Insuring Environmental Cleanup: Triggering Coverage for Environmental Property Damage under the Terms of a Comprehensive General Liability Insurance Policy

Frona M. Powell
Indiana University School of Business
Frona M. Powell*

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I. INTRODUCTION

Concern about widespread environmental contamination caused by industrial pollution and the health hazards associated with hazardous waste has made a clean environment one of the paramount scientific,
social, and political goals of our time. The costs of addressing the problems are staggering. Recent estimates suggest that the cost of cleaning up the nation's hazardous waste sites will approach $500 billion dollars. The average cleanup cost for a Superfund site today is $25 million dollars, and the cost of the investigation and study portion for such a site averages three million dollars.

Considering the enormous costs involved in hazardous waste site cleanup, it is not surprising that parties who potentially may be liable for the costs of such cleanups are willing to invest substantial sums in litigation to avoid or minimize that liability. The mammoth price tag for cleaning up the nation's worst hazardous waste sites encourages parties to litigate because the costs of litigating are often less than the costs of remedying hazardous waste contamination. But litigation does not further the ultimate goal of a clean environment. Rather, it consumes resources that could be spent on cleanup while postponing an ultimate solution to the problem of hazardous waste contamination.

Passage of comprehensive federal and state environmental legislation, like the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or Superfund) passed in 1980, significantly expanded the potential liability of corporate defendants for hazardous waste contamination by imposing strict, joint and several liability on multiple owners, operators, generators and transporters for the costs of cleaning up hazardous waste sites. In addition, individual plaintiffs who have suffered bodily injury and property damage because of industrial pollution may recover damages from corporate polluters under traditional tort theories of trespass, nuisance, and strict liability.

As a result of the large scale costs associated with liability for environmental pollution, corporate defendants have turned to their insurers for defense and reimbursement of costs under the terms of a comprehensive general liability policy (CGL policy). Many courts have been willing to impose liability on insurers for CERCLA cleanup costs and for damages associated with environmental pollution under the terms of CGL policies. In some cases, insureds have sought defense and indemnification under policies that expired long before the damages caused by pollution became manifest. In determining the point in time when insurance coverage is "triggered" by the terms of

4. See infra notes 13-22 and accompanying text.
5. See, e.g., Sterling v. Velsicol, 855 F.2d. 1188 (6th Cir. 1988).
the policy, many courts have relied on traditional techniques of statutory interpretation as well as broad principles of public policy to impose a trigger that effectively maximizes insurance coverage in such cases.

Insurers have aggressively fought imposition of liability under the terms of comprehensive general liability policies, arguing that the language of the standardized CGL policy is not ambiguous and that liability for environmental damages and cleanup costs is excluded by the terms of the policy. Substantial litigation continues as insurers and insureds battle over the meaning of words like "occurrence," "sudden and accidental" and "expected or intended" in the language of the standard CGL policy and its standard "pollution exclusion" clause. Meanwhile, litigation expenses continue to increase, with money spent on transaction costs associated with litigation rather than on the costs of cleaning polluted sites.

In April 1992, the RAND Institute for Civil Justice issued a report that is sure to fuel demands to resolve some of the uncertainty surrounding insurer liability for environmental damage and cleanup costs. According to that report, insurance companies are paying out nearly $500 million dollars annually for Superfund-related liabilities, but only an average of twelve percent goes for actual cleanup; legal fees and transaction costs unrelated to actual cleanups accounts for eighty-eight percent of the funds expended. The study also found that insurers' Superfund costs are escalating rapidly, with insurers spending $470 million on such claims in 1989, almost double their 1986 outlays. According to the RAND report, the transaction costs associated with Superfund liabilities are far higher than those for other lines of property-casualty insurance, almost tripling that for CGL insurance as a whole.

This Article examines the legal issues involved in the determination of insurer liability for environmental property damage and cleanup costs under the terms of a CGL and focuses on a significant question in environmental coverage disputes: When is coverage for environmental damage triggered under the terms of a CGL policy? To that end, the first section reviews statutory and common law principles under which liability for environmental property damage may be imposed on corporate polluters. The next section discusses the standard comprehensive general liability policy by reviewing the history of that policy and the language of the standard CGL policy. Section III of the Article focuses on the meaning of an "occurrence" in the language of a standard policy, and examines the significance of four "triggers"
of coverage developed by the courts in order to define the time of an “occurrence” for purposes of policy coverage: “exposure”; “injury in fact”; “manifestation” and the “triple or continuous trigger.” The final section of the Article discusses the courts’ use of traditional techniques of statutory construction to achieve perceived public policy benefits in insurance environmental liability cases and suggests that the consequences of that approach have created an environment of uncertainty that has led to increased litigation and decreased availability of environmental liability insurance. If we are to proceed with the business of cleaning up the nation’s hazardous waste sites, incentives to minimize rather than maximize insurer/insured litigation must be developed so that the funds expended on Superfund costs can be applied toward the costs of cleanup rather than on transaction costs associated with litigation.

II. CERCLA AND COMMON LAW LIABILITY FOR INDUSTRIAL POLLUTION

The past few decades have witnessed an unexpected and unparalleled passage of a series of powerful federal and state environmental laws designed to address the substantial problems of environmental pollution affecting land, water and air throughout the nation. Passage of comprehensive environmental legislation, such as the Resource Conservation and Recovery Act (RCRA)9 in 1976 and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980, created a whole new legal environment in which businesses and their insurers evaluate the potential liability of industrial polluters.10 Prior to passage of CERCLA and the state laws modeled after it, the liability of an owner or operator of a polluted site for risks such as off-site leakage was generally perceived to be small.11 Because it seemed unlikely that courts would impose significant waste-related liabilities on insurers, comprehensive general liability insurance was available at prices that did not truly reflect an industrial defendant’s risk of liability for on- and off-site pollution under environmental laws in effect today.12

CERCLA (or Superfund) created a broad framework under which multiple parties can be held strictly liable for the costs of cleaning up a

12. Note, supra note 11, at 1575.
facility contaminated by a hazardous substance. Under CERCLA, the Environmental Protection Agency (EPA) has the power to assess liability for cleanup of hazardous substances at any site where hazardous substances have come to be located. The definition of "hazardous substance" and "facility" under CERCLA is extremely broad, and virtually any contaminated site can be subject to cleanup under provisions of the act. CERCLA gives the EPA the power to order a responsible party to clean up a contaminated site or to clean up the site itself and recover cleanup costs from a responsible party. There are four classes of "potentially responsible parties" (or "PRPs") who may be strictly liable for cleanup costs under the act: (1) current owners and operators of the contaminated site; (2) those who owned or operated the site when disposal occurred; (3) generators of hazardous substances; and (4) transporters of hazardous substances. Liability under CERCLA is joint and several; therefore, multiple parties (owners, operators, generators, and transporters) may be liable for the contamination of a particular site. As a result, a party to a CERCLA action may find his liability increased because of the actions of another party over whom he had no control.

CERCLA does not provide third parties injured by industrial pollution a cause of action for personal injury or property damage associated with hazardous waste contamination, but individual plaintiffs may recover substantial damages from industrial defendants under traditional common law tort actions for trespass, nuisance, negligence, and strict liability. Residents living near a corporation's chemical

14. Substances designated as hazardous or toxic under the Clean Water Act, RCRA, the Clean Air Act, or TSCA are incorporated by reference into CERCLA. In some cases, the definition may include nonhazardous substances that contain trace concentrations of hazardous substances. United States v. Conservation Chem. Corp., 619 F. Supp. 162 (W.D. Mo. 1985).
16. See Id.
18. A potentially responsible party under CERCLA may be strictly liable for the costs of cleaning up the site. Consequently, an owner of a contaminated site is a potentially responsible party ("PRP") under CERCLA who may be liable regardless of when the pollution occurred or whether the contamination could have been foreseen. Note, Environmental Cleanup Costs and Insurance: Seeking a Solution, 24 GA. L. REV. 705, 710 (1990).
20. For example, generators of hazardous waste are liable as "potentially responsible parties" under CERCLA. Thus all industries who disposed of contaminants at a particular industrial waste site may be liable for costs of cleanup. Abraham, Environmental Liability and the Limits of Insurance, 88 COLUM. L. REV. 942, 957 (1988).
waste site, for example, have recovered substantial damages from corporate defendants on the theory that the corporation's activities were ultrahazardous and/or abnormally dangerous and that the injury to neighboring landowners was a reasonably foreseeable result of its activities.\textsuperscript{22}

Today an industrial defendant may become the target of many different legal actions arising from the past manufacture or disposal of toxic materials under these statutory and common law principles, even in cases where substances were not known to be toxic at the time of manufacture or disposal. Corporate defendants then become corporate plaintiffs suing their insurers for defense or indemnification under standard CGL policies in order to recover cleanup costs mandated by government agencies or damages awarded to plaintiffs in common law environmental actions. The result is another layer of litigation, increased "transaction" costs for insureds and insurers, and delay in cleanup and damage awards to injured parties.\textsuperscript{23}

\begin{itemize}
  \item \textsuperscript{22} Sterling v. Velsicol, 855 F.2d 1188 (6th Cir. 1988).
  \item \textsuperscript{23} For example, in Montrose Chemical Corp. v. Admiral Insurance, 3 Cal. App. 4th 1511, 5 Cal. Rptr. 2d 358 (Cal. App. 2 Dist. 1992), \textit{petition for rev. granted May 21, 1992}, discussed \textit{infra} at notes 108-30, Montrose Chemical Corporation, a defunct chemical company which manufactured DDT for use in pesticides from 1947 until 1982, sought a declaration that its general liability insurer had a duty to defend and indemnify it in five different actions alleging property damage and bodily injuries as a result of contamination of certain sites where Montrose manufactured its product or disposed of its hazardous wastes. The superior court had granted summary judgment in favor of the insurer, but the court of appeals reversed the trial court's judgment and remanded the case. The Insurance Environmental Litigation Association, representing twenty big commercial insurers, filed an amicus curiae brief in the case, as did lawyers for six policyholders. Litigation costs will probably continue to rise in the case because a petition for certiorari will likely be filed with the California Supreme Court. Stacy Gordon, \textit{Broad Pollution Coverage Granted: 'Continuous Trigger' Ruling Regarded as Major Victory for Policyholders}, \textit{Bus. Ins.}, Mar. 9, 1992, at 1, 77.

III. INSURER LIABILITY FOR ENVIRONMENTAL DAMAGES UNDER A COMPREHENSIVE GENERAL LIABILITY POLICY

The standard CGL policy provides coverage for bodily injury and property damage which occurs during the policy period. As a general rule, and subject to other policy terms and conditions, a CGL insurer's duty to indemnify is "triggered" by a determination that "fortuitous bodily injury or property damage" occurred during the policy period. Prior to 1966, most comprehensive general liability insurance policies were "accident" policies—that is, they generally covered liability of an insured caused by an "accident." The term "accident" was not defined by the policy. After 1966, the standard policy language was changed to substitute the word "occurrence" for "accident." The change was intended to make it clear that an insured event was not limited to sudden events but that an insured event could also include personal injuries and property damage resulting from gradual processes. After 1966, the standardized "occurrence" policy typically read:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applied, caused by an occurrence, and the Company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent. ...

After 1973, "occurrence" was defined in the standard CGL policy to make it clear that suddenness was not a requirement: "'Occurrence' means an accident, including continuous or repeated exposure to conditions, which results in personal injury or property damage neither expected nor intended from the standpoint of the insured." In the mid-1970s, the insurance industry first inserted a pollution exclusion clause into the standard CGL policy. This standardized "pollution exclusion" clause was used until the mid-1980s, when it was replaced by an "absolute" pollution clause which purports to exclude liability for pollution-related occurrences. The standard "pollution exclusion" clause used by the insurance industry between the mid-1970s and 1980s provided:

This policy does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids,
alkalines, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.\footnote{Id. at 115.}

The standardized language of the CGL policy, particularly the definition of "occurrence," "damages," and the words "sudden and accidental" in the pollution exclusion clause have provided fertile ground for parties debating whether a CGL policy provides coverage for site-specific cleanup costs mandated under CERCLA and/or for personal injury and property damages to third parties resulting from hazardous waste pollution. The cases focus on several issues: When does an event "occur" for purposes of the policy—that is, when is coverage of the policy "triggered?"\footnote{See, e.g., Montrose Chem. Corp. v. Admiral Ins., 5 Cal. Rptr. 2d 358 (Cal. App. 2 Dist. 1992).} Does the term "damages" in the standard policy language include environmental cleanup costs mandated under CERCLA, or is the term limited to money damages "at law?"\footnote{See, e.g., Continental Ins. v. Northeastern Pharmaceutical, 811 F.2d 1180 (8th Cir. 1987), aff'd in part, rev'd in part, 842 F.2d 977 (8th Cir. 1988).} Is an event "expected or intended" for purposes of the policy if the insured should have expected the event, or does the pollution exclusion apply where the damage to person or property, rather than the polluting event, was unexpected or unintended?\footnote{The definition of "occurrence" in the standardized CGL policy provides that an "occurrence" is "an accident, including exposure to conditions, resulting in injury or property damage neither expected or intended from the standpoint of the insured." Insurers may deny coverage by maintaining that a discharge and/or resulting injury was either expected or intended. The case law is split on whether "expected or intended" refers to the discharge, not the injury. O’Leary, supra note 23, at 104-08 (citations omitted).} Does the CGL policy apply in cases where the property is owned or occupied by the insured, or does it cover on-site pollution which could extend off-site, thereby causing an insurable event unless the pollution on-site is remedied? What is the meaning of "sudden and accidental" within the pollution exclusion clause?

Relying on traditional rules of contract interpretation, courts have reached different conclusions about the meaning of these words in standard CGL policy language. For example, the meaning of the word "damages" in the standardized language of the CGL policy is one issue frequently litigated by insureds and insurers in environmental insurance cases. Some courts have ruled that the word "damages" does not include CERCLA cleanup costs mandated by the government because monetary claims under CERCLA and its state counterparts are "equitable" in nature.\footnote{These courts hold that the equitable relief sought is a mandatory injunction that}
CGL policy, based upon a determination that an ordinary insured should not be reasonably expected to understand the distinction between equitable remedies and damages "at law."35

CERCLA cleanup costs were unknown to and therefore unanticipated by insurers who issued CGL policies prior to passage of the statute in 1980.36 Presumably the parties could not have actually intended to include such costs as damages covered under the policy at the time the policy was issued, because such liability was unknown. But because it makes little legal or policy sense not to include these costs as damages, and because there is no real principled distinction between costs and damages, most, but by no means all, courts have interpreted CERCLA costs to constitute damages for purposes of the CGL policy.37

Another frequently litigated issue in hazardous waste insurance coverage disputes is the meaning of "sudden and accidental" in the standard CGL pollution exclusion clause. This clause excludes coverage for bodily injury or property damage arising out of the discharge, dispersal, release or escape of contaminants or pollutants, but it does not exclude coverage if the discharge, dispersal, release or escape is "sudden and accidental." On its face, the language of the exclusion appears to exclude liability for non-sudden and non-accidental pollution events, but courts have utilized several theories to avoid limiting an insurer's liability to sudden events under this clause.38 Some courts have found the words "sudden and accidental" to be ambiguous, and on this basis have redefined the terms "sudden and accidental" to mean "unexpected, unusual and unforeseen."39 For example, in an early New Jersey case, Lansco Inc. v. Department of Environmental Protection, an unknown person released 14,000 gallons of oil from an

the PRP pay money damages or clean up a site. Continental Ins. v. Northeastern Pharmaceutical, 842 F.2d 977 (8th Cir.), cert. denied, 408 U.S. 821 (1988).


36. Courts supporting the equitable/legal distinction, however, maintain that the distinction is more than technical, because clean up costs may amount to far more than conventional legal damages. Continental Ins. v. Northeastern Pharmaceutical, 842 F.2d 977, 986 (8th Cir. 1988).

37. Pendygraft et. al., supra note 23, at 151.

38. Courts have refused to enforce the clause because the damage or injury was unforeseen or unintended, the pollutants were no industrial pollutants, or the insured was not the actual polluter. Hadzi-Antich, supra note 23 at 792-93.


insured's tanks which eventually leaked into a river and reservoir. The New Jersey court held the standard pollution exclusion clause in the company's CGL policy was inapplicable because the spill was "unintended" from the standpoint of the insured.41 By equating "sudden and accidental" with "unintended," the Lansco Court made the pollution exclusion the effective equivalent of an "occurrence," as it is defined in the standard CGL policy.42 The result is to render the pollution exclusion clause essentially meaningless.43

Other courts, however, have found the "sudden and accidental" clause unambiguous, and have applied the exclusion in favor of insurers by construing a temporal limitation into the clause or by interpreting the words "sudden and accidental" to modify the release, not the resulting injury.44 Of those state supreme courts construing the standard pollution exclusion clause, at least three have held for policyholders and three for insurers.45 The courts have also split over which party, an insured or insurer, has the burden of proving an event was "sudden and accidental."46

IV. TRIGGERING INSURANCE LIABILITY FOR ENVIRONMENTAL CLEANUP COSTS OR DAMAGES UNDER THE STANDARD CGL POLICY

No other issue better represents the disparity of interpretations of CGL policy language in environmental liability cases than the question of when an event "occurs" for purpose of triggering insurance coverage under the policy. Recent cases determining the appropriate trigger of coverage under a CGL policy not only raise questions of contract interpretation, they also raise a policy question of substantial importance in insurance coverage disputes: Under what circumstances, if any, should the insurance industry bear the costs of cleaning up industrial toxic waste and compensating the victims of environmental pollution under the terms of a standard CGL policy?

41. Id.
42. The standard policy defines an occurrence as "an accident, including continuous or repeated exposure to conditions, which results in personal injury or property damage neither expected no intended from the standpoint of the insured." Mack, supra note 23, at 488.
43. Note, Environmental Cleanup Costs and Insurance, supra note 18, at 715.
45. Wisconsin, Georgia and Alabama have held for policyholders by interpreting "sudden and accidental" as the equivalent or unexpected or unintended damage, while Massachusetts, New York, and North Carolina have held for insurers by finding the word "sudden" to require an abrupt release of pollutants. O'Leary, supra note 23, at 118-19 (citations omitted).
46. Id. at 120.
The typical comprehensive general liability policy requires an insurer to pay all sums which an insured becomes legally obligated to pay as damages because of (1) bodily injury or (2) property damage . . . caused by an occurrence.47 This language is generally interpreted to mean that insurance coverage is triggered when the bodily injury or property damage takes place during the effective dates of the policy.48 In defining an “occurrence” for purposes of triggering coverage under a CGL policy, courts generally focus on the moment the damage occurred rather than the time of the wrongful act, and the moment the injury occurred may differ depending on whether the occurrence resulted in personal injury or damage to real property.

A. Triggering an Occurrence in Personal Injury Cases—the Asbestos Cases

In many toxic torts cases involving bodily injury, like those involving personal injuries from exposure to asbestos, bodily injury occurs at the moment of exposure to the toxic substance and continues to evolve over a long period of time, ultimately resulting in the manifestation of sickness and disease such as asbestosis.49 In some cases where manufacturers of asbestos have sought defense and indemnification from CGL insurers in personal injury cases brought by plaintiffs exposed to asbestos, the manufacturers have successfully argued that liability coverage under the standard CGL policy is a “continuous trigger”—that is, liability is continuously triggered from the moment in time when an injured plaintiff is exposed to asbestos fibers through the time when the injury manifests itself.50 The definition of “bodily injury” in the CGL policy helps support this argument. “Bodily injury” is defined by the policy to include not only bodily injury, but also sick-

47. Hadzi-Antich, supra note 23, at 781. Most CGL policies in environmental claims cases are “occurrence” policies rather than “claims made” policies. An “occurrence” policy requires the insurer to respond, even after expiration of the policy, to an occurrence that happened during the policy term. A “claims-made” policy only covers claims actually made during the policy period. Montrose Chem. Corp. v. Admiral Ins., 5 Cal. Rptr. 2d 358 (Cal. App. 2 Dist. 1992).


49. Evidence suggests that asbestosis begins when a person first inhales asbestos fibers, and that the lungs are continuously punctured with every inhalation and expiration. Zurich Ins. Co. v. Raymark Indus., 514 N.E.2d 150, 155 (1987).

50. Id. The landmark asbestos case establishing this “continuous trigger” theory is Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981). Discussing that case, one court was held, “Keene, involving the exact controversy before us, was decided with an eye toward the predominant purpose of purchasing liability insurance which, basically, included Keene’s reasonable expectation that by purchasing liability insurance it would be insured against liability for asbestos related injury and disease.” J.H. France Refractories v. Allstate Ins., Co., 578 A.2d 468, 473 (Pa. Super. 1990).
ness or disease. In addition to "injury" under the policy, sickness or
disease are separate and distinct triggers of coverage. Thus under the
express language of the policy, an occurrence of each or any of these
events—injury, sickness, or disease—should trigger coverage.

*J.H. France Refractories Company v. Allstate* is an example of a
case where a court applied a continuous trigger in the context of asbes-
tos litigation. In *J.H. France*, J.H. France Refractories filed an action
to determine its insurance coverage among various insurers with re-
spect to asbestos-related lawsuits. On appeal, the Pennsylvania Supe-
rior Court held that the entire asbestos disease process from first
exposure to manifestation was an event triggering coverage of the in-
surer's obligation under a CGL policy covering products liability.

The court began by noting the general rule that the goal of contract
interpretation is to ascertain and effectuate the intent of the

parties. However, the court said, "if the language of a policy prepared by an
insurer is ambiguous, obscure, uncertain, or susceptible to more than
one construction, the language must be construed most strongly
against the insurer, and the construction most favorable to the insured
must be adopted."

The court candidly recognized that these general rules of contract
construction are inherently flexible ones which permit courts a great
deal of discretion in interpreting language in a particular insurance
contract. It stated:

> Much argument in this case has been expended on the very issue of ambi-
guity . . . It appears to us that the concept of ambiguity, as used in interpreta-
tion of contractual provisions, is a rather relative concept. What may appear
to be clear and precise terminology in the abstract reading of the document
may become rather unclear and imprecise when applied to real factual pat-
terns . . . . There is an implicit recognition in law that even the most carefully
drafted document and extensively bargained contract will not provide a true
proverbial “meeting of the minds” as to all possible, or even likely, scenarios
of application.

According to the court in *J.H. France*, in construing ambiguous
contract language, courts have adopted a "reasonable expectation" ap-
proach to contract interpretation, requiring that the "reasonable ex-
pection of the parties be, in essence, imputed as the intent of the
parties and, perhaps as important, acquiesced to by the parties to the

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52. Id.
    Allstate Ins. Co., 592 A.2d 1303 (Pa. 1991); Pet. of Pennsylvania Mfr.'s Ass'n Ins.
    1990).
55. Id.
56. Id.
This test is not, the court cautioned, a "carte blanche approval of the insured's wildest and most comprehensive expectation. Rather, it should clearly incorporate an understanding of the general relationship between the parties, the purpose behind their entering a contractual relationship and the relative position of each."  

The Pennsylvania Superior Court in *France*, like other courts examining the question of trigger of coverage in asbestos cases, also believed that the court should, as a matter of public policy, interpret the policy to further the goals of the insured. The court noted that the language of the CGL policy defined "bodily injury" as not only injury in fact, but also sickness and disease. The court said:

> It is noteworthy that injury is defined (by the policy) as encompassing not only injury in fact, but also sickness and disease. These terms, given their general meaning, encompass progressive and/or transitory processes of the body, more so than a momentary occurrence of injury which produces an immediate physical incapacitation. Since, within the policy, the phrase "injury" is defined in a rather broad fashion to include disease and sickness . . . it is not difficult to conclude, considering only the terminology used, that the policy encompasses the entire disease process, from exposure to manifestation of incapacitation.

The *J.H. France* court concluded that a "continuous" trigger of coverage was appropriate in cases where exposure to a toxic substance begins a process of injury to the body that develops gradually into sickness and disease. It held that in such cases, an insurer is liable for bodily injuries to plaintiffs from the date of exposure to asbestos, continuing through the point in time when the injury or disease manifests itself. 

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57. *Id.*
58. *Id.* at 473, citing a leading decision in this area of inquiry, Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981).
59. *Id.*
60. *Id.* at 476-77.
61. In toxic tort cases involving personal injuries resulting from exposure to asbestos, bodily injury occurs, on a cellular level, almost contemporaneously with exposure to asbestos fibers. "The evidence establishes that individual cells in the trachea die within thirty minutes of being invaded by an asbestos fiber." *Id.* at 474. Because exposure is the ultimate cause of the eventual incapacitation from the accumulation of discreet injuries on a cellular level, exposure should trigger coverage under the policy.

The court also noted that "should exposure be found not to trigger coverage, the insurer would reap an unwarranted windfall. It would be insulated from bearing the liability protection it was reasonably construed to be offering, and thus the risk it was assuming, even though it collected premiums for the entire relevant period." *Id.* at 476. It is also reasonable for an insured to expect that the purchase of liability insurance would cover liability for incapacity developing and manifesting itself during a period of time when the policy was in effect. Manifestation is just as relevant as exposure because it focuses on the end result of the accumulation of cellular injuries.
B. Triggering Liability in Property Damage Cases

Some courts have relied on asbestos cases like *J.H. France* in holding that a "continuous" or "triple" trigger should apply in property damage cases where industrial defendants are mandated to pay the costs of cleaning up a contaminated site under CERCLA or are sued for property damages caused by industrial waste.62 Those courts adopting a continuous trigger suggest that industrial pollution of land or water, especially in those cases where contamination occurs through gradual seepage or leakage from a polluted site, is analogous to the evolution of disease from exposure to toxic substances like asbestos.63

Not all courts, however, accept the applicability of the continuous trigger in property damage cases where insureds seek indemnification for cleanup costs under CERCLA or recovery of damages paid to third parties as a result of hazardous waste contamination of neighboring property. Some courts have found that application of a continuous trigger in property damage cases inappropriate because it is not supported by the language of the policy itself.64 Other courts note that there are significant differences between evolution of human disease as a result of exposure to toxic torts and damage to real property as a result of hazardous waste contamination. Migration of toxic chemicals may result in separable injuries to real property, but the nature of the injury does not "evolve" in the same sense that exposure to asbestos evolves into disease. Exposure to toxic substances like asbestos begins an "injury" process eventually resulting in bodily injury that began with exposure. In property damage cases there is no "progressive" disease in the sense that exposure causes a disease or sickness to develop, although damage caused by a spill may progress further as time passes.65

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64. "Bodily injury" in the standard CGL policies is defined as "bodily injury, sickness or disease," thus suggesting that any continuous evolution of bodily disease, as well as the resulting sickness or disease, should be a triggering event for purposes of the policy. "Property damage" includes "physical injury to property which occurs during the policy period," suggesting that injury occurs when the contamination to real property occurs. See *J.H. France Refractories v. Allstate Ins. Co.*, 578 A.2d 468 (Pa. Super. 1990); Armotek Indus. v. Employers Ins. of Wausau, 952 F.2d 756 (3rd. Cir. 1991).
65. See, e.g., Armotek Industries v. Employers Ins. of Wausau, 952 F.2d 756 (3rd Cir. 1991), where the court found little if any similarity between [an asbestos exposure case] and the present case. Persons who suffer from asbestos-related diseases are often exposed to asbestos for some period and generally do not manifest symptoms until some later point. Here a large spill of chromic acid alleg-
Courts are more likely to adopt a "continuous trigger" in property damage cases where damage occurs as a result of a slow and gradual process, as in cases where leaching from a waste disposal landfill ultimately contaminates neighboring property. These cases appear parallel to the asbestosis cases, where a disease inflicts progressive bodily injury. But the courts are far from uniform in their determination of an appropriate trigger in property damage cases. Presently, at least four different triggers have been adopted by different courts to determine liability for property damage under a CGL policy. These include the "exposure" theory, the "injury in fact" theory, the "manifestation of injury" trigger, and the "continuous trigger" theory. A court's decision to adopt a particular trigger in a property damage case is generally based on three considerations: the express language of the policy; the kind of occurrence resulting in harm—that is, whether the contamination resulted from a sudden event like a "spill" or from gradual contamination like leakage; and general public policy concerns, including a desire to maximize insurance coverage in these cases.

1. The "Exposure" Rule.

Under the exposure rule, liability under a CGL policy is triggered at the time the property is exposed to a hazardous substance. The exposure rule presumes that property damage occurs simultaneously at the moment of the release of hazardous substances. Continental Insurance Companies v. Northeastern Pharmaceutical and Chemical Company (NEPACCO) is an example of a case where a court imposed liability on an insurer under this theory. In that case, Continental Insurance brought suit against NEPACCO, a chemical producer, and its former officers and directors, seeking a declaration that it was under no duty to defend or indemnify NEPACCO for CERCLA and state cleanup liability or for personal injury and property damage arising out of disposal of its chemical waste.

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66. Id. at 763.
67. Id. at 809.
68. 811 F.2d 1180 (8th Cir. 1987), aff'd in part, rev'd in part, 842 F.2d 977 (8th Cir. 1988).
69. From 1970 to 1972, the Northeastern Pharmaceutical and Chemical Company (NEPACCO) produced hexachlorophene at a chemical plant in Verona, Missouri. In July 1971, NEPACCO arranged to dispose of at least eight-five fifty-five gallon drums of these wastes in a trench on a farm near Verona. (called the "Denny Farm" site). Subsequently, in 1971-1973, the company arranged for disposal with
From 1970 to 1972, NEPACCO produced hexachlorophene at a chemical plant in Verona, Missouri, in a process that produced a variety of wastes, including dioxin. In 1971, NEPACCO made arrangements to dispose of these wastes at a farm site in Verona, Missouri (the "Denny farm" site). Later, in 1971 or 1972, NEPACCO hired Independent Petrochemical Corporation (IPC) to dispose of additional wastes generated at the plant. In 1971, 1972 and 1973, thousands of gallons of chemical wastes generated by NEPACCO were spread at Bubbling Springs Stables in Fenton, and on the roads of Times Beach, Missouri. In 1974, twenty truckloads of contaminated dirt from the stables was used as landfill at another site (called the "Minker/Stout/Romaine Creek" site.)

In 1980, the EPA cleaned up the Denny farm site and sought to recover its costs through a lawsuit against NEPACCO and others. In 1983, a number of former residents of Times Beach and Imperial, Missouri, sought recovery for personal injuries and property damage from NEPACCO caused by the dumping of wastes in and around Times Beach (the "Capstick" suit). During the two-year period from 1970 to 1972 that NEPACCO was in business, it was insured under comprehensive general liability policies issued by Continental. Continental maintained that it was under no duty to defend or indemnify NEPACCO for liability arising out of the EPA suit or the suit by Times Beach plaintiffs because costs sought by the government were not "property damage" as defined by the policies, and because the cleanup action was instituted after the effective date of the policies.

The district court granted Continental's motion for summary judgment on the basis that cleanup costs sought by the EPA and the state were not "property damage" as defined by the CGL policies, and that "no damages were incurred by the government entities during the policies' effective dates." The State of Missouri, which had intervened

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70. Id.
71. Id.
72. Three somewhat different policies were in effect from August 5, 1970, to August 5, 1971; August 5, 1971 to August 5, 1972; and August 5, 1972 to November 5, 1972. Each policy required Continental to: "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of A. bodily injury or B. property damage to which this insurance applied caused by an occurrence." Id. at 1182-83.
73. Id. at 1184.
74. Id. The Court also granted Continental's motion to dismiss without prejudice Count II of its complaint (by Times Beach residents), stating that "more specific findings of bodily injury and property damage" were needed first. Id.
to protect its interests arising out of claims against NEPACCO (the "IPC" suit) appealed.

On appeal, a panel of the Eighth Circuit Court of Appeals agreed with the state that the CGL policy language, the common meaning of "property damage," and section 107 of CERCLA all supported the government's position that cleanup costs under CERCLA are compensatory as "property damage" within the meaning of the CGL policies.\(^\text{75}\) The court then addressed the issue of whether the government suffered an "occurrence" of property damage during the policy period because, although the improper waste disposal occurred during the policy period, the cleanup costs were not incurred until long after the policies expired.

The court said that the "majority view" is that environmental damage occurs at the moment that hazardous wastes are improperly released into the environment, and that a liability policy in effect at the time this damage is caused provides coverage for the subsequently incurred costs of cleaning up the wastes.\(^\text{76}\) Under this view, improper disposal of hazardous wastes during a policy period constitutes an "occurrence" of "property damage" at the time of release into the environment.\(^\text{77}\) The court said that the decisions supporting the exposure trigger are similar to those involving insurance coverage for progressive diseases where exposure to a harmful substance occurs during the policy period but the disease or illness develops later after the policy expired. The court stated: "These decisions rest on the view that exposure to the dangerous substance at issue during the policy period caused immediate, albeit undetectable, physical harm which ultimately led to disease or physical impairment after the policy period."\(^\text{78}\) The court also justified the "exposure" trigger in CERCLA cleanup cases by noting "exposure" as a triggering event is consistent with the language of CERCLA itself, which imposes liability whenever there is a "release, or threatened release which causes the incurrence of response costs."\(^\text{79}\)

Applying the exposure theory in this case, the court found that "property damage" first occurred in July 1971, when improper dispo-

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75. Id. at 1189. On rehearing en banc, the 8th Circuit held that the term "damages" as used in standard general liability insurance policy form did not include cleanup costs under CERCLA or RCRA; however, it agreed with the panel decision that Missouri would probably adopt the "exposure" theory of coverage in this case. 842 F.2d 977, 984 (8th Cir. 1988).


77. Id.

78. Id.

79. "[R]elease' means any spilling leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." Id. at n. 23, 1189.
sal of hazardous wastes (the wrongful act), the release of hazardous wastes into the environment (exposure), and the contamination of the environment (injury-in-fact) happened virtually simultaneously. Because exposure occurred during the period of time when the first insurance policy issued by Continental to NEPACCO was in effect, the court held that Continental could be liable for dumping of wastes at the Denny Farm site which first began in July 1971; however, the court said that Continental was not liable to defend or indemnify NEPACCO for liability arising from the IPC suit, in which the state sought to recover the costs of cleaning up the Minker/Stout/Romaine Creek site, because the contaminated dirt was not used as landfill at the site until 1974, and thus exposure and injury in fact occurred after the CGL policies had expired.

Although the Court in Continental Ins. v. NEPACCO adopted an "exposure" trigger for determining application of a CGL policy in this case, it also suggested that a continuous trigger theory might have merit in situations where it is impossible to determine the point in time when an improper release occurred. However, in property damage cases where crucial events—release of hazardous wastes into the environment and subsequent property damage—occur virtually simultaneously, the "exposure theory" is most appropriate according to the court. The exposure theory is based on the assumption that injury occurs at the point of exposure. In cases like Continental Insurance v. NEPACCO, where improper disposal of hazardous wastes immediately results in release into the environment, this trigger is justified. Hazardous wastes are by definition harmful, and exposure and injury in fact occur simultaneously in such cases. In cases where disposal of hazardous wastes into the environment causes the release of hazardous wastes at some point in the future, however, the exposure theory may not accurately reflect the moment in time when injury occurs. For this reason, some courts have adopted an "injury in fact"

80. Id. at 1191.
81. Id. at 1192. The court agreed with the trial court that additional fact finding and analysis was necessary for resolution of the insurance coverage issues in the Capstick suit, involving claims by private individuals for personal and property damage. Id. On rehearing en banc, the 8th Circuit agreed that Missouri would probably adopt an "exposure" theory in this case. 842 F.2d 977 (8th Cir. 1988).
82. Continental Ins. Co. v. Northeastern Pharmaceutical, 811 F.2d 1180, 1192 (8th Cir. 1987), n. 29. The court continued, "In this situation, it may be reasonable to view the time of occurrence as the time the accident or release is first discovered. We are not faced with such a situation here, however, and we are not persuaded that the continuous trigger theory has merit in a cleanup cost recovery case such as this one where the date of the first property damage occurrence is clear and where the cleanup efforts have been pinpointed at the site of this damage." Id. at 1192.
83. McMillan, Circuit Judge, concurring in part and dissenting in part. Id. at 1193.
84. Id. at 1191.
trigger, which triggers insurer liability at point in time when the damage to property actually occurred.

2. The "Injury in Fact" Trigger

Under the express language of an occurrence policy, liability arises when injury to the property or person occurs. As a result, some courts have adopted "injury in fact" as the event which triggers a duty to defend or indemnify under a CGL insurance policy. In a 1990 decision, *Detrex Chemical Industries v. Employers Ins*,[85] the United States District Court for the Northern District of Ohio held that under Michigan law, "injury in fact" triggered the insurer's duty to defend a cleanup action against the insured under a CGL policy.

In *Detrex*, the insured, Detrex Chemical, brought an action against Employer's Insurance of Wausau, Detrex's general comprehensive liability insurer, to determine the insurer's duty to defend and indemnify Detrex in connection with an action by the EPA regarding the discharge of pollutants of chemical solvents at the plant site.[86] After its motion for summary judgment was denied, Detrex moved for reconsideration. On reconsideration, the district court addressed, among other issues, the question of the appropriate trigger of coverage under the terms of the CGL policy.[87]

The CGL policies at issue in the case contained standard policy language defining "occurrence."[88] The insured, Detrex, urged the court to define "occurrence" in a way that imposed a "continuous trigger" of liability under the terms of the policy, arguing that at least part of the continuing damage process at the plant site occurred during the policy period.[89] Detrex maintained that the continuous trigger was applica-

[85] There is a difference between "duty to defend" and "duty to indemnify." The duty to defend an insured under the policy is broader than the duty to indemnify. *Garriott Crop Dusting v. Superior Court*, 270 Cal. Rptr. 678 (Cal. App. 5 Dist. 1990).
[87] *Id.* at 1311.
[88] *Id.* at 1319. The District Court found, among other things, that issuance of a PRP letter by the EPA did not give rise to a duty to defend by the insurer, that in order to avoid the pollution exclusion within the policy, the insured was required to show that the release of pollutants was sudden and accidental in that it happened quickly and without warning, and that the Michigan courts would apply an injury in fact trigger rather than a continuous damage coverage trigger.
[89] "Occurrence" was defined in the 1967-1972 policies as "An accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *Id.*
[90] "Thus, as a matter of law, coverage under Wausau's standard policy language has been triggered. Moreover, each triggered policy is liable for Detrex's entire liability in an Environmental Action, and Detrex may select, from among those triggered, the policy that will respond to a particular Environmental Action." *Id.*
ble in this case because "the occurrence is the cause of the damage, and coverage is triggered by the result during the policy period, not the cause." The insurer Wausau, however, repudiated the "continuous trigger theory," arguing that this theory had only been adopted in result-oriented asbestos bodily injury coverage cases, and that injury in fact, rather than any artificial trigger theory, should determine which policies were triggered.91

After reviewing a number of cases where courts had adopted different theories under which coverage is triggered, the Detrex court concluded that if faced with the question, the Michigan Supreme Court would adopt "an injury in fact trigger" of coverage in this case.92 Under this theory, an actual injury must occur during the time the policy is in effect in order to be indemnifiable.93 The injury in fact rule is based on the conclusion that the "occurrence" clause in the standard CGL policy is not ambiguous, and the "plain meaning" of the term is clear: "It is (1) an accident (2) which results (3) in property damage (4) during the policy period."94 The Detrex court cited, with approval, the following statement from a previous case rejecting ambiguity in the language of the CGL policy:

The plain language of the definition of "occurrence" used in the CGL policy requires exposure that 'results, during the policy period, in bodily injury' in order for an insurer to be obligated to indemnify the insured. The unambiguous meaning of these words is that an injury—and not mere exposure—must result during the policy period. The CGL policies expressly distinguish exposure from injury; to equate the two as urged by Abex is to ignore this distinction. Any argument that mere exposure—without injury—triggers liability is simply unsound linguistically . . . .95

The Detrex decision is based on the plain meaning of the language of the standard CGL policy, and the policy language clearly justifies adoption of an "injury in fact" trigger in hazardous waste coverage disputes involving damage to real property.96 Although the "injury in
fact" rule is justified by the policy language, however, it is often very difficult to determine as a factual matter when the "injury" occurred, especially in property damage cases where the damage results from a slow, gradual process like underground seepage of hazardous substances. In some cases, it may be reasonable to equate injury with exposure. In other cases, it may be difficult if not impossible to determine when the first molecule of contaminant damaged neighboring property. Consequently, in some cases, courts that have adopted the injury in fact trigger in a continuous injury context have had to abandon a precise determination of when injury in fact occurred because of these evidentiary problems. Other courts have adopted a third kind of trigger—the "manifestation of injury" rule, which provides that for purposes of CGL liability coverage, the occurrence is deemed to take place when the injuries first manifest themselves.

3. The "Manifestation of Injury" Trigger

The manifestation rule provides a clear focal point for triggering coverage under a CGL policy because coverage is triggered at the time that personal injury or property damage becomes apparent or known to the victim or property owner. Under the manifestation rule, actual damage is equated with the moment in time the injury manifested itself, or should have been apparent to the complaining party, rather than the time the wrongful act was committed.

The manifestation rule attempts to address situations where a wrongful act such as a release of toxic chemicals through seepage into groundwater produces no harm for some time, but then suddenly manifests itself in some dramatic fashion. In these situations, damage remains concealed for some time before the injury becomes apparent, and determining when that damage first occurred may be impossible.

In a 1986 case, the Fourth Circuit Court of Appeals adopted a "manifestation of injury" rule in a case involving burial of hazardous waste. In Mraz v. Canadian Universal Ins. Co., Ltd., the court held that the complaint in a CERCLA cleanup action against a chemical
company did not allege an "occurrence" within the meaning of the CGL policy because in such cases, "occurrence" is judged by the time at which injuries first manifested themselves (that is, when leakage and damage are first discovered), and the leakage of hazardous waste in this case had not been discovered during the effective dates of the policy.102

In *Mraz*, a CERCLA cleanup action had been filed against Paul and Sally Mraz, who controlled Galaxy Chemicals, Inc., to recover the costs of removing hazardous wastes buried by the company in 1969. The Mrazes then brought an action seeking a declaratory judgment that Galaxy's former insurer, Canadian Universal Insurance, had a duty to defend and indemnify them in the cleanup action. The trial court held that Canadian Universal had a duty to defend the plaintiffs,103 but on appeal, the Fourth Circuit reversed. The court said that in situations where the existence or scope of damage remains concealed or uncertain for a period time even though damage is occurring, the better rule is that the occurrence is deemed to take place when the injuries first manifest themselves.104 Applying the "manifestation rule" in this case, the Fourth Circuit held that there was no "occurrence" for purposes of the CGL policy because nothing in the complaint against the Mrazes indicated that the release was discovered any earlier than 1981, over eleven years after Canadian Universal (the insurer) had ceased coverage.105

The manifestation rule has been justified in other property damage cases where it is difficult, if not impossible, to determine the point in time when damage began.106 However, an interpretation of the "occurrence" language of the CGL policy that triggers liability under a manifestation rule, holding that property damage doesn't occur until

102. *Id.* at 1328.
104. *Mraz v. American Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986), (citing Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56 (3d Cir. 1982); Bartholomew v. Appalachian Ins. Co., 665 F.2d 27, (1st Cir. 1981); Aetna Casualty & Sur. Co. v. PPG Industries, Inc., 554 F. Supp. 290 (D. Ariz. 1983)). The *Mraz* court said, "The general rule is that the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed but the time when the complaining party was actually damaged. Often these cases involve a wrongful act that produces no harm for a period of time and then suddenly manifests itself in a burst of damage." *Id.*
105. *Id.*
the owner knows of the injury, contradicts the actual language of the policy. The policy language mandates coverage when injury or damage occurs, not when it becomes apparent. Inserting an element of knowledge of the occurrence into the definition of occurrence in a CGL policy makes it simpler to identify the point in time when coverage is triggered, but the standard policy language makes no reference to an insured's actual knowledge of the occurrence as a requirement of triggering coverage under the policy. The manifestation rule not only appears to contradict the language of the insurance agreement, it may also be bad public policy. In some cases, under a manifestation of injury rule, insurers could avoid liability by refusing to write new policies if they suspect a flood of claims might be approaching.107 For these reasons, an "injury in fact" trigger is the better rule because it best reflects the intention of the parties as expressed in the language of the agreement.

The injury in fact rule and the exposure rule limit insurer liability in some cases because it excludes insurer liability under CGL policies in effect after exposure or actual release of hazardous substances occurred. The manifestation rule limits insurer liability in some cases because it excludes liability under policies in effect prior to the time the contamination manifested itself. Recognition of the evidentiary problems inherent in these coverage triggers, as well as an assumption that maximizing insurer liability is in the public interest, has led some courts to extend liability of insurers in property damage cases from the point of exposure through the actual "manifestation of injury" under a fourth trigger, the continuous or multiple trigger rule.

4. Applying a Continuous Trigger in Property Damage Cases: Montrose Chemical Corp. v. Admiral Insurance

Under a continuous trigger in property damage cases, liability is imposed on insurers under any policy in effect when exposure to contamination occurred, actual damage to the property occurred, or property damage actually became manifest. Multiple insurers may thus find themselves liable for cleanup of a particular site, and in some states may be jointly and severally liable for the costs of cleanup.108 In 1992 the California Court of Appeals became one of the first courts in the nation to adopt a "continuous trigger" of insurer liability in a pollution cleanup case, Montrose Chemical Corp. v. Admiral Insurance.109 In that case, the California court held that bodily injuries and property damage which are continuous and progressive throughout

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108. This assumes that policy exclusions are not effective. New Jersey, for example, imposes joint and several liability on multiple insurers. Mack, supra note 23, at 496.
successive policy periods are covered by all policies in effect during those periods.\textsuperscript{110} In finding that the insurer, Admiral, was obligated to defend Montrose in those actions, the California Court of Appeals adopted a rule which will have a substantial impact on the insurance industry as a whole.\textsuperscript{111} Under the court’s decision in Montrose, any insurer who issued a comprehensive liability policy to a policy-holder may be obligated to defend and indemnify the insured if the policy was in effect at some time between the moment pollution first began until the contamination became known and the cleanup action instituted.

In Montrose Chemical Corp. v. Admiral Ins., Montrose Chemical Corporation sought a declaration obligating Admiral Insurance Company, its insurer under four comprehensive general liability policies, to defend Montrose in lawsuits seeking damages for personal injuries and property damage allegedly caused by Montrose’s disposal of hazardous wastes at times predating the inception of Admiral’s policies. Montrose, a defunct chemical company, had manufactured DDT for use in pesticides from 1947 until 1982, and since 1960 had been covered by CGL insurance policies purchased from seven different carriers.\textsuperscript{112}

Five actions were pending against Montrose at the time of Montrose’s action against Admiral. All alleged property damage and one alleged bodily injuries resulting from the contamination of sites where Montrose manufactured its product or disposed of its hazardous waste.\textsuperscript{113} The sites involved in the various actions against Montrose

\footnotesize{\textsuperscript{110} The trial court had granted summary judgment in favor of Admiral; on appeal, the Court of Appeals reversed summary judgment granted in favor of Admiral. Id. at 360.}

\footnotesize{\textsuperscript{111} In addition to the parties’ briefs, Mid-America Legal Foundation filed an \textit{amicus} brief in support of Montrose; Atlantic Richfield Corporation, NEC Electronics, Inc., Martin Marietta Corporation, Northrop Corporation, Syntext (USA), Inc. and Univar Corporation filed a joint \textit{amicus} brief supporting Montrose. Pacific Indemnity Company and Continental Casualty Company both supported Admiral, and the Travelers Indemnity Company filed an \textit{amicus} brief supporting Admiral, urging adoption of the “manifestation of loss” rule in property damage cases. American Motorists Insurance Company filed an \textit{amicus} brief urging adoption of an “actual discovery” trigger. Finally, Insurance Environmental Litigation Association and Ayliffe and Companies filed two \textit{amicus} briefs supporting Admiral, addressing the “known loss” rule. Id. at 363, n.7. This case is presently on appeal to the California Supreme Court.}

\footnotesize{\textsuperscript{112} Policies issued by Admiral included four separate CGL policies, covering the period from October 13, 1982, to March 20, 1986. Id. at 360. The policies contained standard CGL language. Admiral’s policies obligated it to “pay on behalf of [Montrose] all sums which [Montrose] shall become legally obligated to pay as damages because of . . . bodily injury, or . . . property damage to which this insurance applies, caused by an occurrence.” Id. “Occurrence” was defined as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of [Montrose].” Id. There were six other insurance carriers involved in the litigation, none of which were parties to the appeal. See Id. at n.1.}

\footnotesize{\textsuperscript{113} Id. at 360. These included an action wherein the United States sought reimburse-
included the Stringfellow site, where chemical wastes generated by Montrose were deposited between 1968 and 1972, and the Parr-Richmond Terminal site, where all chemical processing had ceased in 1964 or 1965 and environmental contamination had manifested itself no later than August 1982.\textsuperscript{114}

In determining whether it was obligated to defend and indemnify Montrose under the terms of its four CGL policies, Admiral urged the court to apply a "manifestation of loss" rule, which would trigger liability under the policies at the point when Montrose discovered (or should have discovered) the problem at the Stringfellow site.\textsuperscript{115} This rule would have effectively limited Admiral's liability to Montrose to damages that became apparent between October 13, 1982 and March 20, 1986, the coverage periods of the four CGL policies issued by Admiral.\textsuperscript{116} Under a "manifestation of loss" coverage trigger, policies commencing after manifestation or discovery of contamination would afford no coverage, even though the injury or damage continued into the effective period of the post-discovery policy.\textsuperscript{117}

Montrose urged the court to adopt the "continuous injury" trigger because this trigger would afford it the greatest coverage under terms of preexisting CGL policies.\textsuperscript{118} The court defined the "continuous trigger" as follows: "Under the 'continuous injury' analysis, the timing of the cause of the bodily injury or property damage (the insured's negligent act) is immaterial (it doesn't matter if it was before or during the policy period), as is the date of discovery of the injury or damage..."
(which may not be contemporaneous), and it is only the effect ... which matters."

The court then examined the standardized language of the CGL insurance contracts involved in the dispute, noting that the construction of the standard policy language defining “occurrence” by courts in various states has been inconsistent and has resulted in a “bewildering plethora of authority ... as a result of the increasing number of toxic tort cases.” The court next distinguished first and third party insurance policies, noting that the interpretation of “occurrence” may differ depending on whether the policy provides coverage for loss or damage sustained by the insured (a “first party” policy) or coverage for liability of the insured to another (a “third party” policy) as in this case.

The California Supreme Court previously had applied the “manifestation of loss” rule in a case involving a “first party” insurance contract. In Montrose, the California appellate court declined to apply the manifestation rule in the third party context, and instead adopted the “continuous injury” trigger. The Montrose court based its decision to impose maximum liability on the insurer on a finding that the term “occurrence” is ambiguous, and by relying on the rule that ambiguity or uncertainty should be resolved against the insurer and, if semantically permissible, the policy construed in favor of coverage to protect the “objectively reasonable expectations of the insured”.

According to the court, it was reasonable for Montrose to expect coverage and a defense for continuous and progressive bodily injuries and property damage under more than one policy in this case. The court said that the distinction between “claims made” and “occurrence” policies supported Montrose's position that a continuous trig-

119. Id.
120. Id. at 363 (citing Gottlieb v. Newark Ins. Co., 238 N.J. Super. 531, 570 A.2d 443, 445 (1990)).
121. Id. at 363, n.9. According to the court, coverage may also differ depending on whether the issue concerns bodily injury or property damage or both, or whether the event is a single event resulting in immediate injury (like an explosion), a single event resulting in continuing injury (such as a chemical spill) or a continuing event resulting in single or multiple injuries (exposure to asbestos). Id. at 384.
122. Prudential-LMI Commercial Ins. v. Superior Court, 798 P.2d 1230 (Cal. 1990). However, the Montrose court distinguished third party policies from first party policies, noting that there is no “inception of the loss” in the former, and no reason for an insured to expect a discovery limitation to be read into a third party policy. Montrose Chem. Corp. v. Admiral Ins., 5 Cal. Rptr. 358, 367 (Cal. App. 2 Dist. 1992). Id. at 367.
123. Montrose Chem. Corp. v. Admiral Ins., 5 Cal. Rptr. 358, 365 (Cal. App. 2 Dist. 1992). Because the policies in question here are ‘comprehensive,’ it was within the insured's reasonable expectation that new types of statutory liability would be covered, as long as they were within the ambit of the language used in the coverage provision. Id. at 366.
124. Id.
ger was appropriate in this case. Under a "claims made" policy, the claim must be asserted during a precise period identified by dates within the policy.\textsuperscript{125} The court agreed with Montrose that application of a "manifestation of loss" rule to a CGL "occurrence" policy in this case would transform its "occurrence" policy into a "claims made" policy.\textsuperscript{126}

In adopting a continuous trigger, the Montrose court also relied on the change in the standard CGL policy in 1966 from an "accident-based" to an "occurrence-based" format, suggesting that by 1966 the insurance industry knew about the potential coverage issues concerning long-term, delayed-manifestation injuries caused by pollutants.\textsuperscript{127} The court found that drafters of the "occurrence" policy and experts advising the industry regarding its interpretation contemplated coverage under successive policies for progressive continuing injuries and damage as in this case.\textsuperscript{128}

Applying a "continuous injury" rule in this case, the court found that Admiral's policies had been triggered by both the Stringfellow Cases and the Levin Metals Cases—in the former because property damage and personal injuries began in 1956 and continued to the present, and the latter because property damage occurred beginning in 1947 and continued to the present.\textsuperscript{129}

The decision by the California Court of Appeals in Montrose has been hailed as a "major victory for policyholders," one which means billions of dollars in coverage to policy holders nationwide because it allows policyholders access to earlier policies, many of which contain

\textsuperscript{125} According to the court, the use of 'claims made' policies to risks beyond the professional liability areas in which such coverage came into extensive use in the 1970s. Corporate purchasers did not respond with enthusiasm—they recognized the increased cost of additional coverage to protect against risks from long-term future occurrences.

\textsuperscript{126} A "claims made" policy limits a carrier's risk by restricting coverage to the single policy in effect at the time a claim is asserted, thus permitting the carrier to establish reserves without regard to possibilities of inflation, upward-spiraling jury awards or enlargements of tort liability after the policy period.\textsuperscript{Id.}

\textsuperscript{127} The court believed the "drafters of the 'occurrence' policy and experts advising the industry regarding its interpretation contemplated coverage under successive policies for progressive continuing injuries and damage."\textsuperscript{Id. at 369.}

\textsuperscript{128} \textsuperscript{Id.}

\textsuperscript{129} See supra note 113. The court also rejected the "known loss" argument. Admiral had contended there was no coverage under this rule, and thus no duty to defend, the Stringfellow cases. Under this rule, when a loss is "known or apparent" before a policy of insurance is issued, there is no coverage.\textsuperscript{Id. at 370 (citations omitted).} The court said that where an insured is under no legal obligation to pay and no lawsuits were filed at the time the policies were purchased, there is an insurable risk within the meaning of the insurance code.\textsuperscript{Id. at 371.}
no aggregate limits and no pollution exclusion. Insurers, on the other hand, have lamented the court's decision, arguing that it is unfair to force an insurer to provide coverage under policies issued long after the damage has become manifest.

While the Montrose decision may not "single-handedly cause the demise of the insurance industry," as some have warned, it is clear that application of a "continuous injury" trigger in this case exposes the insurance industry to substantial liability for environmental cleanup actions under the terms of a comprehensive general liability insurance policy. The court's decision to adopt the "continuous injury" trigger in Montrose was based on a policy decision to interpret "ambiguous language" broadly to maximize coverage. Believing it to be reasonable for Montrose to expect coverage for continuous and progressive bodily injuries and property damage under more than one policy, the court said it would apply equitable considerations to spread the cost among the several policies and insurers.

Clearly there are important environmental policy considerations underlying the court's decision in Montrose. The contaminated sites in Montrose involve some of the most polluted sites in the nation, and the insured, Montrose, was a defunct company that presumably lacked funds to contribute to the costs of cleaning the contaminated sites. By adopting a "continuous trigger" in Montrose, the court substantially expanded the funds available for cleanup of the contaminated sites in that case by making all insurers who issued CGL policies to the defendants in that action potentially liable for sharing the cleanup costs at the site.

It is difficult, however, to reconcile the application of a "continuous trigger" in a property damage case with the plain meaning of "occurrence" in the standard CGL policy. Unlike "continuing bodily injury" cases like the asbestosis cases, the contamination of real property and the resulting property damage involve a series of discreet and separate "injuries" to real property rather than the evolution or development of human disease or sickness. Under the language of the standard

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131. Insurers also criticize the court's ruling on the known loss doctrine, suggesting that there is not enough risk or gamble once a policy holder receives a PRP letter: A loss, to be insurable, must be a contingent risk." Id. at 77.
133. Id. at 365.
134. Id. at 366.
135. Stringfellow waste site near Riverside, California, is one of the nation's most polluted areas, with cleanup costs estimated at more than $750 million. Gordon, supra note 23, at 77.
CGL policy, the term "bodily injury" includes "sickness" and "disease," supporting an interpretation that liability is continuously triggered under the policy during the period of time a disease evolves in the body.\(^{37}\) The term "property damage," which is not defined in the standard policy, contains no suggestion of evolving or developing injury. In fact, the concept of "disease" finds no true analogy in real property cases because land and water do not develop an illness as a result of contamination. Rather, pollution inflicts damage upon the environment, and that damage may occur suddenly, or through a slow and gradual process. The fact that it may be difficult to pinpoint with precision the time the injury in fact occurred does not justify imposing liability on an insurer because contamination continued to exist during successive policy periods.

From a policy perspective, the court's decision to adopt a rule that imposes liability on any insurer who issued a CGL policy at any time between exposure or release of hazardous waste and manifestation or discovery of damage, may have the effect of diminishing the availability of environmental liability insurance coverage in the future by increasing the uncertainty, and consequently the risk, of environmental liability to insurers under these policies. It is possible that imposing a continuous trigger on insurers in cases like *Montrose* may actually delay response and remedial cleanup actions in the future because the decision is certain to encourage more insurer/insured litigation by increasing the number of potentially liable insurers in these cases and by expanding the potential number of litigants involved in multiple-party site cleanup actions.

V. DISCUSSION AND CONCLUSION: EFFECTUATING POLICY THROUGH STATUTORY INTERPRETATION

In establishing an appropriate trigger of coverage under a CGL policy in an environmental coverage dispute, courts generally begin by applying traditional rules of contract interpretation in order to construe the language of the policy. A primary goal of contract interpretation is to effectuate the intent of the contracting parties.\(^{38}\) If the language of the policy is clear, leaving no doubt about the extent of coverage, then intent is determined by the language of the policy. Reference to the language is both the beginning and the end of analysis, without regard to the insured's expectations or any other consideration.\(^{39}\) If, however, the contract language is ambiguous, obscure, uncertain or susceptible to more than one interpretation, the courts

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\(^{38}\) *Id.*

resolve ambiguity by construing the contract against the drafter of the contract—the insurer.  

The fact that courts have developed at least four different "triggering tests" under the same standard "occurrence" language in the CGL policy demonstrates that even the most carefully drafted documents may lack clarity because language is not precise and words are often susceptible to more than one meaning.  

Ambiguity in a CGL policy is heightened when circumstances arise that are not specifically addressed by the writing, as, for example, when an "occurrence" results from a slow process like leakage of hazardous chemicals from one site to another.  

If a court finds ambiguity within a standardized contract like a CGL policy, the court construes the agreement to protect the "objectively reasonable expectation of the insured." This "reasonable expectation" is then imputed to the parties as their actual intent. The rule of reasonable interpretation, thus, does not necessarily result in an interpretation actually intended by the parties. Rather, it is a device through which courts implement public policy. In recent cases interpreting the meaning of CGL policy language in modern environmental pollution and toxic tort cases, there has been a clear trend toward maximizing insurance coverage. The judicial decision to shift CERCLA costs to insurers by interpreting provisions of the standard CGL policy in a way that will maximize coverage is exemplified by imposition of a "continuous trigger" in actions brought to recover damages or costs of cleaning up a contaminated site.

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141. Cases in which courts have struggled to define the words "sudden and accidental," for example, within the standard pollution exclusion clause, demonstrates the conflicting opinions about whether "sudden" includes a temporal element, or is synonymous with "unintended" or "unexpected." See generally, Ballard and Manus, supra note 23.
142. In addition, gradual polluting leaks usually require the courts to interpret the "pollution exclusion" clause because most CGL forms exempt the insurer from coverage unless the event is "sudden or accidental." See Ballard and Manus, supra note 23.
145. Contract interpretation is a matter of state law, and interpretation of the same contract language in the CGL policy has differed from state to state based on courts' different applications of the same principles of statutory interpretation and interpretation of general public policy rationales underlying those principles. Many CGL policies have no choice of law provisions. Because of the diversity of judicial opinions among the states on environmental coverage issues, determination of which law applies may be critical to the outcome of a particular controversy. See, e.g., Detrex Chem. Indus. v. Employers Ins., 746 F. Supp. 1310 (N.D. Ohio 1990)(applying Michigan law under Ohio choice of law rules).
146. Note, Developments—Toxic Waste Litigation, supra note 11, at 1578.
However, imposition of a "continuous trigger" may actually frustrate the ultimate public policy goal of cleaning up contaminated sites. Courts adopting this trigger expose multiple insurers to the threat of increased liability. Any policy issuer during the period of time from actual release to manifestation of property damage may be liable for the costs of site cleanup under CERCLA or state environmental laws. The uncertainty of insurer liability under present case law, the often substantial costs of cleanup, and the strict, joint and several liability provisions of CERCLA, combine to encourage complicated environmental litigation between multiple parties.

The insurance industry is an industry built on risk assessment. Until insurers can better identify and predict their potential liability for environmental damages under the CGL policy, expensive litigation over the scope of liability under the CGL policies is sure to continue. Litigation that further delays cleanup actions at seriously contaminated sites and which consumes substantial funds that could be allocated to actual cleanup will continue as well. Until environmental liability costs become more predictable, litigation and the cost of insurance premiums will likely increase. As a result of uncertainty, insurers are now drafting even stricter pollution clauses or refusing to issue any environmental liability policies at all. Ultimately, industries may be unable to obtain liability insurance for activities that may

148. One result of the desire for certainty is the evolution of the "complete pollution exclusion clause." Because of rulings by the courts that the sudden and accidental pollution exclusion is ambiguous, the industry adopted what has come to be called the "absolute" pollution exclusion:

The company shall have no obligation under this policy (1) to settle or defend any claim or suit against any insured alleging actual or threatened injury or damage of any nature or kind to persons or property which arises out of or would not have occurred but for the pollution hazard: (2) to pay any damages, judgments, settlements, losses, costs or expenses of any kind or nature that may be awarded or incurred by reason of any such claim or suit or any such actual or threatened injury or damage; (3) for any losses, costs or expenses arising out of any obligation, order, direction or request of or upon any insured, including but not limited to any government obligation, order, direction or request, to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize irritants, contaminants or pollutants.

"Pollution hazard" means an actual exposure or threat of exposure to the corrosive, toxic or otherwise harmful properties of any solid, liquid, gaseous or thermal pollutants, contaminants, irritants or toxic substances, including smoke, vapors, soot, fumes, acids or alkalis, and waste materials consisting of or containing any of the foregoing arising out of the discharge, dispersal or release or escape of any of the aforementioned irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water. Waste material includes any materials which are intended to be or have been recycled, reconditioned or reclaimed.

Mack, supra note 23, at 489-90.
expose them to risk of environmental contamination. The result will be to deter many desirable business activities that carry risk by increasing the costs associated with those activities. In some cases, inability to insure against such risks in the future may ultimately result in the elimination of the activity altogether.149

There is no simple solution to the complex problem of who should pay for cleanup of property contaminated by hazardous waste. Industry must be encouraged to minimize pollution, and imposing liability on industrial polluters provides a powerful disincentive for activities leading to environmental contamination.150 Some suggest that imposing liability on insurers for environmental pollution will encourage industry to minimize activities resulting in pollution because insurers will monitor those activities, and insurance premiums will presumably reflect the risk of those activities. However, today “pollution liability” is a virtually uninsurable risk because the risk is simply too high and too uncertain.151 If the ultimate policy goal of state and federal environmental laws is to achieve an efficient and rapid clean up of hazardous waste sites, then ways must be found to address the uncertainty of insurer liability for environmental damage, and to minimize incentives for expensive litigation between insurers and insureds that ultimately delays those cleanup goals.

The insurance industry has proposed changes in the current Superfund program to address some of their concerns. One proposal by the American International Group (AIG) suggests replacing the current retroactive liability system for old sites with a national environmental trust fund (NETF). The NETF would be financed across all economic sectors, without regard to site-specific liability, and used to finance the cleanup of old Superfund sites.152 The fund would be broad-based, and financed by a separate earmarked fee added to all commercial insurance premiums within the U.S. The proposal, however, would not abolish the Superfund liability system for current and future waste disposal, in order to safeguard the deterrent effect on environmentally irresponsible waste disposal by retaining a “polluter pays” concept. The AIG maintains that its NETF proposal would reduce transaction costs and minimize the inequities of Superfund’s strict, joint and retroactive liability system. It would also allow the EPA to devote more resources to cleanup tasks rather than litigation and fund-raising, and create a national oversight committee that

149. This has occurred in the context of product-liability actions—for example, Dow-Corning’s recent decision to cease manufacturing the silicone breast implant.
150. Thus removing liability also removes a disincentive for pollution. Note, Environmental Cleanup Costs and Insurance: Seeking a Solution, supra note 18, at 731.
151. Id. at 728
would enforce high standards of accountability.\textsuperscript{153}

The AIG proposal is one attempt to address the problem of insurer liability and to reach the ultimate goal of site cleanup in a way that will avoid the costs of a litigation-generating liability system.\textsuperscript{154} Replacing Superfund with an environmental response fund which would pay for cleanup costs and compensate parties claiming damages from past pollution on a no-fault basis would minimize the incentive for companies to sue insurers.\textsuperscript{155} Combining the proposal with incentives for pollution prevention also would provide a practical solution to reducing legal costs so prevalent in pollution liability.\textsuperscript{156}

Superfund is scheduled for reauthorization in 1995. In the meantime, various proposals have been introduced which would exempt various parties from liability under the statute, including exemption of transporters and generators of “municipal solid waste” from third party contribution suits,\textsuperscript{157} and federal legislation that would relieve certain municipal governments from Superfund liability.\textsuperscript{158} Recently, the lending community won some relief from Superfund liability when the EPA issued a final rule clarifying the circumstances under which financial institutions may be exempt from Superfund liability for sites managed or acquired through foreclosure.\textsuperscript{159} But attempting to address the individual concerns of industry, lenders, municipalities, insurers, and others under the Superfund program will at best provide only a piecemeal solution to the current frenzy of litigation generated by CERCLA. There is a need to address, in a comprehensive fashion, the joint, several, and strict liability provisions of the Act that contribute to the expensive and protracted legal battles between PRPs and between a PRP and its insurer. A “no fault” system for cleaning up

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\textsuperscript{153} Id.
\textsuperscript{154} The proposal, however, is not without critics who complain that the NETF would tax all holders of liability insurance equally, regardless of the likelihood of incurring pollution liability. Others see it as simply a way for insurance companies to avoid financial responsibility. Note, \textit{Environmental Cleanup Costs and Insurance: Seeking a Solution}, supra note 18, at 723.
\textsuperscript{155} Id. at 728-29.
\textsuperscript{156} Id. at 724.
\textsuperscript{159} 57 Fed. Reg. 18344 (1992). The final lender liability rule clarifies when financial institutions are exempt from Superfund liability for sites they acquire. \textit{Final Lender Liability Rule Released; Keeps Proposal’s Structure, Intent, EPA Says}, 23 Env’t Rptr (BNA) No. 1, at 3 (May 1, 1992).
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old sites, based on fair and workable assessment standards and funded along the lines of the NETF proposal, would benefit both insurers and insureds by decreasing incentives for litigation and bringing about a more swift and cost-effective cleanup of hazardous waste sites throughout the country.

In an attempt to spread the burden of the costs of cleaning the environment, courts have expanded insurer coverage for environmental cleanup costs through interpretation of standard CGL policy language. Extension of insurer liability for environmental cleanup costs under a "continuous trigger" interpretation of "occurrence" in the standard CGL policy exemplifies judicial implementation of a public policy to maximize insurer liability for CERCLA cleanup costs. Expansion of insurer liability, however, has added to an environment of heightened litigation where much money is expended on avoiding liability under federal and state environmental law rather than addressing actual site cleanup. As the time for reauthorization of Superfund approaches, it is time to develop a cooperative, rather than adversarial approach to environmental cleanup. Simply shifting the burden of liability from one group to another under the present system will not provide a solution to the enormous transaction costs and litigation delays associated with the current Superfund program. Replacing the current litigation-based liability system for old sites with a national environmental trust fund which would eliminate the need for companies to sue insurers, and the need for the EPA to sue responsible parties is an idea worth serious consideration.


161. Under one proposal for an "environmental response fund" (an "ERF" modeled after the NETF proposed by AIG), the EPA would not need to sue the companies responsible because it would have already collected the assessment from which it will pay for the cleanup. Participation in the fund would be mandatory, and assessments would be made according to criteria reflecting a company's individual probability of causing an environmental hazard, and would be treated as tax revenues used to clean up environmental contamination. Id. at 728.