UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 21 1985

MEMORANDUM

SUBJECT: Procedural Guidance on Treatment of Insurers Under CERCLA

FROM: Courtney M. Price
Assistant Administrator for Enforcement
and Compliance Monitoring

TO: Regional Administrators, I-X
Regional Counsels, I-X

INTRODUCTION

Defendants in EPA's CERCLA enforcement cases have begun to look to their insurance carriers for both legal representation and indemnification. It is expected that the number of collateral actions involving the insurance carriers of CERCLA defendants will continue to grow, particularly in CERCLA cases involving multiple parties. 1/

The purpose of this guidance is to provide EPA Regional offices with the appropriate procedures to follow in issuing notice letters, developing referrals, and tracking CERCLA enforcement cases that may include insurers as third party defendants. A separate reference notebook and memorandum of law are being prepared by OECM and the Department of Justice to supplement this guidance. The memorandum of law will summarize the recent judicial decisions which have interpreted the applicability and coverage of insurance policies in hazardous waste cases.

1/ Most insurance policies are effective on an annual basis and parties commonly changed carriers during the disposal period, or had several policies in effect at the same time. Therefore, large CERCLA lawsuits could involve multiple insurance carriers and multiple policy periods.

INSURANCE INFORMATION REQUESTS - IDENTIFICATION OF POTENTIAL DEFENDANTS

EPA Regional offices are responsible for preparing and issuing CERCLA notice letters to potentially responsible parties. These notice letters generally include requests for information under RCRA §3007(a)(3) and CERCLA §104(e)(4). All information requests should include a request for copies of insurance policies in force during the PRP's association with the site. The requests should solicit information regarding insurance policies that are currently in effect as well as those effective during the period of activity in question. 2/

The information request responses from potentially responsible parties should be reviewed by the Regional Counsel's Office to determine the types of policies carried by the party and the extent of coverage under each policy. Insurance carriers determined to have exposure should be notified at the same time we notify the insured PRP.

REFERRALS TO THE DEPARTMENT OF JUSTICE

The Department of Justice attempts to ascertain the existence of insurance coverage and, where appropriate, to assert litigation theories which would enable the United States to proceed against insurance carriers in hazardous waste cases, or to involve them in settlement negotiations. The Department of Justice has requested that EPA provide insurance information as a routine portion of our case development report and referral package.

All referrals of hazardous waste cases to the Department of Justice should include a brief summary of the insurance coverage of potential defendants. This information is particularly important for actions involving bankrupt or potentially insolvent parties.

2/ See Memorandum "Procedures for Issuing Notice Letters" From Gene A. Lucero, Director EPA Office of Waste Programs Enforcement, to Directors, Waste Management Divisions Regions I-X; Directors, Environmental Services Divisions Regions I-X; Regional Counsels, Regions I-X. (October 12, 1984). Pages 4-5, and 24-25 discuss information requests regarding the insurance policies of potentially responsible parties.

THE INSURANCE POLICY - DETERMINING THE SCOPE OF THE COVERAGE

The standard liability insurance policy is broken down into three sections: 1) declarations; 2) statement of general liability; and 3) the standard coverage section. The declarations section contains general statements of the intent of the parties and the name of the insurer and the insured. The statement of general liability contains the definitions applicable to the policy and the provisions common to the various standard coverage sections. The standard coverage sections constitute the bulk of the policy and contain the insuring agreement and exclusions, including any pollution exclusion provisions. The standard coverage section usually includes the insurer's promise to pay on behalf of the insured and the insurer's duty to settle or defend claims against the insured alleging bodily injury or property damage covered under the policy. 3/

The interpretation of the insurance policy should begin with a review of the standard coverage section to determine the theories upon which EPA can proceed. Most insurance policies only obligate the insurance carrier to defend against any suit seeking damages or to pay on behalf of the insured such damages which are covered under the terms of the policy.

Thus, it is important to examine the scope of coverage of the insurance policy before referring an action to the Department of Justice which may have insurance aspects. Claims for injunctive or equitable relief are usually not included within the coverage of the insurance policy, and the referral for such relief need not include the insurer as a potential defendant. It may nevertheless be prudent to notify involved carriers of such a claim.

Where any CERCLA §107 damage claim is included as a basis for relief, the insurer may be identified as a potential defendant. Claims for punitive damages may also be covered under the policy and the Regions should include insurers as

---

3/ The insufance carrier has a duty to defend the insured even if the claims are groundless, false or fraudulent.

defendants where punitive damages are sought. 4/ The referral package prepared by the Region should also include a discussion of the types of policies which were issued to the responsible party.

TYPES OF INSURANCE POLICIES

There are two types of insurance policies. The first is the traditional casualty insurance contract known as the Commercial General Liability Policy (CGL). The standard CGL policy covers accidental or sudden bodily injury and property damage. The second type of policy is the "claims-made" pollution liability policy or Environmental Impairment Liability (EIL) policy. The EIL policy covers the insured for liability for bodily injury and property damage resulting from gradual pollution, or clean up costs incurred by the insured. EIL pollution liability policies enable owners and operators of hazardous waste treatment, storage, and disposal facilities to comply with RCRA's financial responsibility requirements.

CGL Policies

There are four separate areas of coverage available under the CGL policies which may be applicable to CERCLA actions. The first is the premises and operations hazard policy. This policy provides coverage for liabilities resulting from a condition on the insured's premises or from the insured's operations in progress whether on or away from the insured's premises. This type of policy would cover the owner or operator of a facility, whether the hazardous waste facility was active or inactive, as long as the covered liability resulted in a condition which originated during coverage.

The second area of coverage under the CGL policy is the products and completed operations policy. This policy provides coverage for liabilities arising after products have left the physical possession of the insured and after the work performed has been completed or abandoned. This type of policy may cover the generator of hazardous substances if the waste can be characterized as a final product.

4/ Most policies are silent regarding coverage for punitive damages. Some states have allowed claims by the insured for punitive damages paid to the federal government.

OUTLINE OF INSURANCE ISSUES
TABLE OF CONTENTS

INTRODUCTION (continued)

INTRODUCTION

Since the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1/] in 1980, the Environmental Protection Agency (EPA) and the Department of Justice (DOJ) have initiated more than 100 enforcement actions against the owners and operators of hazardous waste facilities, generators who arranged for the disposal of hazardous substances, and transporters who handled hazardous substances. Many of these cases, some of which were built upon prior claims under the Resource Conservation and Recovery Act (RCRA),[2/] involve claims for millions of dollars of response costs. Defendants in these cases generally have sought legal representation and indemnification from their insurance carriers. It is expected that the number of collateral actions involving the insurance carriers of RCRA and CERCLA defendants will continue to grow, particularly in cases involving multiple parties.[3/]

The first purpose of this handbook is to provide a basic understanding of insurance law and potential claims for relief against insurers which will allow EPA and DOJ enforcement

---

1/ 42 U.S.C. §§ 9601-9656.

2/ 42 U.S.C. §§ 6901, et seq, most commonly 42 U.S.C. § 6973.

3/ Most insurance policies are effective on an annual basis, and generators commonly changed carriers during the disposal period or had several policies in effect at the same time. Therefore, large RCRA/CERCLA lawsuits can involve multiple insurance carriers and multiple policy periods.

lawyers to litigate these claims, as well as respond to defenses raised by insurance carriers.

The second purpose of this handbook is to offer an understanding of the insurance requirements of RCRA and CERCLA. Under the financial responsibility regulations promulgated pursuant to Section 3004(6) of RCRA, each owner or operator of a hazardous waste management facility must maintain liability insurance against both sudden and accidental occurrences.[4/] An owner or operator of a hazardous waste facility may also satisfy post-closure care financial assurance requirements by obtaining post-closure insurance.[5/] The handbook will review these regulatory requirements and their enforcement through compliance actions, and will also briefly address the insurance program provided for in Section 108 of CERCLA, which has yet to be implemented.

Finally, the handbook is intended to serve as a basic reference resource. Some of the best articles and notes on insurance issues are included as appendices and, in the case of some issues, are referenced in lieu of primary discussion. In addition, an alphabetical compendium of selected cases appears at the back of the handbook.

4/ 40 C.F.R. 264.147.

5/ 40 C.F.R. 264.143(e)

I. Types of Policies Issued

General Introduction

The standard liability insurance policy is broken down into three sections: (1) declarations; (2) the statement of general liability; and (3) the standard coverage sections. The declarations section contains general statements of the intent of the parties and the names of the insurer and the insured. The statement of general liability contains the definitions applicable to the policy and the provisions common to the various standard coverage sections. The standard coverage sections constitute the bulk of the policy and contain the insuring agreement and exclusions, including any pollution exclusion provisions.[6/] The standard coverage section usually includes the insurer's promise to pay on behalf of the insured and the insurer's duty to settle or defend claims against the insured alleging bodily injury or property damage covered under the policy.[7/]

The interpretation of the insurance policy should begin with a review of the standard coverage section. Most insurance policies only obligate the insurance carrier to

---

6/ See pp. 20-24 for a detailed discussion of the pollution exclusion.

7/ The insurance carrier has a duty to defend the insured even if the claims are groundless, false or fraudulent. See Jackson Township v. Hartford Acc. & Idem. Co., 186 N.J. Super. 156, 160 (1982) (included in the Compendium).

defend against any suit seeking "damages" or to pay on behalf of the insured "damages" covered under the terms of the policy. Thus, it is important to examine the scope of coverage of the insurance policy in reviewing any potential referral or suit against a carrier.

Claims for injunctive or other equitable relief usually are not included expressly within the coverage of the insurance policy. Nonetheless, several courts have sustained claims to recover costs of abatement or response incurred by the insured. See discussion below at pp. 17-18. CERCLA Section 107 damages and response cost claims generally will be covered, or a cognizable claim may be made. Claims for penalties under CERCLA Section 106(b) or punitive damages under CERCLA Section 107(c)(3) may also be covered under the policy, although some insurance agreements specifically exclude coverage for punitive damages.[8/] The referral package prepared by EPA should include, if information is available, a discussion of the policies which were issued to the responsible party and copies of the policies.

There are two basic types of insurance policy. The first is the traditional casualty insurance contract known as the Comprehensive General Liability Policy (CGL). The standard CGL policy covers accidental or sudden bodily injury and property damage from an "accident," or "occurrence," during

---

8/ Most policies are silent regarding coverage for punitive damages. Some states have allowed claims by the insured for punitive damages paid to the federal government.

the policy period, regardless of when the claim is actually made. Since about 1970, CGL policies generally have attempted to exclude coverage of any hazardous substance injuries that were not "sudden and accidental" in nature and contain a "pollution exclusion" to that effect. These clauses have not succeeded in excluding coverage in a broad range of situations involving hazardous waste "damage."

The second type of policy is the "claims-made" pollution liability, or Environmental Impairment Liability (EIL) policy. The EIL policy covers the insured's liability for bodily injury and property damage resulting from gradual pollution or cleanup costs incurred. It is called a "claims-made" policy because it covers only claims made during the term of the policy. The EIL policy is analogous to health or life insurance, where the claimant is not required to make a showing of accidental injury. One class of claims-made pollution liability policies is specifically designed to enable owners and operators of hazardous waste treatment storage and disposal facilities to comply with RCRA's financial responsibility requirements. For brief descriptions of the various types of policies which have been issued and key typical clauses, see Appendix A.[9/]

A. The Comprehensive General Liability (CGL) Policy

There are three types of coverage available under CGL policies. The first is premises and operations hazard

---

9/ T. Smith, Jr., "Environmental Damage Insurance -- A Primer," reported at VII Chem. & Rad. Waste Lit. Rptr. 435 (1983).

coverage. This coverage is for liabilities resulting from a condition on the insured's premises or from the insured's operations in progress, whether on or away from the insured's premises. This type of policy would cover the owner or operator of a facility,[10/] whether the hazardous waste facility was active or inactive, as long as the disposal, storage or treatment was still in progress.

The second and third areas of CGL coverage are product hazard coverage and completed operations hazard coverage. These two, originally combined, are now separate and distinct. Product hazard coverage covers injuries arising out of product use, and is probably irrelevant to virtually all CERCLA claims, unless the court can be persuaded to view a pollutant as a product. In addition, the event of release probably must take place after relinquishment of control by the generator, and away from the generator's premises. Completed operations coverage may afford a somewhat broader basis for recovery, but is nontheless subject to limitations which would require appropriate facts and careful pleading. See Appendix G, pp. 562-563 for a summary discussion of key facts of both product hazard and completed operations coverage.

The standard coverage section of a general liability policy sets out the scope of the insurance agreement and the exclusions applicable to claims made by the insured.

10/ CERCLA Section 107(a), 42 U.S.C. 9607(a).

The exclusions to the scope of the insurance coverage must be clearly and precisely drafted.[11/] The exclusion which insurers invoke against claims for damages created by hazardous wastes is the pollution exclusion. The standard pollution exclusion reads:

> "This insurance does not apply ... to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, 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, release or escape is sudden and accidental." (Emphasis added.)

The historical development of this exclusion to the standard liability policy provides a key to understanding recent interpretations of the applicability of the pollution exclusion to hazardous waste cases.

B. Development of the Pollution Exclusion

The first standard form for general liability insurance policies was developed in 1940. The model policy provision was drafted to include liability for all claims made by the insured that were "caused by accident." This provision was widely interpreted by the courts to include coverage for common law nuisance claims for environmental damage if

---

11/ Because the insurer selects the language for the policy, the exclusions are generally interpreted in favor of the insured. An exclusion must be drafted with clear and exact language to be given effect by the courts. See e.g. Allstate Ins. Co. v. Klock Oil Co., 426 N.Y.S. 2d 603 (N.Y. App. 1980) (included in the Compendium).

the pollutants were suddenly and accidentally discharged.[12/]

In 1966, the Insurance Rating Board developed a new model contract which covered claims "caused by occurrence" rather than claims "caused by accident." The Board defined occurrence broadly to include "an accident," including continuous or repeated exposure to conditions, which results, during the policy period, "in bodily injury or property damage neither expected or intended from the standpoint of the insured." The new language required a finding that the damages were not foreseeable or intended. However, the courts continued to hold insurance companies liable for environmental damages even where the pollution was foreseeable if the damages were accidental.[13/] In 1973, comprehensive general liability policies were revised to include the pollution exclusion clause. See p. 7 for the text of the exclusion. The courts which have interpreted the pollution exclusion clause have agreed on three relevant points: (1) the insurer has the burden of proving noncoverage; (2) the exclusion applies to the intentional polluter; and (3) the exclusion does not apply to entities which neither expect nor intend their conduct to result in bodily injury

---

12/ See Appendix C, Hourihan, "Insurance Coverage for Environmental Damage Claims" 15 Forum 551, 552 (1980).

13/ Grand River Lime Co. v. Ohio Casualty Ins. Co., 32 Ohio App. 2d. 178, 289 N.E. 2d 360 (1972).

or property damage. See discussion at pp. 20-24.[14/]

C. The Environmental Impairment Liability (EIL) Policy

Regulations promulgated pursuant to RCRA (see notes 4 and 5) have prompted several insurance carriers to offer first party insurance coverage -- that is, coverage for injuries caused by the insured, obtained by the insured.

The most common of these "claims-made" policies is the EIL policy, which generally provides insurance coverage for personal injury and property damage only from gradual pollution, but not that which is sudden and accidental. Off-site cleanup costs, including those incurred to avert a loss, are typically covered; on-site cleanup costs are not. Also typically excluded from EIL policies are coverage of oil and gas drilling, liability arising from nuclear fuel, damage to property owned or occupied by the insured, fines or penalties, punitive damages, costs of cleaning up pre-existing conditions at any site owned or leased by the insured, and costs of maintenance or routine cleanup.

D. Insurance Services Office (ISO) Policy

Another type of "claims-made" policy is the ISO pollution liability policy -- also developed in response to RCRA regulatory insurance requirements. ISO policies

---

14/ For a detailed history of the development of the pollution exclusion, see Appendix D, S. Hurwitz & D. Kohane, "The Love Canal - Insurance Coverage for Environmental Accidents," Insurance Counsel J., July 1983, p. 378.

provide indemnification and defense coverage for pollution-caused bodily injury and property damage and reimbursement coverage for pollution cleanups imposed by law or voluntarily assumed with the consent of the insured. Insurance coverage under an ISO policy is also extended to sites used by the insured for storage or treatment but which are operated by others. Costs of defense are provided apart from the limits of liability. The policy excludes from coverage damages which are expected or intended by the insured, costs of cleanup for sites owned, operated or used by the insured, liability from abandoned sites, or liability arising from the intentional violation of statutes or regulations, but does cover both gradual and sudden and accidental damages and injuries.

Despite an increase in "claims-made" environmental insurance policies, coverage for pollution-related damages under an EIL or ISO policy is still rare. It is much more likely that a potential EPA hazardous waste enforcement action will involve a general liability policy (CGL).

III. Judicial Construction of CGL and CGL/Pollution Exclusion Policies

A. Construction of CGL Policies Generally

Decisions generally construing CGL policies have focused on several issues: whether a covered "accident" or "occurrence" has taken place, whether damage to the affected "property"

is covered, what statute of limitations should be applied and in what manner, what defenses are available to insurers, and how should liability be apportioned among insurers and insureds. A discussion of these issues will be followed by a separate discussion of pollution exclusion clause construction.

1. "Accidents" under pre-1966 policies.

CGL policies written prior to 1966 insured against damage or injury "caused by accident." Early decisions considering when events giving rise to an injury were covered focused on whether or not the event was ". . . [a]n event that takes place without one's foresight or expectations; an undesigned sudden and unexpected event, chance, contingency." United States Fidelity & Guaranty Co. v. Briscoe, 205 Okla. 618, 239 P.2d 754, 757 (1951) (included in the Compendium), quoting from Webster's International Dictionary. Thus, cases addressing injuries arising out of consequences of the insured's business which were typical and obvious tended to deny coverage while cases involving unintended consequences (even those arising out of failure to foresee that which should have been seen) tended to affirm coverage. Two articles address these issues. Appendix E, J. Goulka, "The Pollution Exclusion," VI Chem. & Rad. Waste Lit. Rptr. 745, 745-748, (1983) contains a succinct introduction to these cases. Appendix F, C. Mitchell and J. Tesoriero, "When Does the Occurrence Exist Under the General Commercial Liability

Policy?," VII Chem. & Rad. Waste Lit. Rptr. 457 (1984), provides an additional detailed background on the history and development of both the "accident" and "occurrence" clauses.

2. "Occurrences" under post-1966 policies.

In 1966, most CGL policies began to insure against damages and injuries arising out of an "occurrence" during the policy period -- leaving open the central question of when an "occurrence" has taken place and the related issue of whether sequential or multiple occurrences have taken place. The former question is critical in evaluating which policy or policies may provide coverage and occasionally whether the statute of limitation may have run on the claim. The latter question is critical to these issues, to what policy limits or multiples of limits may apply, and to issues of apportionment among carriers.[15/]

CGL policies generally define an occurrence 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

---

15/ If insurance coverage exists for the entire relevant period of time, but the plaintiff cannot establish when the damage began or how it was apportioned during the period of time, courts will normally only require the plaintiff to prove that damages occurred, and leave to the insurance companies the burden of allocating the damages among themselves. See Appendix G, Hourihan, "Insurance Coverage for Environmental Damage Claims," 15 Forum 551, 559 (1981).

of the insured." The theories upon which courts have determined whether and when a covered "occurrence" has happened are several, having evolved to meet generic fact patterns. A discussion of those theories follows. See generally Appendix F and Appendix O, Charles Maher, "Asbestos Extravaganza," 5 Calif. Lawyer 60, 62-63 (June 1985).

In simple property damage cases not involving slow accumulation of damage, the general rule is that there is no "occurrence" until the actual harm for which relief is sought manifests itself. National Aviation Underwriters, Inc. v. Idaho Aviation Center, Inc., 93 Idaho 668, 471 P.2d 56 (1970). See also Annot., 57 A.L.R. 2d 1385 (1958). This rule is generally known as the manifestation theory.

On the other hand, in cases where damages are sought for sickness or disease resulting from long term exposure to toxic substances, courts have found that actual injury occurred during the policy period in which exposure alone occurred. Insurance Company of North America v. Forty-Eight Insulations, Inc., 451 F.Supp. 1230 (E.D. Mich. 1978), aff'd 633 F.2d 1212 (6th Cir. 1980). This rule is generally called the exposure theory. In addition, in contrast to ordinary property damage cases where the manifestation theory applies, in property damage cases where damages slowly accumulate, courts have generally applied the exposure theory in determining insurance coverage. So long as there is any tangible damage (even if minute)

resulting from exposure, the courts have allowed coverage from that time, although the damage may not manifest itself until much later. See, e.g., Champion International Corp. v. Continental Casualty Co., 546 F.2d 502 (2d cir. 1976), cert. denied, 434 U.S. 819 (1977); Porter v. American Optical Corp., 641 F. 2d 1128 (5th Cir. 1981); Union Carbide Corp. v. Travelers Indemnity Co., 399 F.Supp. 12 (W.D. Pa. 1975); and Gruol Construction Co. v. Insurance Co. of North America, 11 Wash. App. 632 524 P.2d 427 (Wash. Ct. App. 1974).

Thus, it appears that application of the exposure theory is appropriate in the context of CERCLA hazardous waste litigation, since tangible injury and damage to the environment can occur soon after exposure to hazardous wastes, although damage may not manifest itself until much later. At least one court has held that where a landfill leaches toxic waste into groundwater over a number of years and harm results, the exposure theory should be applied.[16/] Application of the exposure theory in the CERCLA context means that coverage would be triggered under the insurance policies from the time when the environment was first exposed to the hazardous waste. Presumably, under the exposure theory, all policies from the time of disposal forward would be implicated, so long as some tangible damage to the environment could be shown to have occurred at the time of exposure and to have continued thereafter.

16/ Jackson Township v. American Homes Assurance Co., Docket L-29236-80 (N.J. Super.) (unreported), cited in Jackson Township v. Hartford Acc. & Indemnity Co., 186 N.J. Super. 156, 165-166 (1982) (included in the Compendium).

Notably, application of the exposure theory to trigger insurance coverage does not necessarily rule out application of the manifestation theory to trigger subsequent coverage. In some cases, in order that the purpose of the policy not be undercut and in order to protect the reasonable expectations of the insured, the insurance coverage during the period of manifestation of the injury or damage is also triggered. See Keene Corporation v. Insurance Company of North America, 667 F.2d 1034, 1045 (D.C. Cir. 1981). This approach is commonly known as the "tripple-trigger" or "continuous injury" theory.

The application of the exposure, manifestation, and triple-trigger theories has frequently risen in the analogous context of the asbestos-related disease cases. In those cases dealing with a slowly progressive disease in which tissue damage occurs shortly after initial inhalation (exposure), the courts have generally favored the more generous exposure and triple-trigger theories. See, Porter v. American Optical Corp., supra; Insurance Co. of North America v. Forty-Eight Insulations, Inc., supra; and Keene Corp. v. Insurance Company of North America, supra. (applying both the exposure and manifestation theories to trigger maximum coverage under the policies). One district court, however, has adopted solely the manifestation theory in an asbestos related disease case. See Eagle-Picher Industries v. Liberty Mutual Insurance Co., 523 F.Supp. 110 (D. Mass. 1981).

Therefore, although only one unreported state trial court decision has addressed this issue in the hazardous waste context, there is strong analogous authority to support application of the more expansive exposure theory to trigger insurance coverage in waste cases. Moreover, there is some analogous authority to support application of both the manifestation and exposure theories to trigger insurance coverage. Consequently, once a pollution incident has been determined to constitute an "occurrence" not excluded from coverage under a pollution exclusion clause, there should be little problem in triggering coverage under the maximum number of policies by application of these theories..

Finally, the question must be answered of how many "occurrences" have taken place, where the injury continues over a period of time and may manifest itself in distinct and separate kinds of damages. Courts determine the frequency of the "occurrences," for purposes of applying a policy's per occurrence limit or deductible provisions, by applying one of several tests.[17/] For a discussion of each of these tests, see generally Appendix G, pp. 559 et. seq.

17/ Generally, these tests include: the "effect test" (looking to the vantage of the injured party and commonly finding more than one "occurrence"); the "causation test" (widely accepted view based on examination of cause); the "time and space test" (focusing on proximity of causative factors in time and space), the "operative hazard test" (examining the number of distinct causative acts); and the "average person test" (which is what it seems -- the favorite of judges not enamored with more abstract, rationalized standards).

3. Apportionment of liability among insurers and insureds.

Determinations concerning the number and duration of "occurrences" can have a substantial impact upon the extent to which multiple carriers of a single or many insured parties may be liable -- a problem greatly compounded by the technical complexity and large numbers of defendants typical in hazardous waste litigation. For a thorough treatment of the theories for determining when "occurrences" take place and the consequential application of those theories to apportionment problems, see Appendix H, Note, "The Applicability of General Liability Insurance to Hazardous Waste Disposal," 57 So. Cal. L. Rev. 745 (1984).

4. The scope of "property damage" coverage.

Courts have become progressively more willing to extend covered "property damage" to costs of voluntary and compulsory remediation -- especially where the insured is responding to conditions which may result in further damage to property, health or the environment, or where a governmental entity may incur costs and seek eventual reimbursement. See Lansco, Inc. v. Dept. of Environmental Protection, 138 N.J. Super. 275 (1975) (included in the Compendium) (coverage of on-site spill remediation required by state law); US Aviex Co. v. Travelers Ins. Co., 125 Mich. App. 579 (1983) (included in the Compendium) (coverage of investigative and remedial costs for state-mandated groundwater cleanup, founded upon holding that groundwater was not property of the insured);

and Riehl v. Travelers Ins. Co., Civ. No. 83-0085 (W.D. Pa. Aug. 7, 1984), VIII Chem. & Rad. Waste Lit. Rptr. 839 (included in the Compendium) (coverage of CERCLA potentially reponsible party's abatement costs). For a more detailed discussion of this issue, see Appendix I, M. Rodburg and R. Chesler of Lowenstein, Sandler, Brochin, Kohl, Fisher, Boylan & Meanor, "Beyond the Pollution Exclusion: [etc.], (1984), pp. 364-369; and Appendix J, K. Rosenbaum, "Insurance, Hazardous Waste, and the Courts: Unforeseen Injuries, Unforeseen Law," 13 ELR 10204, 10205-10207 (July 1983).

5. Statute of limitation questions.

In state common law suits for injuries or damage, the court's choice among exposure, manifestation, and triple-trigger theories of occurrence may have a substantial relationship to the running of the applicable statute of limitations. Fortunately, this choice of theories to determine when injury or damage "occurs" within the meaning of a comprehensive general liability policy would not determine when the statute of limitations should commence running under CERCLA.[18/] Otherwise, the date that injury

---

18/ Under Section 112(d) of CERCLA, 42 U.S.C. 9612(d):

> No claim may be presented, nor may an action be commenced for damages under this title, unless that claim is presented or action commenced within three years from the date of discovery of the loss or the date or enactment of this Act, whichever is later . . .

or damage is deemed to occur for purposes of statutes of limitations is generally the date of manifestation. See, e.g., United States v. Kubrick, 444 U.S. 111, 123-24 (1979); Urie v. Thompson, 337 U.S. 163, 170-71 (1949).

6. Defenses available to the insurer.

Where an injured person may sue the insurer directly, before or after judgment against the insured, that suit is generally subject to all the defenses the insurance company has against the insured, including the defense that the insurance company has not received notice of the underlying lawsuit as per the policy terms and deadlines, and the defense that the insured has not cooperated with the insurance company. Generally, judgment creditors stand in the shoes of the insured and have rights no greater and no less than the insured's rights would be if it had paid the judgment and then sued its insurance company to recover the amount paid. Greer v. Zurich Insurance Co., 441 S.W. 2d 15,30 (Mo. 1969); accord McNeal v. Manchester Insurance and Indemninity Co., 540 S.W. 2d 113, 119 (Mo. Ct.App. 1976) (rights of the injured person are derivative and can rise no higher than those of the insured). See also Appendix L, Appleman, Insurance Law as Practice §§ 4813-4817 (hereafter "Appleman").

Problems with notice, etc., may present considerable difficulties during attempts by the United States to recover for CERCLA costs against insurance companies.

B. Construction of CGL/Pollution Exclusion Policies

In response to the judicial interpretation of the new "occurrence" language in CGL policies the insurance industry developed a specific exclusion to its policies which was meant to clarify insurance coverage for claims for pollution damage. See pp. 7-9 for exclusion language and history. This exclusion, referred to as the "pollution exclusion," has now been incorporated into the printed provisions of most commercial insurance forms. It was intended by the Insurance Rating Board not to restrict coverage, but merely to clarify coverage by the use of the new language. The pollution exclusion disallows claims for bodily injury or property damage due to a release of toxic chemicals, waste materials, pollutants or contaminants into the environment unless the release is "sudden and accidental." There is a split of authority regarding the meaning of these terms. Several courts have held that they are ambiguous, and have construed the clause broadly in favor of the insured. In these cases, coverage of the pollutor has been upheld. In contrast, some recent decisions have held that the exclusion may apply to the knowing, frequent hazardous waste polluter, and that there is no ambiguity in the "sudden and accidental" clause in such cases.

Long-standing principles of insurance contract construction include the requirement that to be effective, an exclusion must be conspicuous, plain, and clear, and must be construed strictly against the insurer and liberally in

favor of the insured. See, e.g., Pepper Industries, Inc. v. Home Insurance Co.; 134 Cal. Rptr. 904, 67 C.A.3d 1012 4th Dist. (included in the Compendium). Any ambiguities must be resolved in favor of the insured. See, e.g., Abbie Uriguen Oldsmobile-Buick, Inc. v. United States Fidelity Ins. Co., 95 Idaho 501, 511 P.2d 783 (Idaho 1973) and note 11, supra. The courts that have considered the pollution exclusion clause have almost unanimously held it to be ambiguous, since it is fairly susceptible to two different interpretations. As such, they generally have resolved that ambiguity in favor of the insured. See, e.g., Union Pacific Insurance Co. v. Van Westlake Union, Inc., supra; Niagara County v. Utica Mutual Insurance Co., 103 Misc. 2d 814, 427 N.Y.S. 2d 171 aff'd 439, N.Y.S. 2d 538 (1981) (included in the Compendium); and Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So.2d 95, 99 (Ala. 1977) (included in the Compendium).

The terms of the pollution exclusion clause focus on the insured's intent in the actual discharge of the pollutant. The definition of "occurrence," on the other hand, focuses on the insured's expectation or intent with regard to causing damage or harm. The majority of courts, taking a broad view of insurance carrier's liability, have interpreted the pollution exclusion clause, together with the definiton. of "occurrence," to provide coverage except where there is an intentional consequence, caused by a polluter who expects or intends his conduct to cause damage. See, e.g., Allstate

Insurance Co. v. Klock Oil Co., supra (included in the Compendium); Union Pacific Insurance Co. v. Van's Westlake Union, Inc., 34 Wash. App. 208, 664 P.2d 1262 (Wash. 1983); Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co., 186 N.J. Super. 156, 451 A.2d 990 (N.J. Super App. Div. 1982) (included in the Compendium).

In Lansco Inc. v. Department of Environmental Protection, supra at p. 282 (included in the Compendium), the court found that the term "sudden," rather than meaning "brief or of short duration," means "happening without previous notice or on very brief notice; unforeseen; unexpected; unprepared for." The term "accidental" means happening "unexpectedly or by chance." The court therefore concluded:

> . . . under the definition of "occurrence" contained in the policy, whether the occurrence is accidental must be viewed from the standpoint of the insured and since the oil spill was neither expected nor intended by Lansco, it follows that the spill was sudden and accidental under the exclusion clause even if caused by the deliberate act of a third party.

Similarly, in Union Pacific Insurance Co., supra, a massive gasoline leak occurred at the insured's gas station. Approximately 80,000 gallons of gasoline leaked out of a small hole in an underground gasoline pipe over a period of months. Despite the policy's requirement that an occurrence be "sudden" or else subject to the pollution exclusion clause, the court held that the leaking from the line was not expected nor intended, nor was the resulting damage. Therefore, the pollution exclusion clause did not

exclude coverage. 664 P.2d at 1266. See also Allstate Insurance Co., supra at 605, where the court states that the discharge or escape of gasoline could be both sudden and accidental, even though undetected for a substantial period of time, since "sudden," as used in pollution exclusion clauses, "need not be limited to an instantaneous happening."

A few courts have refused to find any ambiguity in the terms "sudden and accidental" where the insured knowingly discharges a substance as a normal feature of operations, but has no expectation of intent to cause damage. In Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984) (included in the Compendium) the court determined that no insurance coverage was provided to Great Lakes in connection with a CERCLA action by the United States against Great Lakes and others for hazardous waste contamination. Notably, the district court and the First Circuit focused on two documents in deciding whether insurance coverage was triggered: (1) the comprehensive general liability insurance policy; and (2) the United States' complaint against Great Lakes. Because the United States' complaint alleged that Great Lakes was liable for contamination which "has taken place as a concomitant of its regular business activity . . . ", the First Circuit determined that no sudden or accidental occurrence triggering coverage was alleged. The court found that there is no ambiguity in the policy "when the policy is read against the complaint." Thus, where insurance is or may be a

factor, care must be taken to avoid counterproductive pleading.

The U.S. District Court for the Eastern District of Michigan followed the Great Lakes decision in American States Insurance Co. v. Maryland Casualty Co. 587 F. Supp. 1549 (E.D. Mich. 1984) (included in the Compendium). The court held that the insurance companies did not have a duty to defend or indemnify the company because the underlying National Drum litigation involved the continued, non-accidental dumping of waste at the site.

In summary, the general and widely accepted view is that CGL policies with pollution exclusion clauses provide coverage for pollution incidents where either the discharge itself or the resulting damage is unexpected or unintended. But, under the First Circuit's decision in Great Lakes Container, supra, the discharge must be "accidental." For example, coverage exists for pollution incidents which involve gradual seepage or leaking which is unexpected or unintended.

III. Construction of EIL and ISO Policies

A. The EIL Policy

The Environmental Impairment Liability (EIL) policy was developed to provide coverage for liabilities not thought to be covered by CGL policies following development of the pollution exclusion -- that is, claims for property damage and personal injury such as bodily injury, mental anguish, disability, death at any time -- present or in

the future -- caused by non-sudden, non-accidental "environmental impairment." These policies have not been the subject of significant judicial construction. For an excellent discussion of their terms, issuance and use, see Appendix K P. Milvy, "Environmental Impairment Liability Insurance and Risk Assessment," The Environmental Forum, Oct. 1982, p. 30.

B. The ISO Policy

The Insurance Services Office (ISO) policy is generally more limited. The EIL policy -- restricting coverage to damages and losses arising out of a "pollution incident," which includes only "direct" releases that result in "injurious amounts" of pollution -- is generally believed to cover only fortuitous damages, not those which are "expected or intended." These policies have not been the subject of significant judicial construction, but their terms are discussed in substantial detail and contrasted with those of EIL policies at Appendix A, pp. 449-453.

IV. Statutory Insurance Requirements

A. RCRA Financial Responsibility Requirements

Under section 3004(6) of RCRA, EPA must establish standards "as may be necessary or desirable" for financial responsibility, including financial responsibility for corrective action, applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities.[19/]

19/ 42 U.S.C. § 6924(a)(6).

The 1984 amendments to RCRA added in section 3004(t) that financial responsibility may be established by any one or a combination of the following: insurance, guarantees, surety bonds, letters of credit, or qualification as a self-insurer.[20/] RCRA also requires owners and operators of facilities with interim status to certify that the facilities are in compliance with financial responsibility requirements.[21/]

The regulations require each facility owner or operator to certify financial assurance for both closure and post-closure activities and to maintain liability insurance against both sudden accidental and non-sudden accidental occurrences. The requirements constitute Subpart H of Parts 264 and 265 of 40 C.F.R. Part 264 contains standards that apply to interim status facilities. RCRA also provides for interim authorization of state programs that are substantially equivalent to the federal program. Many states have some type of financial requirements for closure and post-closure, but they vary considerably from state to state.

The first step to establish financial assurance for closure and post-closure is to estimate the cost of closure and the annual cost of post-closure monitoring and maintenance.

20/ 42 U.S.C. §6924(t).

21/ 42 U.S.C. Section 6925(e)(2)(B) and (e)(3)(B).

The amount of financial assurance must at least equal the adjusted cost estimates. The owner and operator may use one or more of several mechanisms allowed by the regulations to meet the requirements. As noted above, the possible mechanisms include trust funds, surety bonds (that either guarantee payment into a trust fund or guarantee performance of closure or post-closure), letters of credit, and insurance; or the owner or operator may meet the requirement by satisfying a financial test that provides a corporate guarantee of closure or post-closure.[22/] To meet the financial assurance requirements, an owner or operator may use more than one of the options, except the financial test mechanism. One option may be used to assure funds for all facilities of one owner or operator. The most often used mechanism is the financial test (about 80 percent) and the least used is insurance (about 2.7 percent). EPA will release the facility from the financial assurance requirements after receiving certification that closure has been accomplished as set out in the closure plan.

Closure and post-closure insurance must satisfy a number of requirements. The owner or operator must submit a certificate of insurance to the Regional Administrator. The policy must be insured for a face amount at least equal to the

---

22/ 40 C.F.R. 264.143, 265.143.

closure or post-closure cost estimate, and it must guarantee that the insurer will pay for the closure or post-closure activities. If the cost of closure or post-closure is significantly greater than the face amount of the policy, EPA may withhold reimbursement of funds. The owner or operator may not terminate the policy without EPA approval, nor may the insurer cancel the policy except for failure to pay the premium. Even upon failure to pay the premium, the insurer cannot cancel the policy if within 120 days of notice of failure, the facility is abandoned, interim status is terminated, closure is ordered, or the owner or operator is named a debtor in a bankruptcy proceeding.[23/]

In addition to the closure and post-closure financial assurances, the owner or operator must demonstrate financial responsibility for claims arising from its operation for personal injuries or property damage to third parties.[24/] For sudden accidental occurrences, the owner or operator must maintain liability coverage of at least $1 million per occurrence with an annual aggregate of at least $2 million. For non-sudden accidental occurrences, the owner or operator of a surface impoundment, landfill, or land treatment facility must maintain liability coverage of at least $3 million per occurrence with an annual aggregate of $6 million. The owner

---

23/ 40 C.F.R. 264-143(e)-(8), 40n C.F.R. 265-143(d)(8).

24/ 40 C.F.R. 264.147, 265.147.

or operator may demonstrate financial responsibility by having liability insurance, as specified in the regulations by passing a financial test for liability, or by using both mechanisms. Variances from these requirements are available if the owner or operator demonstrates that the levels of insurance are higher than necessary. Conversely, the Regional Administrator may impose higher levels of coverage if warrante

The owner or operator must continuously provide liability coverage for a facility until final closure. Therefore, after final closure, claims for personal injury or property damage to third parties are no longer covered by insurance required by RCRA. However, upon eventual transfer of liability, CERCLA's Post-Closure Liability Trust Fund will assume "the liability established by this section or any other law for the owner or operator of a hazardous waste facility. . .".[26]

B. CERCLA FINANCIAL RESPONSIBILITY REQUIREMENTS

CERCLA Section 108(a)[27] requires that the owner or operat of each described vessel "carrying hazardous substances as cargo" maintain at least $5 million in "evidence of financial responsibility." Proof may be established by any combination of "insurance, guarantee, surety bond, or qualification as a self-insurer." This requirement is essentially an expansion of preexisting spill response

---

25/ 242 C.F.R. 265.147(a)(1).

26/ 42 U.S.C. § 9607(K). The 99th Congress is considering eliminating the entire post-closure liability transfer scheme.

27/ 42 U.S.C. § 1321(p).

program requirements under the Clean Water Act.[28/] Insurance policies issued under these programs should be considered whenever a release from a vessel is involved. CERCLA Section 108(b)[29/] requires that the Administrator, no earlier than December 11, 1985, promulgate financial responsibility requirements for facilities not covered under the RCRA subtitle C program. Priority is to be given to "those classes of facilities" which "present the highest level of risk of injury." This program has not begun, but should be considered as a potential source of coverage after December 11, 1985.

Two articles discuss many of the above issues in greater detail. Appendix B, D. Jernberg, "Environmental Risk Insurance," FIC Quarterly, Winter 1984, pp. 123, et seq., briefly addresses the RCRA and CERCLA insurance schemes and follows with a detailed discussion of coverage under different policy types and examines various developments in the writing of exclusions. Appendix C, A. Light, "The Long Tail of Liability, [etc.]," 2 Va. J. Nat. Res. L. 179 (1982), discusses uncertainties concerning coverage as between RCRA program insurance and the CERCLA post-closure liability fund.

28/ 42 U.S.C. § 9608(a).

29/ 42 U.S.C. § 9608(b).

"for bad faith either in negotiating or in failing to negotiate the settlement of any claim." Thus, the United States may assert state direct action claims or assigned bad faith claims in addition to its federal direct action claim.

One likely enforcement issue occurs where the insured is in bankruptcy. RCRA Subsections 3004(t)(2) and (3) leaves open the question of whether the insurance proceeds are part of the estate in bankruptcy. Our probable position will be that if the judgment is not satisfied from the estate after a period of time specified by state law, which is likely since it is in bankruptcy, then the proceeds are not part of the estate and the government or other claimants may take action directly against the insurer for the judgment.

2. CERCLA enforcement claims.

The only express rights of action against insurance carriers under CERCLA are authorized at subsections 108(c) and (d), 42 U.S.C. 9608(c) and (d), and which provide:

> (c) Any claim authorized by section 9607 or 9611 of this title may be asserted directly against any guarantor providing evidence of financial responsibility as requried under this section. In defending such a claim, the guarantor may invoke all rights and defenses which would be available to the owner or operator under this subchapter. The guarantor may also invoke the defense that the incident was caused by the willful misconduct of the owner or operator, but such guarantor may not invoke any other defense that such guarantor might have been entitled to invoke in a proceeding brought by the owner or operator against him.

> (d) Any guarantor acting in good faith against which claims under this Act are asserted as a guarantor shall be liable under section 9607 of this title or section 9612(c) of this title only up to the monetary limits of the policy of insurance or indemnity contract such guarantor has undertaken or the guaranty of other evidence of financial responsibility furnished under this section, and only to the extent that liability is not excluded by restrictive endorsement: Provided, that this subsection shall not alter the liability of any person under section 9607 of this title.

The authorization of a direct claim against a guarantor is limited to a "guarantor providing evidence of financial responsibility as required under this section" (emphasis added). Section 108 has two provisions requiring evidence of financial responsibility. Section 108(a) requires evidence of financial responsibility by the owner or operator of certain vessels and offshore facilities, in accordance with regulations promulgated by the President. Thus, once the President or his designee promulgates such regulations, a right of direct action is available against any insurer issuing insurance under those regulations to a covered vessel or offshore facility.[30/]

The second requirement for evidence of financial responsibility is in Section 108(b). Section 108(b)

30/ The Coast Guard takes the view that section 108(a) of CERCLA "implicitly" repeals or supersedes financial responsibility regulations under section 311(p) of the Clean Water Act, 33 U.S.C. 1321(p), and that under the provision section 302(c) of CERCLA, 42 U.S.C. 9652(c), the section

[FOOTNOTE CONTINUED ON NEXT PAGE]

establishes a framework for imposing financial responsibility requirements on onshore facilities, but on a prolonged schedule. Not later than December 11, 1983, the President is to identify the classes of facilities for which financial responsibility requirements will be developed. The actual requirements are to be promulgated no earlier than December 11, 1985. When the regulations are promulgated, they are to impose incremental financial responsibility requirements over a period of not less than three years nor more than six years from the date of promulgation. Thus, under the framework established in Section 108(b), financial responsibility requirements would not begin until at least December 11, 1985, and consequently, a direct claim against an insurer under Section 108(c) could not be made until after that date.[31/]

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

311(p) regulations remain in full force and effect until such time as section 108(a) regulations are issued.

Financial responsibility requirements and direct cause of action provisions similar to those contained in section 108 of CERCLA are also found in section 311(p) of the Clean Water Act, 33 U.S.C. 1321(p), and in section 305 of the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. 1815.

The authority to promulgate financial responsibility regulations required under CERCLA section 108(a) regarding vessels and offshore facilities was delegated to the Coast Guard by Executive Order 12418 (May 5, 1983), 48 Fed.Reg. 20891 (May 10, 1983).

31/ This entire provision may be qualified in the same manner as set forth in RCRA Section 3004(t) during reauthorization of CERCLA in 1985.

The next question is whether some other federal claim against insurers may be found or implied under CERCLA. The two sections of CERCLA most relevant to the possibility of a right of direct action against an insurer are Sections 107 and 108, 42 U.S.C. § 9607 and 9608. Section 107 is the main liability provision of CERCLA and does not by its terms include insurers among the list of responsible parties listed in Section 107(a). Section 107(e) preserves the validity of insurance agreements, but does not implicitly or explicitly authorize actions directly against insurers by a party other than the insured. As noted above, an analysis of the language of section 108 reveals a legislative intent to permit actions directly against financial responsibility insurers, but only under limited conditions.

A clear federal direct right of action under CERCLA against insurance companies appears to be dependent upon the issuance of financial responsibility regulations. As to the onshore facilities with which we deal most frequently, such regulations will not be promulgated until at least December 11, 1985. In the interim, there is only a potential for developing an interstitial federal common law, based on the need for a uniform approach to the assertion of claims generally allowed under state law. CERCLA section 302(c) preserves financial responsibility regulations issued under section 311(p) of the Clean Water Act and RCRA, as well as all state direct action claims which the United States may be entitled to assert.

B. Assigned or Subrogated Claims of the Insured Assignment After Judgment, Assignment Before Judgment, Assignment of Claims for Breach of Duties, and Assignments After Bankruptcy

This section will discuss whether and under what conditions a defendant or potential defendant in a RCRA or CERCLA case could assign its claim against its liability insurance carrier to the United States. As with other insurance issues, these are largely issues of State law. Accordingly, specific state authorities should be consulted before any strategic decisions are made.

Resolution of assignment questions depends to a substantial degree on the factual context of the case. This discussion assumes that the United States has a RCRA or CERCLA claim against a defendant and that the defendant has possible liability insurance coverage with respect to that claim. If the defendant is a "deep-pocket," i.e., it will be able to satisfy any judgment against it, the United States probably would not want to take more than a passive role with respect to insurance coverage issues. Acordingly, for purposes of further discussion, we can assume that the defendant has little if any assets to satisfy the CERCLA judgment and that the United States' primary hope for substantial recovery is from the insurance carrier.

Assignment After Judgment

Fundamental issues regarding the prosecution of direct action claims against an insurer are usually dependent on

whether a judgment has yet been entered against the insured defendant on the claim. If it has, there are a number of possible methods for pursuing claims directly against the insurance carrier. These may include, depending on the jurisdiction and the insurance policy involved, proceeding as a third party beneficiary under the policy, as a judgment creditor garnishee, as an assignee, or proceeding under applicable statutory provisions allowing direct suit against the insurance carrier. See A. Windt, Insurance Claims and Disputes 365 (1984). Of course, if the insurance carrier has defended its insured without a reservation of its right to deny coverage, it can be expected to pay the judgment, to the extent of policy limits, without the need for further proceedings.

In the absence of a policy provision providing for direct action by the injured party, the United States could proceed after judgment via garnishment or applicable statutory provisions allowing direct claims against the insurer. Alternatively, an assignment could be taken of the insured's rights against its insurer, in partial or full settlement of the United States' claim against the insured.

Liability insurance policies generally have a provision prohibiting assignments. The following provision is typical.

> Assignment. Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon.

Nevertheless, courts have almost uniformly held that the prohibition is one against assigning the general coverage

provided by the policy before loss, and that it does not encompass a prohibition against assignment after a loss has occurred. The basis for this distinction has been explained as follows:

> Although there is some authority to the contrary, the great weight of authority supports the rule that general stipulations in policies prohibiting assignments thereof except with the consent of the insurer apply to assignments before loss only, and do not prevent an assignment after loss, for the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim arising thereunder, and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim.

16 Couch on Insurance 2d §63:40 (Rev. ed.); accord, 7 Appelman, Insurance Law & Practice §4259; Maneikis v. St. Paul Insurance Co., 655 F.2d 818, 826 (7th Cir. 1981) ("Policy provision [against assignments], however, can only prohibit assignment of policy coverage, not assignment of an accrued cause of action."); International Rediscount Corp. v. Hartford Accident & Indemnity Co., 425 F.Supp. 669 (D. Del. 1977); and Brown v. State Farm Mutual Automobile Insurance Association, 1 Ill. App. 3d 47, 272 N.E. 2d 261, 264 (1971)

Following an assignment, the assignee stands in the shoes of the insured and will be subject to any defenses that the insurer had against the insured prior to assignment. See A. Windt, supra, at 367. Thus, the insurer can assert that the claim is not within the coverage of the policy or that policy conditions have not been complied with. Therefore,

the value of any assignment should be examined carefully prior to its acceptance as consideration for settlement.

Assignment Before Judgment

While an assignment after judgment is generally allowed, assignments before judgment present special problems and may not be appropriate in certain situations. At least two problems arise in the prejudgment context.

First, liability policies generally require the insured to cooperate with the insurer. Assignment of a claim under the policy against the insurer could be construed as a violation of the cooperation requirement. Such a construction would be likely if the insurer has agreed to defend and has not denied coverage. The cooperation clause of a liability insurance policy will be deemed violated where the insured, by collusive conduct, appears to be assisting the claimant in the maintenance of his action. 14 Couch on Insurance, supra, §51.115; and Brown v. State Farm Mutual Automobile Insurance Association, supra, 272 N. E.2d at 264 ("[C]ollusion in respect to liability is, of course, a direct violation of the non-cooperation clauses of the insurance policies, and if established is a defense to the insurer's liability.").

However, in a situation where the insurer has denied coverage and has refused to defend, an assignment should not violate the cooperation requirement. It has generally been held that there is no duty to cooperate once the insurer has denied coverage. 14 Couch on Insurance, supra, §51.121; A. Windt, supra, at 97; Shernoff & Levine, Insurance: Bad Faith

Litigation, §3.06[3] (1984); and see Critz v. Farmers Insurance Group, 230 Cal. App. 2d 788, 41 Cal. Rptr. 401 (1964). In Critz, the court rejected the argument that an assignment of rights against the insurer violated the cooperation agreement of the policy in a situation where the insurer had itself failed to comply with the policy. 230 Cal. App. 2d at 801. The Court stated:

> Whatever may be [the insured's] obligation to the carrier, it does not demand that he bare his breast to the continued danger of personal liability. By executing the assignment, he attempts only to shield himself from the danger to which the company has exposed him. He is doubtless less friendly to his insurer than he might otherwise have been. The absence of cordiality is attributable not to the assignment, but to his fear that the insurer has callously exposed him to extensive personal liability. The insurer's breach so narrows the policyholder's duty of cooperation that the self-protective assignment does not violate it.

The other obstacle to an assignment before judgment is the standard policy provision -- called the "no action" provision -- requiring a judgment against the insured, or a settlement consented to by the insurer, before suit is commenced against the insurer. One such provision provides:

> Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

See generally, 11 Couch on Insurance, supra, §§44:318-44:323.-
Again, in situations where the insurer has agreed to defend its insured, this provision will likely prohibit any pre-judgment assignment. However, an assignment may be possible if the insurer refuses to defend.

As noted above, the standard policy provision requires, as a predicate to the insurer's liability, a judgment or a settlement among the claimant, the insured and the insurer. If the situation which creates the desire for an assignment is one where the insurer refuses to settle, a settlement without the insurer's consent would not ordinarily create a basis for liability by the insurer. However, it has been held that if the insurer refuses to defend the insured, the insured may enter into a reasonable settlement and, thereafter, seek reimbursement from its insurer. This rule is stated by Appleman as follows:

> If an insurer unjustifiably refuses to defend a suit, the insured may make a reasonable settlement or compromise of the injured person's claim, and is then entitled to reimbursement from the insurer, even though the policy purports to avoid liability for settlement made without the insurer's consent.

7C Appleman, supra, §46.90. In such a situation, the insured may, as part of a settlement, "simply assign certain rights to the plaintiff." Id. See also id. §4714. In other words, the settlement can include an assignment.

Maneikis v. St. Paul Insurance Co., 655 F.2d 818 (7th Cir. 1981) illustrates this point. There, Maneikis initially sued an attorney, Solotke, who represented him

in a prior business matter. Solotke's professional liability insurer, St. Paul Insurance, denied coverage and refused to defend, claiming the matter sued upon was not within scope of the policy. Thereafter, Maneikis and Solotke entered into a settlement agreement of $200,000 to be satisfied by Solotke's payment of $50,000 and his assignment to Maneikis of his rights against St. Paul. Maneikis sued St. Paul on the assignment. The trial court granted summary judgment to St. Paul. The Seventh Circuit reversed. It found that the policy provision prohibiting assignments did not apply to assignments of an accrued cause of action and that an "insurer's wrongful refusal to defend permits the insured to negotiate a reasonable settlement." Id at 827. See also Carter v. Aetna Casualty and Surety Co., 473 F.2d 1071 (8th Cir. 1973); Critz v. Farmers Insurance Group, supra; Samson v. Transamerica Insurance Co., 30 Cal. 3d 220, 240-41, 178 Cal. Rptr. 343, 636 P. 2d 32 (1981); Shernoff & Levine, supra, §3.06(3) ("It has also been held that when the insurer denies coverage and refuses to defend its insured, the insured need not notify the insurer of any assignment of his or her rights against the insurer prior to judgment."); and 14 Couch on Insurance, supra, §51.72. Couch states the rule as follows:

> If the insurer unjustifiably refuses to defend an action against the insured, on the ground that the action was based upon a claim not covered by the policy, it cannot successfully invoke the no trial clause to bar liability, for the reason that when the settlement by the insured after the unjustified refusal to

> defend was made in absolute good faith in order to avoid the chance of an adverse verdict for a much larger sum, it would seem grossly unjust, if not contrary to public policy, to insist that there must be in every case an actual trial and verdict.

To summarize, where the United States has not yet obtained a judgment and where a defendant's insurer has refused to defend,[32/] a settlement could be considered with the defendant which included, among other things, assignment of the defendant's claims against its insurer. Specific state authority should, of course, be consulted before such an assignment is negotiated and accepted.

Assignment of Claims for Breach Duties

Another fact situation in which the assignment issue frequently arises--involves bad faith refusal to settle.

It is generally held that an insurance carrier which in bad faith refuses to settle a claim within policy limits may thereafter be liable to the insured if a judgment is entered beyond the policy limits. This subject is discussed at length in 7C Appleman, supra §§4711-15: See, e.g., Critz v. Farmers Insurance Group, supra.

For example, assume that plaintiff sues defendant for $50,000. Defendant has an insurance policy with a $25,000

32/ An insurer may frequently defend its insured with a reservation of its right to ultimately deny coverage. There is a division in authority as to whether such a reservation of rights, or non-waiver agreement, must be consented to by the insured. See 14 Couch on Insurance, supra, §651:89. As noted above, if there is a defense by the insurer with reservation of rights, it may be questionable whether the defendant could enter into a settlement without the insurer's consent and still preserve its rights against the insurer.

policy limit. During the course of litigation, plaintiff offers to settle for $25,000. If the insurance carrier in bad faith refuses to accept the settlement and judgment is thereafter entered for $50,000, the insurer will be, if its bad faith is established, liable to pay the entire $50,000 and may also be subject to a punitive damage award.
In the situation described, one assignment issue arises if the insurer, after judgment, pays plaintiff $25,000 but refuses to pay the other $25,000. Can the defendant assign its bad-faith-refusal-to-pay claim to plaintiff in satisfaction of the judgment against it? Most courts have said yes.

Brown v. State Farm Mutual Automobile Insurance Association, supra, illustrates this situation. There, an insured was sued for $40,000. It had an automobile liability policy for $20,000. After discovery, the plaintiff offered to settle for $20,000. The offer was refused. Judgment was entered for $40,000. The insurer then paid $20,000. The insured's only assets were $5,500 and a potential claim against the insurer for bad faith refusal to settle. Those assets were assigned to plaintiff, who then sued the insurer. The Illinois appellate court allowed the assignment stating: "We find no valid reason in public policy why the cause of action should not be assignable." 272 N.E. 2d at 264; accord, Murphy v. Allstate Insurance Co., 17 Cal. 3d 937, 132 Cal. Rptr. 424, 533 P.2d 584, 587 (1976) ("The insured may assign his cause of action for breach of the duty to settle without

consent of the insurance carrier, even when the policy provisions provide to the contrary.").

Bad faith refusal to pay claims may well arise in CERCLA cases, particularly as the requirements of CERCLA become more clearly established. In situations where the claim of the United States exceeds policy limits and the insured has little if any assets of its own, it may be advisable for the United States to consider making a less-than-policy-limits settlement offer. If the offer is refused and a judgment beyond policy limits is obtained, the United States can then consider taking an assignment of the insured's claim against the insurer for wrongful refusal to settle.

Finally, assignments in the excess liability context, i.e., where a judgment exceeds policy limits, are apparently quite common and allow the judgment creditor to seek full reimbursement from the insurer. One treatise describes the situation as follows:

> A common practice by which the injured third-party claimant achieves full compensation, and the insured is absolved from the liability judgment, is an assignment by the insured of his rights against the insurer to the insured's judgment-creditor. In exchange for the assignment, the claimant signs a covenant not to execute above the policy limits against the insured. The assignment thus becomes a convenient way for the insured to fully satisfy the injured party. In situations where the insured is basically 'judgment proof,' it may well net the injured party far more than execution of the judgment against the insured. One disadvantage of this technique for the claimant is that the risks of collectibility and litigation against the insurer fall upon the claimant.

1 Long, Law of Liability Insurance §5.46.

allows a party who has obtained judgment under the policy to proceed against the insurer. It provides:

> Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy.

Where such provisions are present, they are probably required by statute.

D. Common Law Denial of Direct Action[33/]

Common law generally denies claims by injured persons against a tortfeasor's insurer. Appleman, § 4861. Liability and indemnity policies (the first covers the insured's liability, the second primarily serves to cover the insured's losses) typically contain clauses barring joinder of the insurer in actions against the insured, which are upheld in the absence of a statute to the contrary. Appleman, § 4861. Similarly, most jurisdictions do not allow the insurer to intervene in an action against the insured. Appleman, § 4861. See, e.g., United States v. Northeastern Pharmaceutical and Chemical Co., Inc., Civ. No. 80-5066-CIV-S-4 (W.D. Mo., May 3, 1983) (included in the Compendium) (denying insurer intervention in a RCRA § 7003 and CERCLA §§ 106 and 107 action).

33/ The discussion under this heading and the next is derived largely from two sources: Appleman, Insurance Law and Practice (1981, Supplemented 1984), §§ 4861, et. seq. ("Appleman") (Appendix L), and American Insurance Association, Statutes Affecting Liability Insurance (1981) (AIA Survey) (A summary of direct action rules in the 50 states, Guam and Puerto Rico is presented at Appendix M.).

There is one notable exception to the common law rule regarding direct action. Some jurisdictions allow direct actions, in the absence of a direct action statute, where the policy is required. Alabama recognizes such an exception, while Arizona does not. In Illinois, it is recognized in actions on employer's liability and compensation policies. Appleman, § 4862. This exception is sometimes qualified for specific forms of insurance. See Appendix M. Since states operating approved RCRA regulatory programs will probably require insurance under state law, this exception may be significant.

E. State Direct Action Statutes

As of 1981, twenty-seven states, Puerto Rico and Guam had adopted some form of direct action statute. See Appendix M. These statutes may allow joinder of insurers, independent prejudgment litigation against insurers, post-judgment suits to recover directly from insurers, or some combination of these options. These statutes typically provide that liability policies must contain provisions allowing such suits, or provide that such suits may be brought notwithstanding a policy clause to the contrary.[34/]

Frequently, authorized direct action claims are limited by category or are otherwise conditioned. For example,

---

34/ The first direct action suit brought by the United States to recover from the insurer of a RCRA/CERCLA judgment debtor is United States v. Continental Insurance Co., Civ. No. 85-3069-CV-5-4 (W.D. Missouri, filed March 1985). The complaint is presented as Appendix N.

sixteen states allow post-judgment suits against insurers only if the judgment has not been be met by execution upon the insured. Only Louisiana, Guam and Puerto Rico allow broad prejudgment direct actions. See Appendix M, and the ALA Survey, which contains details of individual state statutes.

Due to the extraordinary variety of state statutes on this subject, the United States may be served best by arguing the necessity of a uniform federal common law rule for direct action in RCRA and CERCLA cases, as has been done successfully for the similarly diverse issues of joint and several liability and contribution. See United States v. A & F Materials, 578 F. Supp. 1249, 1255-56 (S.D. Ill. 1984); United States v. Chem-Dyne, et al., 572 F. Supp. 802, 807 (S.D. Ohio 1983; and Wehner v. Syntex Agribusiness, Inc., Civ. No. 83-642 (2) (E.D. Mo. April 1, 1985) IX Chem. & Rad. Waste Lit. Rptr. 879.

F. Other Procedures for Litigation Between Insurers and the United States

1. Intervention by the insurer in an action by the United States against the insured.

As indicated at p. 47, supra, the courts generally have not allowed insurers to intervene in suits against the insured. This has proven true in all cases in which the question has been tested under RCRA and CERCLA. On the other hand, if all parties to the litigation support permissive intervention in an action by the United States under an

environmental statute, there is no obvious reason why intervention must be denied.

2. Declaratory judgment suits between the insurer and the insured.

Private and governmental civil suits under RCRA and CERCLA have spawned several suits for declaratory relief between insurers and purportedly insured waste site owners and operators, transporters and generators. A private attorney reportedly stated in April, 1985 that Aetna Casualty Ins. Co. (one of the major carriers in the field) was then receiving an average of two hazardous waste related claims per day. In several state court cases involving coverage disputes between CERCLA responsible parties and their insurers, efforts have been made to join the United Staes as a third party defendant on the grounds tht it is an interested party. None of these efforts has succeeded.

Sovereign immunity bars any suit against the United States in the absence of a specific congressional waiver. There is no statute providing that the United States can be named as a defendant in one of these cases. The type of relief sought does not seem to affect the applicability of the immunity one way or the other; and the cases generally hold that the doctrine is absolute. Thus, the state courts do not have jurisdiction over the United States in these insurance suits. Block v. North Dakota, 103 S.Ct. 1811, 1816 (1983); United States v. Sherwood, 312 U.S. 584, 586 (1941).

Success by the insured in coverage litigation probably precludes the insurer from contesting some or all questions of coverage in a subsequent direct action by the United States. The doctrine of collateral estoppel, or issue preclusion, holds that where an issue of fact or law was actually litigated and determined by a valid and final judgment, that determination is conclusive in a subsequent action involving the same parties or at least the same party as is sought to be held, whether it is on the same or on a different claim. Wright, Law of Federal Courts § 100A (4th ed. 1983) [hereinafter Wright], and cases cited.

If the United States is not a party to the litigation, could it be bound? Ordinarily, persons who were not parties to the first action will not be estopped. 18 C. Wright, A. Miller & E. Cooper, Federal Practice, Procedure, and Jurisdiction §§ 4448-4449 (1981) and [hereinafter Wright and Miller] and cases cited. Where a defendant is not subject to the jurisdiction of a court, it can not be a party and thus can not be bound by collateral estoppel. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969); Oil & Gas Ventures First 1958 Fund, Ltd. v. Kung, 250 F. Supp. 744, 753-54 (S.D.N.Y. 1966); and 18 Wright & Miller § 4449. Thus, if a court could not exercise jurisdiction over the United States, the United States could not be considered a party and could not be estopped by any decision by the court.

However, nonparties to suits can sometimes be held to be collaterally estopped -- if the nonparty actively participated in the prior case, and was a party in everything but name; if the nonparty's interests were specifically represented in the first action, e.g. a trustee or guardian was involved in the first suit; if the nonparty had some actual duty to either enter the lawsuit or give some notice that it was not interested in the suit and would not consider itself bound by it; or, if there was a sufficient party to the suit, e.g., they held successive interests in the property that was the subject of the suit. 18 Wright & Miller § 4449 and cases cited.

The first two exceptions do not seem applicable to the United States. The latter two exceptions to the nonparty rule might conceivably apply. The first of these latter exceptions would extend preclusion to those persons that had an opportunity to participate in the litigation, that did not do so, that did not inform the actual parties that they might raise the issue in the future, and thus lead the parties to believe that they were not interested in the litigation. This exception is primarily espoused in the works of commentators and is really a form of equitable estoppel. See, e.g., 18 Wright & Miller §§ 4452 and 4453; and Restatement (Second) of Judgments § 62 (1981). But the rules for applying equitable estoppel against the United States are unique. It is by no means clear that the United States can be estopped under any circumstances. Some Circuit Courts of Appeal have

stated that estoppel cannot lie against the federal government. Hicks v. Harris, 606 F.2d 65, 68 (5th Cir. 1979). Other Circuits have allowed the United States to be estopped under certain limited circumstances, i.e., where there has been a misrepresentation that rises to the level of "affirmative misconduct." Community Health Services of Crawford County, Inc., v. Califano, 698 F.wd 615, 620-21 (3rd Cir. 1983); Mendoza-Hernandez v. INS, 664 F.2d 635, 639 (7th Cir. 1981). These decisions allowing estoppel may not be in keeping with the Supreme Court's latest pronouncement on the issue, Schweiker v. Hansen, 450 U.S. 785, 788-91 (1981). But even if these decisions still are valid, getting a case dismissed because a court has no jurisdiction and later raising the same issue in a court of competent jurisdiction does not seem to be "affirmative misconduct" -- at least where there are no representations accompanying the dismissal of the first case that the issue will not be raised later.

Even if this exception could be refuted successfully, it may be a better idea simply to moot it, since the United States could do so with a minimum of effort. All that would have to be done is to notify the parties after the United States is dismissed that it will not consider itself bound by any determinations in the case.

The second potentially applicable exception to the nonparty rule holds that where there is some legal relationship between the nonparty and a party, such as where one is a predecessor in interest to the same claim or property, the

nonparty can be bound in later suits. An insurance company would seem to have a basis for estopping the United States from retrying the insurance company's liability under its contract on this basis only if the United States actually has taken an assignment of the assured's claim against the carrier and has no independent rights of action.

The preclusive effect on a nonparty judgment creditor of a finding of no coverage in a suit between the insurance company and its insured was addressed in Hocken v. Allstate Insurance Co., 147 S.W.2d 182 (Mo Ct. App. 1941). Hocken filed suit against the insured for personal injuries suffered as a result of a car accident and recovered a judgment for $2,500. While Hocken's suit was pending, the insurance company filed suit against the insured and Hocken seeking a declaration that the policy was void due to fraudulent misrepresentations by the insured in the procurement of the policy. For undisclosed reasons, the insurance company dismissed Hocken as a party and judgment was rendered against the insured prior to the entry of a judgment for $2,500 in Hocken's favor in the underlying personal injury suit.

Hocken later brought a garnishment proceeding against the insurance company to recover the $2,500 judgment. In its defense, the insurer contended that the declaratory judgment against the insured was not subject to collateral attack but was binding on Hocken because she was in privity with the insured, having derived her rights against the insurance company solely through the insured. The trial

reversed and remanded the case for a new trial on the issue of coverage.

The crux of the appellate court's decision was its holding that, contrary to the insurance company's assertion, the injured party was not a privy to the suit between the insurance company and the insured. It reasoned that Hocken was not privy because she acquired whatever rights she possessed under the policy prior to the institution of the declaratory judgment action. 147 S.W.2d at 186. "After those rights came into existence the insured could not by any act, or by the submission to the rendition of judgment against him, lessen the interest vested in [the injured party]." Id.

Hocken's rights were acquired before the institution of the declaratory judgment action because under Missouri law the injured party acquires its rights to the insurance coverage at the time of the accident or the occurrence of the injury. "It is true that those rights were originally derived through the insured, but by operation of law they are fixed and independent of any control by the insured, so that as to all act and relations subsequent to the accident, which gave rise to plaintiff's rights, they were not in privity." Id. at 188. See also Mathison v. Public Work Supply District, 401 S.W. 2d 424, 431 (Mo. 1966) ("to make one "privy" to an action he must have acquired his interest in the subject of the action subsequent to the commencement of the suit or rendition of judgment").

The rights of the United States against an insurer in an environmental case, under this analysis, would be acquired at the time of the accident or occurrence giving rise to liability.

Courts in other states are in accord with the logic and holding in Hocken. In United Farm Bureau Mutual Insurance Co. v. Wampler, 406 N.E.2d 1195 (Ind. Ct. App. 1980), an injured party sought to execute a judgment against the insured by proceeding against the insurer. The insurance company asserted that a previous judgment against the insured on the issue of coverage was res judicata as to the injured party. The court held that the injured party was not in privity with the insurer or the insured and not bound by the outcome of the declaratory judgment. Id. at 1197. The court relied on 7 Am.Jur. 2d, Automobile Insurance §§(1963):

> A judgment determining, as between an automobile liability insurer and the insured or a person claiming to be insured, a question of coverage in favor of the insurer does not, as a matter of res judicata, preclude the injured person from litigating the question of coverage in a subsequent action or proceeding instituted by him against the insurer, since the injured person is not in privity with any of the parties in the former proceeding.

In Gladon v. Searle, 412 P.2d 116 (Wash. 1966), while a suit by an injured party against the insured was pending, the insurance company commenced an action against the insured for a declaratory judgment as to coverage. The company did not notify or attempt to join the injured party, and a default judgment was entered in favor of the insurer

after the insured failed to answer the suit. The injured party subsequently recovered a default judgment against the insured and filed a garnishment action against the insurance company. Judgment was entered against the insurer, which appealed. The court held that "third party claimants in an action of this nature are not bound by a declaratory judgment in which they were not made a party." Id at 118.

The insurance company in Sobina v. Busby, 210 N.E. 769 (Ill. App. Ct. 1965), sought to use a judgment from a suit between the insurance company and the insured as a defense in an action by the injured parties against the company to recover on a judgment entered against the insured. Citing Hocken, supra the court observed, "There is ample authority holding that the plaintiffs in the underlying tort action are not in privity with the insured, that the insurance policy is one against liability and not against loss, that the plaintiffs' rights accrued at the time of the accident and were not cut off in a later decree entered in proceedings to which the plaintiffs were not parties." Id. at 772-73.

Southern Farm Bureau Casualty Insurance Co. v. Robinson, 365 S.W.2d 454, 456 (Ark. 1963), addressed the following question:

> Can a default declaratory judgment between an insurer and an insured, instituted while suit is pending in a foreign jurisdiction between the insured and an injured person, which suit the insurer is defending, destroy the rights of the injured person who was not a party of the declaratory judgment proceedings?

The court said "No," and explained that the rights of the injured party arose at the time of the injury and are antagonistic to the rights of both the insurer and the insured. Id. at 457; see also 46 C.J.S. Insurance §1191, p. 123 ("The rights of the injured person who may maintain an action against insurer are to be determined as of the time of the accident out of which the cause of action grew . . . .)" and Shapiro v. Republic Indemnity Co., 341 P.2d 289 (Cal. 1959). In Shapiro, the injured parties recovered a judgment against the insured and then brought an action against the insurer on a public liability insurance policy that covered the insured. The insurer argued that its liability must be determined according to the policy as it was reformed in a postaccident action between the insurer and the insured. The court held that, as third-party beneficiaries of the insurance policy, the injured parties had an interest that could not be altered or conditioned by the independent action of the insurer and the insured in reforming the policy. Id. at 291; accord Boulter v. Commercial Standard Insurance Co., 175 F.2d 763, 766 (9th Cir. 1949)(applying California law).

The New Jersey Supreme Court has also rejected the argument that, because the injured person stands in the shoes of the insured, a judgment in a suit between the insured and the insurer is conclusive against the injured party. Dransfield v. Citizens Casualty Co., 74 A.2d 304, 306 (N.J. 1950). The court in Dransfield reasoned that the

injured person has a cause of action the moment he or she is injured and is not in privity with the insured. Virginia likewise has held that, even though a judgment creditor stands in the insured's shoes, the injured party is not barred by a plea of res judicata. Storm v. Nationwide Insurance Co., 97 S.E.2d 759 (Va. 1957). "The insured and the Company may not litigate and have [the injured party's] rights against the Company, which had their inception at the time of her injury, determined in an action to which she is not a party." 97 S.E.2d at 764. See also Bailey v. United States Fidelity and Guaranty Co., 103 S.E.2d 638, 641 (S.C. 1937) (injured party would not be privy, and therefore not bound by judgment in a suit to which he was not a party, where her rights were acquired at time of injury and prior to the rendition of the judgment).

The commentators agree with this line of cases. Couch states, "A judgment determing as between an automobile liabilit insurer and the insured or a person claiming to be insured, a question of coverage in favor of the insurer does not, as a matter of res judicata, preclude the injured person from litigating the question of coverage in a subsequent action or proceeding instituted by him against the insurer, since the injured person is not in privity with any of the parties in the former proceeding." Couch, Cyclopedia of Insurance Law, §45:945 (2nd ed.). Likewise, Appleman notes that "an injured person can neither be bound by a judgment in favor of the insured in a suit brought by another claimant, nor by

a judgment in favor of the insurer, in an action brought upon the policy by the insured." Appleman, §11521; see also 69 ALR2d 858, 859.

One Ohio case that is inconsistent with all of these other cases. In Conold v. Stern, 35 N.E.2d 133 (Ohio 1941), an injured party recovered a judgment against the insured for personal injuries sustained in an automobile collision. The judgment creditor then brought an action against the insurer to recover the amount of the judgment. The insured company averred as a defense a judgment in an action between the insurer and a different party also injured in the same collision in which the court held the policy null and void due to the insured's failure to cooperate. The court held that a judgment in favor of the insurer in an action by an injured party on the question of noncooperation was res judicata in favor of the insurer in a later action by another person injured in the same accident. Id. at 140-41. The court reasoned that the right of the insured against the insurer was fully litigated in the suit by the first injured party and the declaratory judgment against the insured is a bar against another injured party whose right, if any, against the insurance company is derived from and dependent upon a valid right of the insured against the insurance company.

The decision in Conold nowhere mentions the issue of privity or when the rights of the injured party arise, but focuses solely on the rights of a judgment creditor being derivative of the rights of the insured. Also, the case

involves an action by an injured party where judgment has been entered in favor of the insurer in a similar action by another person injured in the same accident. Most importantly, although the more recent case of Celina Mutual Insurance Co. v. Sadler, 217 N.E.2d 255 (Ohio Ct. App. 1966), suggests that the holding in Conold is still the law in Ohio, Conold has not been followed by the courts of any other state. Accordingly, although Conold should caution the United States against remaining a nonparty to an action in Ohio between an insured another party injured by the insured, it should not affect the decisions of the United States in other states.

Yet another exception to the estoppel rule may be applicable to our cases. When collateral estoppel would violate general notions of public policy, or would work an injustice, it is not to be applied. Specifically, where the government is involved in a case designed to protect the public, it should not be estopped by previous cases to which it was not a party. Porter & Dietsch, Inc., v. FTC, 605 F.2d 294, 299-300 (7th Cir. 1979); Defenders of Wildlife v. Andrus, 77 FRD 448, 454 (D.D.C. 1978); Restatement (Second) of Judgments § 28 (1981); and 18 Wright & Miller § 4426. Hazardous waste cases appear particularly apposite for applying this principle. The United States is attempting to fund the containment and removal of very serious threats to health and the environment. It should not be hampered in these efforts by estoppel arising out of litigation. Moreover, the line of cases discussed in the context of whether the

United States could be considered as having a relationship with some party, and thus be bound by his failure in litigation, is buttressed by the unique public responsibilities of the government.

Finally, although it is doubtful that the United States will want to intervene in declaratory judgment actions between liable parties and their insurers, it is not at all clear that the court would allow such intervention in the absence of a preexisting judgment and an independent direct action claim. See Independent Petrochemical Corp., v. Aetna Casualty and Surety Co., Civ. No. 83-3347. (S.D. Ohio, March 8, 1985) 22 ERC 1523, IX Chem. and Rad. Waste Lit. Rptr. 911 (included in the Compendium), denying Rule 24(a)(2) intervention to individuals asserting unresolved personal injury claims against the bankrupt IPC; but cf. Re-Solve v. Canadian Universal Ins. Co., (Mass. Super Ct., CA No. 14767, May 14, 1984), discussed at IX Chem. & Rad. Waste Lit. Rptr. 822 (allowing the Commonwealth of Massachusetts to intervene in an action between a polluter and its insurer).