The Future of Environmental Remediation: Who Will Pay?

By Aleka Skouras

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA, a.k.a Superfund) provides a general structure for environmental remediation and indemnification under the tort theory of strict liability.[1] Nonetheless, CERCLA indemnification under liability insurance has been the source of much litigation due to judicial interpretation of revisions to the Comprehensive General Liability (CGL) Insurance policy.[2] Courts have construed these changes to the CGL policy to limit insurer liability for pollution prevention and remediation costs under CERCLA.[3] This trend has forced industrial producers of hazardous waste and other statutorily defined potentially responsible parties (PRPs)[4] to seek alternatives sources of insurance indemnification.[5]

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This article will outline the relationship between CERCLA and insurance coverage and discuss the way many courts have construed the 1973 CGL revisions in CERCLA litigation. These judicial interpretations have limited the scope of insurance coverage for environmental remediation and indemnification under CERCLA.[6] The reduction of environmental liability coverage under commercial CGL insurance has emphasized several alternative sources of indemnification for environmental contamination which I will also briefly discuss.

CERCLA Policies

By enacting CERCLA in 1980, the U.S. Legislature intended to authorize the Environmental Protection Agency (EPA), to 1) clean up hazardous and potentially hazardous sites and 2) require PRPs to indemnify the Government for preventative and remedial actions.[7] Courts have construed the language of CERCLA broadly to support "congressional concerns that federal government be immediately given tools necessary for prompt and effective response to problems of national

magnitude resulting from hazardous waste disposal . . ."[8] To further those policy goals, the Legislature created a strict liability standard of responsibility under CERCLA with very few exceptions: Legislative history clearly establishes Congress' understanding that it was incorporating a standard of strict liability under this chapter.[9]

The only exceptions to Superfund liability are occurrences attributable to "an act of God; an act of war;" or an act of a third party with whom the PRP has no contractual relationship.[10] Because of the unforeseeable nature of environmental damage, and the unpredictable cost of environmental remediation, PRPs have attempted to evade indemnification responsibility under CERCLA. In the majority of cases, insurance providers and municipalities have the "deepest pockets" among the PRPs. This paper will ignore the issue of municipality liability under CERCLA, and will concentrate on methods by which insurance companies escape CERCLA liability for environmental pollution.

Insurance Provisions Used to Avoid CERCLA Liability

Generally, the terms of the CGL insurance policy determine the scope of insurers responsibility to indemnify insureds. In 1973, the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau revised the existing CGL insurance policy by including the "pollution exclusion clause".[11] A typical pollution exclusion clause serves to eliminate insurance liability for bodily injury or property damage that does not result from a sudden or accidental occurrence.[12] Consequently, only environmental damage resulting from occurrences such as oil spills from ruptured tankers establish liability under CERCLA.

The pollution exclusion clause furthers the insurance belief that providing "coverage against liability for gradual pollution could be subject to considerable moral hazard as well as to adverse selection."[13] Insurance companies do not want financial or moral responsibility for determining what level of potential or actual harm constitutes "damage". By drawing the line for coverage at "sudden and accidental incidents", insurance companies hope to achieve the desired goal of "security over speculation" in the field of environmental litigation.[14] However, the language of the pollution exclusion clause allows for subjective interpretation in several areas. This results in conflicting views of when courts should find insurance

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companies responsible for indemnification of damages arising from environmental pollution.

There are two major areas of dispute in insurance liability litigation regarding the subjective interpretations of the pollution exclusion clause. The first concerns the meaning of the term "sudden and accidental" and the second concerns the meaning of the term "damage". Courts have construed the phrase "sudden and accidental" to exclude insurance liability for intentional, continual pollution. "Insurer cannot, under public policy of California, indemnify insured against liability for insureds own willful wrong."[15] Section 533 of the California Insurance Code codifies this rule[16] and cites supporting cases, creating, in effect, an express exclusion to liability for intentional pollution.[17]

This exclusion impacts a diverse group of industries such as hazardous waste disposal, painting, machining, and oil production and storage. As a matter of public policy, the services provided to society by these industries have balanced against the resulting environmental damage. The California legislature has concluded that, "the quality of life of the citizens of this state is based upon a large variety of consumer goods produced by the manufacturing economy of the state. The complex industrial processes that produce these goods also generate waste by-products, some of which are hazardous to the public health and the environment."[18]

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The definition of "damage" under the pollution exclusion clause presents another area in which insurers can elude liability. Under CERCLA, the actual or threatened release of a hazardous substance that may present a public danger justifies action by the EPA.[19] In cases of prevention, as opposed to remediation, the EPA action results in injunctions or declaratory relief for "all costs of removal or remedial action incurred by the United States Government or a State."[20] Courts consider the damages incurred by prophylactic actions equitable in nature as opposed to legal.[21]

Accordingly, equitable damages do not fall within the purview of those "damages" envisioned by the writers of the CGL policies because

they do not compensate for actual "property damage" or "bodily injury." Equitable damages do not satisfy the tort requirement that actual harm must occur. Critics of the narrow interpretation of "damages" have pointed out the benefits of preventative action under CERCLA: "While site cleanups are costly, . . . many more costs result from the neglect of such sites. If a community is completely contaminated, the affected property must be purchased by the government and its inhabitants relocated. These are precisely the enormous costs that can be averted by prophylactic measures."

However, the policy goal of providing stability in the insurance community contradicts the CERCLA policy goal of preventing foreseeable harm. In addition, insurers argue that the cost of environmental remediation usually exceeds the value of the contaminated land and, according to insurers, also exceeds the cost of the foreseeable harm.[22]

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In response to the ensuing dearth of commercial liability insurance available for environmental contamination, California and other states have proposed alternative sources of coverage.

Alternative Insurance Measures

An example of alternative coverage includes the "Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989" passed by the California Legislature to address petroleum spills from underground storage tanks.[23] The act provides assistance for "small businesses and farms which have limited financial resources" on the grounds that uncorrected spills cause "long-term threats to public health and water quality." [24] The policy articulated by the act is "to establish a fund to pay for corrective action where coverage is not available."[25]

The Joint Underwriting Association of Liability Insurance Act exemplifies another alternative insurance coverage plan enacted by the California Legislature. The Act provides a market assistance program for "designated class[es] of risk [to whom insurance] is not readily available in the voluntary insurance market."[26] However, the Legislature passed this Act to protect those in need of medical malpractice insurance.[27] The Act also contains a clause prohibiting application of the Act to parties seeking insurance for environmental pollution.

In 1988, the Massachusetts Legislature passed a similar act designed to protect those unable to acquire pollution insurance in the voluntary insurance market. That act created a state subsidized, industry funded reinsurance corporation for those companies "unable to obtain pollution liability insurance in the commercial marketplace." The Legislature explained this act would "fill a critical need caused by the general unavailability of commercial pollution liability insurance." [28]

Superfund itself is an alternative to direct insurance remediation and indemnification of environmental contamination. In addition to providing insurance, CERCLA furthers the congressional intent of limiting damage due to foreseeable environmental hazards. Revenue to support the Superfund comes from taxes on industry, federal appropriations and indemnification from PRPs. Without reimbursement from PRPs, the revenue raised form taxes and appropriations will not ensure the continuation of the Superfund.[29]

Conclusion

Courts have held that "public policy did not preclude coverage under CGL policy and comprehensive excess indemnity policy for environmental cleanup costs pursuant to CERCLA."[30] Many state legislatures, including California's, have reiterated this view in their Health and Safety Codes and by their enactment of alternative insurance legislation. Yet the extent of indemnification available from traditional, commercial insurance has become more and more limited due to the policies of the insurance industry represented by the pollution exclusion clause of the CGL policy. If remediation under CERCLA is to continue, the question remains: Who will provide indemnification funds necessary for the renewal of the Superfund?

The California Health & Safety Code suggests that the answer lies not in indemnification but in regulation of activities creating hazardous wastes, "the Legislature finds that persons producing hazardous wastes can be encouraged to reduce their production of that waste by regulatory and financial incentives. The Legislature further finds and declares that the provisions of this act are intended to provide these needed incentives."[31]

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This approach fails to acknowledge that regulation alone will not provide a viable solution to the problem of environmental contamination.

Industry inevitably results in some degree of environmental pollution. The issue of regulation also raises separate concerns regarding environmental pollution. Instead of providing a mechanism for remediation, a strict regulatory scheme encourages industry to move to areas with less stringent environmental regulations. With the passage of the NAFTA, this possibility has created a serious threat to areas in Canada and Mexico that do not enforce environmental regulations as strictly as the U.S. Relocation exploits communities willing to accept the burden of environmental pollution, and its accompanying health dangers, in return for the money generated by industry.

From a public policy standpoint, the current situation promises an undesirable outcome. The California Legislature has stated that "safe and responsible management of hazardous wastes is one of the most important environmental problems facing the state at the present time. It is critical to the protection of the public health and the environment, and to the economic growth of the state."[32] The existence of toxic sites compromises the health of the residents, environment and economy of every state. However, the policies furthering economic stability and predictability in the insurance industry conflict with the preventative policies espoused by Superfund. Resolution of the insurance problem confronting CERCLA authorized environmental remediation requires a reassessment of the policy goals surrounding environmental remediation.

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NOTES

1. See, 42 U.S.C.A. §§ 9601 et seq. (West 1983); U.S. v. Parsons, 723 F.Supp. 757, (1989), (liability under CERCLA is strict, without regard to party's fault or state of mind); Farmland Indus., Inc. v. Morrison-Quirk Grain Corp., 987 F.2d 1335 (1993) (liability under CERCLA is not dependant on any showing of causation or fault). Also, for a discussion of joint and several liability as applied to CERCLA, see, Robert M. Harkins, Jr., *Environmental Protection Agency v. Sequa* and the Erosion of Joint and Several Liability under Superfund, Environs, December 1993, at 30.

2. 42 U.S.C.A. § 9607 (West 1983).

3. See, e.g. Plasticolors, Inc. v. Cincinnati Ins. Co., 620 N.E.2d 856 (Ohio Ct. App. 1992) (pollution exclusion excluded coverage for cleanup costs incurred under CERCLA); U.S. v. Conservation Chemical Co., 653 F.Supp. 152 (1986) (pollution exclusion clause in liability policy excluded coverage for pollution not caused by sudden and accidental release of contaminants); U.S. Fidelity and Guar. Co. v. George W. Whitesides Co., Inc., 932 F.2d 1169 (1991), (pollution exclusion clause in liability policy unambiguously excluded coverage for claims asserted under CERCLA).

4. 42 U.S.C.A. § 9607(a) (West 1983).

5. For a discussion of municipality liability under CERCLA, see Molly A. Meegan, Municipal Liability for Household Hazardous Waste: An Analysis of the Superfund Statute and Its Policy Implications, 79 Geo. L.J. 1783 (1991).

6. See Kenneth S. Abraham, Environmental Liability Insurance Law (Prentice Hall Law & Business) (1991)[hereinafter Environmental Liability Insurance Law].

7. 42 U.S.C.A. § 9604(a) (West 1983); See also, U.S. v. Wade, 577 F.Supp. 1326, 1331 (E.D. Pa. 1983) (act intended to facilitate cleanup and to place financial burden on those responsible); U.S. v. Reilly Tar & Chem. Corp., 546 F.Supp. 1100, 1112 (D. Minn. 1982) (Congress intended that government be given tools for effective response and that those responsible bear cost and responsibility for remedying harm).

8. U.S. v. Reilly Tar & Chem. Corp., 546 F.Supp. 1100 (D.Minn. 1982).

9. City of Philadelphia v. Stepan Chem. Co., 544 F.Supp. 1135 (1982); See also, 42 U.S.C.A. § 9607 (West 1983).

10. 42 U.S.C.A. § 9607 (West 1983).

11. Mark K. Suri, Taking the Insurers to the Dumps: Interpreting "Damages" -- Is there Coverage for Hazardous Waste Cleanup Costs Under Comprehensive General Liability Insurance?, 13 J. Corp. L.Rev. 1103 (1988).

12. Generally, pollution exclusion clauses eliminate coverage for "bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalies, toxic chemicals, liquids or gases, waste materials, or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental. From 3 R. Long, The Law of Liability Insurance, App. C., at 63 (1987).

13. Kenneth S. Abraham, Environmental Liability and the Limits of Insurance, 88 Colum. L.Rev. 942 (1988), at 14.

14. Tracey Cordes, Who Gets the Bill?: Determining Insurers' Duty to Defend and Indemnify Against Hazardous Waste Clean-up Costs Under General Liability Policies, 18 Envtl. L. 931 (1988), at 6.

15. Maxon v. Sec. Ins. Co., 29 Cal. Rptr. 586 (1963).

16. "An insurer is not liable for a loss caused by the willful act of the insured..." Cal. Ins. Code § 533 (Deering 1992).

17. Cal. Ins. Code § 533 (Deering 1992); See, e.g., AIU Insurance Co. v. Superior Court, 274 Cal. Rptr. 820; Allstate Ins. Co. v. Overton, 160 Cal. App. 3d 843 (1984).

18. Cal. Health & Safety Code § 25135 (Deering 1988).

19. 42 U.S.C.A. § 9606(c) (West 1983).

20. 42 U.S.C.A. § 9607(a)(4)(A) (West 1983).

21. See, e.g., Maryland Casualty Co. v. Armco, 822 F.2d 1348 (4th Cir. 1987); Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977 (8th Cir. 1988).

22.Abraham, supra, at 18.

23. Cal. Health and Safety Code § 25299.10 (Deering Supp. 1994).

24. Id.

25. Cal. Health & Safety Code § 25299.10(b)(6) (Deering Supp. 1994).

26. Cal. Ins. Code § 11890(a) (Deering Supp. 1994).

27. Cal. Ins. Code § 11895(b) (Deering 1977).

28. Dukakis Signs Bill to Make It Easier to Obtain Pollution Liability Insurance, 2 Toxics Law Rep. (BNA) 34 at 935 (Jan. 27, 1988).

29. See, 26 U.S.C.A § 9507(a) (West 1983) and 42 U.S.C.A. §§ 9601-9657 (West 1983).

30. Morrisville Water & Light Dep't v. U.S. Fidelity & Guaranty Co., 620 N.E.2d 856 (1992).

31. Cal. Health & Safety Code § 25117.11 (Deering 1988).

32. Cal. Health & Safety Code § 25135 (Deering 1988).