder against all of them.[74]

Second, on indemnification issues, the judicial pattern is less distinct, but some clear threads seem present.

If a PRP generator's wastes damage third-party property, the courts usually find coverage, assuming they can get past the pollution exclusion's "sudden and accidental" limitation and that they can find an "occurrence" during the policy period that gave rise to the damage.[75]

On-site cleanup demands on the PRP's property have given the courts a much harder time, not only, because of the pollution and owned property exclusions and the possible absence of an occurrence, but also because of the character of the typical EPA demand, which sounds more in equity than in law and not seek damages so much as injunctive relief. While some courts have recharacterized the cleanup demands as suits for damages,[76] others have denied coverage for injunctive relief.[77] With respect to the owned property exclusion, the most persuasive line of reasoning is that unless property other than the PRP's has been contaminated, there is no coverage.[78]

These threads suggest the possibility that the insurance community might be willing, eventually, to provide PRP's with defense in every CERCLA cleanup claim, and to provide indemnity where PRP's waste has actually caused third parties' bodily injury or property damage, if PRP's in return agree to be responsible for the removal or treatment of wastes on their own property or on the property of others if these wastes have not actually damaged that property.

The term "actually damaged" is meant to imply a distinction between traditional insurance concepts on the one hand and the mere presence of wastes or the contamination of resources in which private parties have no interest on the other hand.

Liability insurance contracts are written to respond to some event that results in property damage or bodily injury to third parties for which common law money damages may be claimed. Yet many CERCLA actions are brought primarily to prevent an event from occurring, by requiring PRP's to treat or remove wastes that may not have caused harm to anything or anyone for which damages might be claimed. The courts have tied themselves in intellectual and semantic knots trying to find in cleanup demand or cost recovery cases either a covered event, someone to compensate, or damages: Pleas for

injunctive relief have been recharacterized as suits for damages, the state's inchoate interest in trees and often unusable groundwater has been reclothed as real property ownership, and the mere presence of the wastes has been recast as an occurrence.[79] The results of these cases are predictably absurd, and insurers believe that PRPs must acknowledge this if there is to be any lasting accommodation between the two groups.

Insurers believe that it is unjust to apply, to *before the fact* administrative orders aimed at preventing harm insurance contracts designed to respond to *after the fact* demands for money damages resulting from discrete events. For example, if the brakes on an auto insurance policyholder's car need repair, or a tree in a homeowners policyholder's yard looks as though it is about to fall on his neighbor's house, neither policyholder would dream of demanding that his auto insurer fix his car's brakes to prevent him from having an accident, or that his homeowners insurer cut down the tree before it falls

If insurance policies were to provide such "maintenance"-type coverage, insurers would be creating what they call a "moral hazard" for themselves – the possibility that policyholders would deliberately neglect routine maintenance in order to take advantage of their insurance coverage.

While insurers can readily understand the public benefits of cleaning up on-site waste in order to prevent harm, as insurers they cannot, by accepting in one context liability for the cost of such prophylactic non-events, create a claims environment that would, in all other contexts, lead policyholders to claim that liability insurance intended to protect them from the unpredictable consequences of their negligence is also intended to be a sort of all-purpose maintenance contract against the predictable ravages of use and the passage of time.

PRP's, on the other hand, believe that judicial observance of the distinction insurers draw between liability and maintenance would leave the bulk of the indemnity burden in typical cleanup actions on the PRP's. For site owners and operators, most, if not all, CERCLA costs are associated with cleanup on their own property. They argue that, to the extent the cleanup serves to prevent damage to off-site property of third persons, the insurer is merely being asked to pay now what it would have paid but for the cleanup.

When insurers protest that this reading of their contracts forces them to argue that their policyholders were deliberately irresponsible in the handling of wastes, in that the policyholder's argument seems to assume that environmental damage will be an inevitable, and therefore expected, consequence of their waste disposal activities, the PRP's respond by pointing out that, under CERCLA, the courts are saying that it doesn't matter either that a PRP handled wastes responsibly or that his conduct did or did not cause harm. They argue that CERCLA liability attaches to a PRP's *status*, whether as generator, transporter, facility owner, rather than to the consequences of his conduct. And if liability insurance is intended to answer for any legal liability imposed on the policyholder, they ask, why should the policyholder's conduct, other than willful or deliberate malfeasance, have anything to do with whether he's covered or not?

Insurers respond to this question by pointing out that they have been forced to focus on the consequences of their insureds' conduct because most of the linchpins of coverage under general liability policies – an "occurrence" (in policies without the "sudden and accidental" qualification of that term) that gives rise to third-party bodily injury or harm to property for which money damages are sought – are quite often entirely absent in Superfund actions.

PRP's also argue that the kinds of distinctions insurers might prefer to draw are unrealistic in the cleanup context. They ask, for example, what happens when there is both on-site, and off-site property damage. Would insurance cover both the cleanup of the off-site damage and the on-site costs of preventing further off-site migration of wastes? They go on to assert that, even if these distinctions could be adequately articulated, it would be hard to forecast with the needed predictability how their use would play out on the bottom line at each particular site.

It is not the purpose of this paper to propose a perfect model for resolving cleanup coverage issues dividing the insurance community and the PRP's, but rather to suggest avenues that might be explored toward that end. Only experience can dictate the shape of any ultimate agreement. And even if the ideal solution were set to paper, these crucial questions would remain: Where would the insurers and the PRP's get the money to carry out their ends of the bargain? And how would the agreement be enforced against any and all parties to a particular site cleanup?

Insurers would likely have to fund their share mostly out of surplus, although some of the defense costs could be expensed as "unallocated loss adjustment expenses." But the savings inherent in any cost-sharing agreement would so soften and stretch out the ultimate "hit" on insurers that the industry would probably be able to add enough to surplus from profits on its ongoing business to fund, on a hand-to-mouth basis, its part of the bargain.

PRP's, for their part, could build their expected costs into the prices of their products and services as a matter of prudent business planning. Here, too. cost-sharing would both soften and stretch out the "hit" on the business community.

Assuring universal participation in any "global" agreement on waste cleanup insurance coverage would depend on the extent to which its original signatories constituted a "critical mass" of those implicated at each site. Achieving such a mass may prove easier in the finite universe of liability insurers than in the almost infinite universe of PRP's.

"Critical Mass," as the experience of the Asbestos Claims Facility suggests, is that number of insurers and PRP's needed to convince non-signatories at a particular site that their interests will be better served by participating in the agreement than by going it alone. Here, too, only experience will determine what constitutes a "critical mass".

In conclusion, the consequences of failure to achieve an agreement are so dire as to make it imperative that, no matter how difficult the legal and technical issues dividing PRP's and insurers might be, men and women of good will begin now to develop a lasting, voluntary, marketplace solution to an important environmental problem – financing the cleanup of this nation's hazardous wastes in an efficient, effective and equitable manner.

NOTES

1 "Superfund: Extent of Nation's Potential Hazardous Waste Problem Still Unknown," United States General Accounting Office, Rept. NO. GAO/RCED-88-44, December, 1987.

2 *Op. cit. supra* n. 1 at 2-3.

3 *Id* at 13.

4 *See Superfund Strategy,* Office of Technology Assessment, 1985.

5 "Hazardous Waste: Corrective Action Cleanups Will Take Years To Complete," United States General Accounting Office, Rept. NO. GAO/RCED-88-48, December 1987.

6 Id. at 2.

7 Ibid.

8 See § 121, Pub. L. No. 99-499, October 17, 1986.

9 *Cost Implication of Changes in Superfund Cleanup Standards,* a study prepared by Putnam, Hayes & Bartlett, Inc., for the American Insurance Association, March 20, 1986, at 1.

10 *Ibid.*

11 § 116, Pub. L. 99-499, October 17, 1986.

12 *Op. Cit. supra* n. 1 at 15-16.

13 *Id.* at 13. Of the nearly 1,000 sites on the NPL, 184 are RCRA SUBTITLE D landfills.

14 *Op. cit. supra* n. 9 at 5.

15 *See Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Co.* (NEPACCO), F.2d. (8th Cir. 1988).

16 "Insurers Win Major Pollution Coverage Dispute," American Insurance Association Press Release No. DC 13, February 26, 1988, at 1.

17 *Id.* at 1-2.

18 F.2d (4th Cir. 1987), *cert. den.*, U.S. (1988)

19 *Insurance Co. of North America v. Forty-Eight Insulations, Inc,* 451 F. Supp. 1230 (E.D. Mich. 1978), aff'd 633 F.2d 1212 (6th cir. 1980), *aff'd on reh'g.*, 657 F.2d 814 (6th Cir.), *cert. denied,* 454 U.S. 1109 (1981); *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir.), *cert. denied sub nom. American Casualty & Surety Co. v. Porter,*454 U.S. 1109 (1981); *Keene Corp. v. Ins. Co. of North America,* 667 F.2d 1034 (D.C. Cir. 1981) *cert. denied,* 455 U.S. 1007, *reh'g denied* 456 U.S. 951(1982).

20 *See, e.g.*, "UTC Sues 240 Insurers for Pollution Cover," *Business Insurance,* February 1, 1988, at 28.

21 "Superfund Unleashes Flurry of Coverage Suits", *Business Insurance,* February 1, 1988, at 1.

22 *See, e. g., Summit Associates, Inc. v. Liberty Mutual Fire Insurance Co.*, N. J. Super. (Law Div., Middlesex County), Docket No. L-47287-84 (Feb. 25, 1987); *Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Company,* 186 N. J. Super 156, 451 A.2d 990(1982).

23 *See, e. g. Waste Management of Carolina v. Peerless Insurance Co.*, 315 N.C. 688, 340 S.E.2d 374, *reh. denied,* 316 N.C. 386, 346 S.E. 2d 134 (1986); *Transamerica Insurance Co. v. Sunnes,* 77 Ore. App. 136, 711 P.2d 212 (Or. Ct. App. 1985), *review denied,* 301 Or. 76 711 P.2d 631 (1986).

24 R.D. Chesler, M.L. Rodburg, C.C.Smith, Jr., *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability,* 18 Rutgers L.J. 9 (1986). *See also* S.L. Birnbaum, T.R. Newman, I.A. Sullivan, W.J. Wright, Jr., "Hazardous Waste Litigation: CGL Insurance Coverage Issues", *Second Annual Insurance Litigation Institute* at 3 (Prentice Hall Law & Business, 1988).

25 *Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co.*, 186 N.J. Super 156, 451 A.2d 990 (1982); *Township of Jackson v. American Home et al.*, Docket no. L-29236-8 (Law Div., Aug. 31 1984); *Ayers et al. v. Township of Jackson*, 189 N.J. Super. 561, 461 A.2d 184 (1983); Rev'd in part and aff'd, in part, 106 N.J. 557, 525 A.2d 287 (1987).

26 N.J. Super (Law Div., Middlesex county), Docket No. L-47287-84 (Feb. 25, 87).

27 1987-88 Property/Casualty Fact Book, Insurance Information Institute, at 5-6 (1987).

28 The same reserve deficiency existed when asbestos disease claims accelerated dramatically in the late 1970's. With between 40,000 and 50,000 cases already pending, and new claims coming in at the rate of 1,500 per month, these liabilities threaten the financial viability of the Asbestos Claims Facility, and perhaps that of some of its members as well. Here, the results in insurance coverage cases have typically maximized the relief sought by policyholders.
A similar phenomenon looms with respect to the industry's potential exposure for the costs of asbestos removal from public buildings. The number of buildings involved suggests that in the asbestos disease cases: an EPA survey found potentially dangerous asbestos in 511,000 office and other commercial buildings, 208,000 apartment houses, and 14,000 federal buildings. These are in addition to 33,000 school buildings found to contain friable asbestos.

29 The premium-to-surplus ratio of an insurer is a key indicator of its solvency. Most insurers are comfortable with a ratio of between 2 to 1 and 3 to 1, although higher ratios are found among companies with preponderantly "long-tail" business.

30 This was the case in *Keene Corp. v. INA*, *Supra* n. 19, which held that any insurer of a business which exposed workers to asbestos is liable for the consequences of that exposure if it furnished coverage to the business at any point in the continuum from the worker's first exposure to the manifestation of his or her disease. *See also In re Asbestos Insurance Coverage Cases*, Judicial Council Coordination Proceedings No. 1072 (S.F. Sup. Ct., Dept. 9, 5/29/87).

31 "Superfund Defense and Cleanup Costs: An Insurer-Policy holder Counsel Colloquy", *Docket*, vol. 6, No. 1, American Corporate Counsel Association (Winter, 1988), at 9/

32 *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

33 *See* Wolfe, Thomas, *The Bonfire of the Vanities* (1987).

34 *See Supra* n. 19 and accompanying text.

35 28 U.S.C. § 1332 (a).

36 28 U.S.C § 1331 (a).

37 *See Younger v. Harris*, 401 U.S. 37 (1971). *See also* Friendly, *Federalism: A. Foreword*, 86 Yale L.J. 1019 (1977).

38 The McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011-1015, provides that general Federal statutes are not applicable to the business of insurance unless they specifically so provide. Insurers historically have discouraged Federal involvement in insurance matters.

39 Upon occasion, the Court has adopted State Law as Federal law in particular cases, in effect replicating, at the Federal lecel, the varieties of State law approaches to given issues. *See e. g., Mordan v. C.G.C. Music, Ltd.*, 600 F Supp. 1049 (1984), 804 F. 2d 1454 (9th Cir. 1986); *U.S. v. Kimbell Foods, Inc.* 440 U.S. 715 (1979).

40 *See, kj e.g., Silkwood v. Kerr McGee Corp.*, 464 U.S. 238 (1984), in which the Court ruled that punitive damage claims under State Law were not impliedly prempted by pervasive Federal regulation of the nuclear industry.

41 *See* American Insurance Association, "Proposal to Reform and Expedite Cleanup Under Superfund" (1985), which recommended that pre - 1980 disposal problems be dealt with under a fault-blind, tax-funded, public works system.

42 *See supra* n. 41 and accompanying text.

43 Known among business lobbyists as the "silver bullet", the amendment, advanced by a coalition including Travelers, Liberty Mutual, CIGNA, Crum & Forster and the Alliance of American Insurers, would have eliminated coverage of CERCLA cleanup liability under any pre-1980 insurance policy that did not specifically provide it.

44 *See* §§ 122 (b) (1) of CERCLA, as amended by SARA; and "Superfund Program; Mixed Funding Settlements", 53 Fed. Reg. 8279-85 (March 14, 1988).

45 *See, generally,* § 121, Pub. L. 99-499, which establishes CERCLA cleanup standards. The section vests EPA with discretion to select remedial actions which meet its general standards, but fail to meet standards under specific environmental statutes, under certain circumstances. *See, also* "Policy Shift Is Urged for Toxic Cleanup Fund", *New York Times,* March 22, 1988, at A23.

46 *See supra,* n. 11 and accompanying text.

47 Indeed, EPA's sole involvement in insurance issures is concentrated in section 108 of CERCLA, which directs the Agency to establish financial responsibility requirements for those subject to the statute.

48 *Kenner v. Monsanto,* 112 Ill.2d 223, 492 N.E. 2d 1327 (1987).

49 *Jackson v. Johns-Manville Sales Corp.,* 781 F. 2d 394, 413-15 (5th Cir.), *cert. denied,* 106 S. Ct. 3339 (1986).

50 *Dartez v. Fibreboard Corp.,* 765 F. 2d 456 (5th Cir. 1985).

51 E. Donald Elliott, "Toward Incentive-based Procedure: Three Approaches for Regulating Scientific Evidence", Working Paper # 76 (unpublished), Civil Liability Program, Center for Studies in Law School, at 5 (footnotes omitted) (March 1988) (quoted with permission of the author and hereinafter cited as Elliott).

52 Elliott, *supra,* at 6-8 (footnotes omitted). Professor Elliott reports that the "going rate" for one of the leading clinical ecologists' testimony is $ 20,000 per plaintiff, and that 83 percent of the claims currently pending against Exxon seek damages for harms other than clinically diagnosable physical injury.

53 *See supra,* n. 11 and accompanying text.

54 Elliott, *supra,* n. 51 at 5.

55 *See, generally,* Title II of H.R. 5640, 98th Cong. 2d sess. (1984). Section 203 of this bill did not rule out claims for pain and suffering from and individual's fear of experiencing injury, illness or death; it might become ill. *See also* § 1114 (b) (1) (C) of H.R. 4813, 98th Cong. Ist Sess. (1983), which created a presumption that a plaintiff's harm was caused by exposure to waste site chemicals if a jury found that "exposure to such hazardous substances has a reasonable likelihood of causing or significantly contributing to death or to a personal injury or illness of the type suffered by the applicant." The subparagraph specifically permitted the introduction of "immunological studies" into the evidence in support of the presumption.

Ronald E. Gots, M.D. Ph.D., President of the National Medical Advisory Service, at page 5 of his March, 1984, *Response to H.R. 4813,* prepared for the Crum & Forster Insurance Companies, said that the bill "would formulate a presumption of causality upon a framework of unresolved scientific disputes built upon a foundation of disparate, controversial, irrelevant of scientifically meaningless data".

56 *See* Jim J. Tozzi and Charles W. Chesler, "The Federal Cause of Action: An Estimate of Its Costs" (Sept. 20, 1984).

57 130 Cong. REC. H 8854-55 (daily ed. Aug. 9, 1984).

58 *See* Pub. L. 99-499, § 112 (d) (2) (1986).

59 *See* Pub. L. 99-499, § 107 (d) (1986).

60 Pub. L. 99-499, § 107 (d) (2) (A) and (B).

61 *Ibid.*

62 Pub. L. 99-499, § 107 (d) (2) (C).

63 43 C.F.R. Part II, 51 Fed. Reg. 27674-27753 (1986).

64 *Lansco, Inc. v. Environmental Protection Dept.*, 138 N.J. Super. 275 (Ch. Div. 1975), *aff'd* 145 N.J. Super. 433 (App. Div. 1976), *certif. den.* 73 N.J. 57 (1977).

65 *United States Aviex Co. v. Travelers Insurance Co.*, 125 Mich. App. 579 (Ct. App. 1983).

66 Insurers should also ponder the implications of the logic in these cases, which involved *off-site* damages to property other than that of the policyholders, for possible liability for *on-site* damages under first party property insurance contracts. *Cf. Riehl v. Travelers Insurance Co.*, Civil Action No. 83-0085 (W.D. Pa., August 13, 1984), *rev'd* 772 F. 2d 19 (3d Cir. 1985). The Court of Appeals reversed a District Court holding that the insurer was obligated to defend and indemnify its insured against CERCLA cleanup liability for contamination of the insured's own property, notwithstanding the fact that the contamination had caused no third-party bodily injury or property damage in the traditional sense.

67 Indeed, the SARA experience suggests that the next reauthorization of CERCLA could well make its liabilities more, not less, onerous.

68 *See e.g.*, "Fifth producer leaves asbestos claims facility", *Business Insurance*, April 11, 1988, at 2.

69 *Ibid.*

70 *Supra* n. 19.

71 This figure of course would not include the policyholders' excess limits carriers or umbrells carriers, or any of the insurers' reinsurers. These carriers may also want to participate in collective arrangements, if only to assure that primary dollars are wisely and efficiently spent.

72 PRP's at some sites have banded together to sue their insurers for defense and indemnity. A joint insurer response, whatever the outcome, would be cheaper for all the insurers and would enhance their leverage in either litigation or negotiation.

73 These economies of scale would be even more spectacular if insurers other than the primary carriers became part of the cost-sharing arrangement.

74 *See, e.g., Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, 654 F. Supp. 1334 (D.D.C. 1986); *Shapiro v. Public Service Mutual Ins. Co.*, 19 Mass. App. 648, 477 N.E. 2d. 24 (1985); *Shapiro v. American Home Assurance Co.*, 616 F. Supp. 960 (D. Mass. 1985).

75 *Buckeye Union Ins. Co. v. Liberty Solvents*, 17 Ohio app. 3d 127, 477 N.E.2d. 1227 (1984).

76 *New Castle County v. Hartford Accident and Indemnity Co.*, No. 85-436JLL (D.C. Del., November 2, 1987); *Solvents Recovery Service of New England v. Midland Ins. Co.*, No. L-025610-83 (N.J. Super. Ct., Law Div., Union Cnty.); *Consolidated Rail Corp. v. Certain Underwriters at Lloyds*, No. 84-2609 (E.D. Pa., 6/3/86); *U.S. Avoex Co. v. Travelers Ins. Co.*, 336 N.W. 2d 838 (Mich. App. 1983).

77 *Maryland Casualty Co. v. Armco, supra; Mraz v. Canadian Universal Ins. Co.*, 804 F. 2d 1325 (4th Cir. 1986); *CPS Chemical Co. v. Continental Ins. Co.*, (No. 1-060537-84 N.J.Sup. Ct.), Mealy's Lit. Rpt., 11/10/87.

78 *Atlantic City Municipal Utilities Corp. v. CIGNA companies*, No. A-1320-84t7 (N.J. Super. Ct. App. Div., Dec. 19, 1985); *E.C. Electroplating Inc. v. Federal Ins. Co.*, No. L-06-2919-85 (N.J. Super. Ct., Feb. 18, 1986). *But see Summit Associates v. Liberty Mutual Ins. Co., supra* n. 26.

79 *New Castle County v. Hartford Accident & Indemnity Co., supra;* ("damages" given ordinary meaning and covers cleanup costs); *Broadwell Realty Services v. Fidelity and Casualty Co.*, A-5301-85 (N.J. Super. Ct., App. Div., May 23, 1986, Supp. June 24, 1986) (demands to remedy damage to groundwater and surface water are covered by insurance policy); *Solvents Recovery Service of New England v. Midland Insurance Co.*, No. L-025610-83 (N.J. Super., Law Div. Union Cnty.) (in a request to appeal an interlocutory order finding coverage, Hartford Ins. Co. argues that no actual environmental harm has been demonstrated from hazardous substances spill. *See* Mealy's Litigation Reports, Vol. 52, p. 4053 , March 24, 1987).