STATUS OF THE EIL INSURANCE MARKET

by Eugene R. Anderson

I. Environmental Insurance Required by Law*

A. Resource Conservation & Recovery Act of 1974 (RCRA) and the Hazardous 7 solid waste amendments of 1984 (HSWA)

Industry in the United States annually generates more than 350 million metric tons of solid waste. The Environmental Protection Agency (EPA) has estimated that approximately 57 million tons of hazardous wastes have been generated annually and only ten percent of it has been disposed of in an environmentally sound manner.

Against this background, Congress passed the Resource Conservation & Recovery Act of 1976 (RCRA). This act, as amended, seeks to promote health, protect the environment and conserve resources by (1) training, (2) education, (3) research, (4) prohibiting future open dumping, and (5) regulating the handling of hazardous waste. RCRA establishes the framework for regulating hazardous wastes by tracking it from its generation to its final disposal - "cradle to grave." Specific obligations are imposed upon hazardous waste generators, transporters, and upon storage and disposal facilities. As part of the obligation, the EPA issued requirements regarding financial responsibility for hazardous waste treatment, storage and disposal facilities. The EPA considered the financial responsibility requirements to be an important aspect of the act for the purpose of protecting human health and the environment, because the requirements, ideally, ensure that sufficient finances exist to compensate injuries to people and property and ensure proper closure for the hazardous waste treatment, storage and disposal facilities (TSDFs).

RCRA requires that owners and operators of hazardous waste treatment, storage and disposal facilities either obtain insurance or demonstrate the financial capacity to self insure against third-party claims for personal injury or property damage caused by "sudden and accidental occurrences" arising from the operation of such facilities. Coverage for nonsudden releases is required only for facilities presenting the greatest risks: landfills, land treatment facilities, and surface impoundments.

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*Does not cover state laws

B. Comprehensive Environmental Response, Compensation & Liability Act of 1980 (CERCLA), also called Superfund Act

The purposes of CERCLA are (1) to provide emergency response and cleanup funds when hazardous substances are released into the environment, (2) to enable the federal government to recover such costs from responsible parties, and (3) to provide funds for cleanup of inactive hazardous waste disposal sites where there is post-closure (after hazardous waste site has been officially closed), a hazardous substance release.

The major fund created by the act is the Hazardous Substance Response Trust Fund, which ultimately will total $1.6 billion, to be used for emergencies, situations involving unidentified owners or operators, or claims unsettled within 45 days of filing.

A second fund, known as the Post-Closure Liability Fund, will be responsible for the liability and maintenance obligations of owners and operators of treatment, storage and disposal facilities authorized under RCRA - five years after they have been closed. The fund's assumption of liability will be based on the facility having complied with RCRA's regulations on post-closure performance, including the five-year monitoring period. The monitoring must have indicated that there is no substantial likelihood of a risk to public health or welfare. Once all these conditions have been met, the facility owner or operator must notify both the EPA and the state. The fund will assume liability 90 days after the notification.

The entities subject to liability under the act include waste generators, transporters and those who handle disposal. The act imposes strict (without fault), retroactive (referring to a prior time), and joint and several liability (making anyone responsible for the acts of all who might have contributed to whatever damage or injury occurred), upon parties responsible for the costs incurred by the federal government. "1 tsp. = 1 billion dollars."

C. Motor Carrier Act of 1980

The primary purpose of the Motor Carrier Act of 1980 is to "deregulate" the trucking industry. It is designed to promote competitive and efficient transportation services by removing many of the restrictive rules under which the industry has operated for many years. These rules frequently forced truckers to use roundabout routes and to return to their bases empty. The act also eases entry requirements, enabling small new firms to start operation.

The act seeks to improve environmental safety by setting higher financial responsibility limits on carriers of hazardous substances. The higher limits are designed to cause truckers to be more safety conscious.

D. Worker's Compensation

Worker's Compensation is a general and comprehensive term applied to those laws providing for compensation for loss resulting from the injury, disablement, or death of workmen through industrial accident or disease.

Fifty separate state worker's compensation laws follow basically the same general principles: (a) a right to compensation is given for all injuries incident to the employment, (b) compensation is awarded in accordance with a definite schedule based upon the loss or impairment of the workman's wage earning power, and (c) medical expenses are paid.

II. Environmental and Pollution Problems in the United States

A. Statutes

1. CERCLA

Aspects of the financial responsibility requirements which particularly impact on the insurance industry.

(a) Section 108(c) of CERCLA provides that (1) any insurer may be sued directly for the cleanup costs incurred by the United States or any state or a third party as a result of the release of hazardous material, (2) for damages arising from the loss or destruction of natural resources caused by the release of a hazardous substance, and (3) for the recoupment of funds expended from the Superfund created by CERCLA.

The section also provides that in defending against such actions the insurance company may use all defenses available to the owner or operator of the facility from which the release occurred, as well as the defense that the release was caused by the willful misconduct of the owner or operator. The insurance company may not use any other defense which would be available to it in an action brought against it by the owner or operator of the facility. Therefore, in a direct action brought against an insurance company under CERCLA, the insurance company will not be able to disclaim liability on the grounds that its policyholder failed to pay its premiums or that it has failed to satisfy any other condition contained in the insurance policy.

(b) Section 108(d) provides that an insurer may be held liable for an amount in excess of the policy limit if it is found not to have acted in good faith in defending against CERCLA claims. While the requirement of good faith negotiation is not new to insurers, insurers are concerned about the definition of "good faith," under the act.

The EPA has adopted the position, which has been confirmed by a number of courts, that joint and several liability may be imposed retroactively under CERCLA on a strict liability basis.

(1) Joint and several liability - the government could proceed against any one or a group of potentially liable parties for the total costs of the cleanup.

(2) Strict liability - liability for these costs is strict, in the sense that no showing of fault or negligence is required.

(3) Retroactive liability - there is no limit under the act to how far back in time an act by a former generator, owner, operator, or transporter which contributes to a current release may have occurred in order for him to be liable. Similarly, there is no guarantee that the treatment or disposal of substance or waste today will not render the generator, owner or operator liable many years in the future for extensive cleanup and remedial costs.

(c) Victim's compensation - the possibility that a victim's compensation provision will be added to CERCLA - The "Superfund Study Group" report (September 1982) to Congress has recommended the inclusion of an administrative compensation remedy without a showing of fault, similar to employment-related insurance systems, workers' compensation. To date, Congress has still not acted on extension of the Superfund Bill.

(d) Proliferation of Litigation - T. Lawrence Jones, president of the American Insurance Association, testifying at the April 3, 1985 hearing of the Senate Committee on Environment and Public Works, explained how recent court decisions have compounded the problems created for insurers under CERCLA. "Superfund enforcement actions produce litigation among potential responsible parties seeking to spread the liability more

equitably than the law does now. These cases, in turn, give rise to additional suits as potentially responsible parties attempt to obtain coverage of their defense and cleanup costs from their general liability insurers."

B. Case Law

1. The Common Law - is state law and varies considerably from state to state.

(a) Negligence

"Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." The standard is often stated as "what a reasonable man would do under the circumstances." Case law has long recognized that if a person discharges pollutants negligently, and as a result someone else suffers personal injury or property damage, a claim may be maintained for the damages caused as a result.

(i) Negligence can be used in many contexts, including products liability.

(ii) Negligent failure to warn - Borel v. Fibreboard Paper Products, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

(iii) Negligent pollution, disposal of waste - See Ewell v. Petro Processors of Louisiana, Inc., 364 So. 2d 604 (La. Ct. App., 1978), cert. denied, 366 So. 2d 575 (La. 1979); Knabe v. National Supply Division of Armco Steel, 592 F.2d 841 (5th Cir. 1979).

Negligent product design, production, and marketing - See Collins v. Eli Lilly, (Jan. 17, 1984).

(b) Trespass

Trespass requires an interference with plaintiff's possessory interest in land (plaintiff is the party with a claim against another, the party against whom the claim is brought is called the defendant). Trespass is an unauthorized entry of a person or thing upon the landowner's property. Most states recognize that if someone pollutes the environment so that it causes physical damage to another's property, that someone is liable for the resulting damages in a trespass action.

Trespass is rarely used in toxic tort cases - but, see Rushing v. Hooper McDonald, 300 So. 2d 94 (Ala. 1974). Early case for private recovery under trespass doctrine for chemical pollution - Martin v. Reynolds Metal, 221 Ore. 86, 342 P.2d 790 (1954) (settling of microscopic fluoride particles on property owner's property constituted trespass).

(c) Nuisance

(i) Private Nuisance - is an unreasonable interference with the landowner's use and enjoyment of his land. Private nuisance claims may be brought for the interference with use and enjoyment created by noise, by odors, and other air pollution and by water pollution. The maintenance of a hazardous waste disposal site could easily fit the description of a private nuisance and the threat of personal discomfort or personal discomfort or disease interferes with the use and enjoyment of property.

(ii) Public Nuisance - may be defined as an unreasonable interference with a general right of the public. Examples: Interference with public health (hogpens), public safety (fireworks in the street), public peace (loud noises) and public comfort (bad odors).

(d) Strict Liability, Ultrahazardous or Abnormally Dangerous Activity

Some activities are considered to be so dangerous that there may be liability for resulting damage, regardless of fault.

The leading case imposing strict liability in the environmental area is the 1868 English decision, Rylands v. Fletcher, L. R. 3 H.L. 330 (1861-73) All E. R. 1 (1868). Mill owners constructed a reservoir, and the water broke through and flooded the claimant's mine. Strict liability was imposed on the theory that the mill owners had engaged in a non-natural use of their land and therefore should bear the risk and costs if that use injures someone else's property interest.

The doctrine of strict liability has not been applied to environmental torts in all states, nor has its application been uniform among those states where it has been applied. In New Jersey, for example, strict liability for toxic torts evolved by analogy to strict product liability of the type reflected in section 402A of the Restatement (Second) of Torts. The courts there reasoned that the social policy that holds a manufacturer strictly liable for injuries caused by a defective product applies with equal force to a generator or handler of hazardous substances if those substances escape and cause injury. See New Jersey v. Ventron Corp., 182 N.J. Super. 210 (App. Div. 1981) (owners of mercury processing plant strictly liable for pollution of adjacent creek); Dep't of Transportation v. PSC Resources, 175 N.J. Super. 447, 419 A 2d 1151 (N.J. Super. Law Div., 1980); City of Bridgeton v. B.P. Oil, Inc., 146 N.J. Super. 169, 369 A.2d 49 (N.J. Super. Law Div. 1976).

Other states have arrived at strict liability by analogizing the handling of hazardous chemicals to the line of cases relating to "ultrahazardous activity," such as dynamiting, for which strict liability has been imposed. This is also sometimes described as "abnormally dangerous" activity. Some state courts have rejected this doctrine. See, e.g., Wright v. Masmite Corp., 368 F.2d 661 (4th Cir. 1965), cert. denied, 386 U.S. 934 (1967) (no liability for unintentional release of formaldehyde fumes).

(e) Expanding Concepts of Toxic Tort Liability

Toxic tort plaintiffs may be confronted with several problems. First, there is often a substantial passage of time between the release of a hazardous substance and the eventual exposure of the person. Second, there can also be a substantial latency period between exposure to the pollutant and the emergence of adverse symptoms. This is especially true in the case of carcinogens (cancer-causing substances), for which the latency period may range from ten to forty years.

Claimants often find that by the time symptoms emerge and they can identify the cause, their claims may be barred by applicable statutes of limitations. Many states have adopted "tolling" rules under which the statute does not begin to run until the injury occurs, or in some cases, until the causal connection with the defendant is or should have been recognized. These formulations may vary widely from state to state.

Several theories have been advanced for easing the plaintiff's burdens in this type of case, as in the related area of product liability.

(i) Concert of action - involves tortious conduct by a defendant who acts with others or pursuant to a common design. Defendants who are properly joined under this theory are each jointly and severally liable to the plaintiff for all of his injuries.

To act in concert, the defendants need not have expressly agreed upon their plan, but rather the agreement may be implied from the conduct of the actors. Ex. - A race between two drivers, A and B, where A hits a pedestrian and the pedestrian sues both A and B as jointly and severally responsible.

The original purpose behind concert of action appears to have been to deter antisocial behavior by groups of persons, by holding liable all those intentionally connected with the action. The theory is being expanded to apply in strict product liability cases. For example, the theory has been used in a diethylstilbestrol (DES) case, when the plaintiff was unable to identify the specific brand of DES taken by her mother, and there was evidence indicating that the manufacturers had joined in a form of concerted action. Abel v. Eli Lilly & Co., 94 Mich. App. 559, 289 N.W. 20 (Ct. App. 1979).

(ii) Alternative liability - widely recognized theory that applies to a situation in which two or more defendants acted in a way that may have caused injury to the plaintiff, but it is not possible to tell which of their actions in fact was the cause. Normally, the defendants do not act in concert. Summers v. Tice. An example in the environmental area is Borel v. Fibreboard Paper Products Corp., where an industrial worker was exposed to several kinds of asbestosis during his employment. He contracted asbestos and was allowed to join as defendants all manufacturers to whose asbestos he had been exposed. His claim was for negligence in failing to warn him of the dangers of inhaling asbestos dust. The court held each manufacturer jointly and severally liable and, once plaintiff established exposure, shifted the burden to each defendant to prove that its product could not have caused the injury. Pending enforcement actions indicate an intent by the government to apply this approach to hazardous waste disposal situations involving multiple generators.

(iii) Enterprise liability - similar in principle to the concert of action theory. It seeks to address the situation where an industrywide practice may be harmful. If it can be established that an entire group breached a duty to the plaintiff, as a result of which he was injured, and through no fault of his own he is unable to identify which member or members of the group actually caused the injury, the entire group may be jointly and severally liable. Not all potential defendants need be joined. The practical effect of enterprise liability is to shift the burden of proof from the plaintiff to the group of defendants, who may each be held strictly, jointly, and severally liable, except to the extent that a member of the group proves that he did not cause the injury.

(iv) Market-share liability - obviates need to show cause in fact against individual defendants. In Sindell v. Abbot Laboratories, the California Supreme Court allowed the daughter of a mother who took the drug diethylstilbestrol (DES) during pregnancy, where apparently as a result, the daughter later developed cancer, to maintain an action against most of the manufacturers of the drug. The court held that if causation were established as to the drug but not the specific manufacturer, the entire industry would be liable. The court believed that it would be unjust for the plaintiff to go without relief simply because, as a result of the passage of time, which was not her fault, it was impossible for her to identify the specific manufacturer of the drug taken by her mother. The risk of loss was shifted to the group of companies which had created the problem. Each member of the industry was held liable in proportion to its market share.

(v) Liability without cause - compensation for fear, emotional distress, pain and suffering arising out of current exposure, without currently compensable physical injuries. Agent Orange.

(vi) Cancerphobia - Arnett v. Dow Chemical Co. "To award damages based on a mere mathematical probability (of future injury) would significantly undercompensate those who actually do develop cancer and would be a windfall to those who do not."

2. The pollution exclusion.

Standard Comprehensive General ("CGL") insurance policies are legal liability policies.

(a) CGL covers pollution unless excluded.
(b) Pollution exclusion excludes pollution.
(c) Exception to exclusion for sudden and accidental.

A). The "Sudden and Accidental" Exception

The most frequently litigated aspect of the pollution exclusion is the scope and meaning to be given to the exclusion's exception which provides that the exclusion does not apply to discharges, dispersals, etc. which are "sudden and accidental."

(1) "sudden and accidental" means "neither expected nor intended from the standpoint of the policyholder." Lansco Inc. v. Department of Environmental Protection, 138 N.J. Super. 275, 350 A.2d 520 (1975), aff'd, 145 N.J. Super. 433, 368 A.2d 363 (1975), cert. denied, 73 N.J. 57, 372 A.2d 322 (1977).

In Lansco, vandals opened the valves on two of Lansco's tanks. Oil leaked from th policyholder's property over a four-day period. Lansco cleaned up the oil spill and sought an order compelling the insurer to indemnify it for the costs of cleanup. The court held that the pollution exclusion did not apply because the question of whether the oil spill was sudden and accidental under the exclusion clause "must be viewed from the standpoint of the insured" (emphasis added).

(2) "sudden and accidental" - unintended consequences of an intentional act.

In Farm Family Mut. Ins. Co. v. Bagley, 64 A.D.2d 1014, 409 N.Y.S.2d 294 (4th Dep't 1978), the policyholder was sued for damages when the chemicals sprayed on his oat field carried over onto his neighbor's land. The court noted that, although the insured intended to discharge the chemicals, he did not intend to disperse them on his neighbor's property, nor did he intend to cause injury or harm to his neighbor. Therefore, the court ruled that, although the insured's act was intended, its consequences were not, and the act would be considered "sudden and accidental." See Allstate Insurance Co.

v. Klock Oil Co., 73 A.D.2d 426 N.Y.S.2d 603 (4th Dep't 1980); Jackson Township Municipal Authority v. Hartford Accident and Indemnity Co., 186 N.J. Super. 156, 451 A.2d 990 (1982); Buckeye Union Ins. Co. f. Liberty Solvents and Chemicals Co. Inc., C.A. No. 11598 (Ct. App. Ohio, July 11, 1984). But, c.f., American States Ins. Co. v. Maryland Casualty Co., Civ. No. 82-70353 (E.D. Mich. July 3, 1984).

From the cases discussed above, it is evident that mere negligence on the part of the policyholder will not activate the pollution exclusion; rather something more is required. The first case in which that extra element was found to present is Barmet of Indiana v. Security Ins. Group, 425 N.E.2d 201 (Ind. App. 1981) - in upholding the denial of coverage, the court reasoned that, in light of the numerous complaints received by the policyholder over a four-year period, the emmission of gases could not be considered "sudden and accidental." The court also rejected the policyholder's contention that its lack of intent to cause injury made the pollution exclusion inapplicable, on the grounds that numerous complaints received by the policyholder made the problem foreseeable rather than accidental.

During the past two years, insurance companies have received a slightly more favorable reception in the courts, and have succeeded in disclaiming coverage based on the pollution exclusion.

Techalloy Company Inc. v. Reliance Insurance Co., 487 A.2d 820 (Super. Ct. Pa. 1984) (holding that carrier was not obligated to defend policyholder against claim for personal injuries caused by exposure to toxic chemicals which leached from insured's property over 25 years because the alleged pollution was not "sudden"); Great Lakes v. National Union Fire Insurance Company, 727 F.2d 30 (1st Cir. 1984) (the court held that no coverage was required because the pollution-induced property damage resulted from the regular business activity of the insured and therefore was not sudden and accidental); American States Insurance Co. v. Maryland Casualty Co., Civ. No. 82-70353 (E.D. Mich., July 3, 1984) ("National Drum" case).

Summary

With limited exceptions that judicial interpretation of the phrase "sudden and accidental" contained in

the pollution exclusion has been so overwhelmingly favorable to policyholders that the exception has almost completely swallowed the exclusion. Under the decisions rendered to date, discharges or releases of pollutants will be considered "sudden and accidental," and thus covered by the CGL policy, unless (1) the policyholder knew that it was polluting and the injury caused by the pollution was foreseeable, as in Barmet, supra, or (2) such discharges occur over an extended period of time as a natural consequence of the policyholder's business and thus lack any of the attributes normally associated with an accident, as in Great Lakes, supra. When the cases discussed above are read in conjunction with the other judicial exceptions carved out of the pollution exclusion, it becomes evident that the pollution exclusion is not much of an exclusion at all.

B). Judicially Created Exceptions - the courts and the pollution exclusion

(1) Active v. Passive polluter -

In Niagara County v. Utica Mutual Insurance Co., 103 Misc.2d 814, 427 N.Y.S. 2d 171 (Sup. Ct. Niagara Co. 1980), aff'd, 80 A.D.2d 415, 439 N.Y.S.2d 538 (4th Dep't 1981), a case involving the Love Canal site, the court held that the pollution exclusion was intended to deny coverage to active polluters. Therefore, because the complaint in the underlying action merely charged the County with permitting others to pollute, the County was, at worst, a passive polluter and consequently, the pollution exclusion did not bar coverage. See, Autotronic Systems, Inc. v. Aetna Life and Cas. Co., 89 A.D.2d 401, 456 N.Y.S.2d 504 (3rd Dep't 1982) (the court, citing the Niagara case held that the exclusion applied only to active polluters because the policy behind the exclusion, i.e., the desire to impose the full risk of loss on the polluting party, would not be furthered by denying coverage to a party not engaged in the actual polluting activity.

(2) Types of Pollutants -

In Molton, Allen & Williams Inc. v. St. Paul Fire & Marine Ins. Co., the court held that the pollution exclusion applied only to industrial pollutants similar to those specifically listed in the language

of the exclusion, and did not apply to the unintentional washing of sand by virtue of rainfall, onto the property of an adjacent landowner. See Pepper Industries, Inc. v. Home Ins. Co., 67 Cal. App. 3d 1012, 134 Cal. Rptr. 904 (1977) (pollution exclusion did not explicitly refer to damages caused by fires or explosions, it was held inapplicable).

(3) Types of Injuries -

In Connor v. Farmer, 382 So.2d, 1069, cert denied, 385 So.2d 267 (La. 1980), the pollution exclusion was held inapplicable in a suit against an employer by an employee who contracted silicosis. The court reasoned that the plaintiff's injuries, and thus, the employer's liability, arose from the employer's failure to provide its employees with adequate protective apparel rather than from the employer's discharge of pollutants and therefore, the pollution exclusion did not bar coverage of the employer.

III. Possible Solutions

A. Government intervention into the EIL market

Examples of government intervention:

Inner city property insurance

Flood insurance

Earthquake insurance

Medical - Medicare, Medicaid

Nuclear - Price Anderson

Social Security

Federal crime insurance

Superfund

Black lung

New Zealand law - pays compensation to any citizen injured - very comparable to our workers' compensation laws

B. Insurance industry solutions

1. Eliminate joint and several liability for waste dumped after 1980. Establish a mandatory apportionment system based on how much waste a company dumps at a site.

2. Require EPA to use Superfund revenues to clean up all hazardous waste dumped prior to the December 1980 enactment of the Superfund Act.

3. Minor adjustments to tort system.

C. Industry solutions

1. Chemical industry private funding of cleanup program.

2. Many companies are going out of businesses involving risk of environmental hazards.

3. Very enhanced program of controls.

D. Combination of insurance industry and government actions.

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