

THE UNANSWERED QUESTION OF ENVIRONMENTAL INSURANCE ALLOCATION IN OREGON LAW

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I. INTRODUCTION

Environmental insurance allocation, an unresolved issue under Oregon law, poses significant problems for insurance companies and Oregon policyholders. Moreover, the public interest in cleaning up Oregon's contaminated lands and waters frequently rests on issues of environmental insurance allocation. Hundreds of polluted sites dot the Oregon landscape, a legacy of over 150 years of settlement and development since we attained statehood. Federal and state environmental cleanup legislation and regulations in the 1980s imposed joint and several, strict, retroactive liability on many current and former owners and operators for the costs of cleaning up these sites.¹ In fact, the Oregon Department of Environmental Quality (DEQ) has identified over 550 sites that are sufficiently contaminated to require private and public entities and individuals to conduct investigations and cleanups.

Beginning early in the twentieth century, many entities and individuals that were later held responsible for contaminated sites purchased comprehensive general liability (CGL) policies.² In Oregon, an extremely broad range of public entities, including municipalities, ports, and school districts, obtained CGL policies. Private industry, from privately held, single-site businesses to publicly held corporations with multiple industrial sites, likewise obtained CGL policies. Many different general liability carriers issued CGL policies to Oregon entities over the course of the twentieth century.

Soon after the enactment of the 1980s strict liability pollution statutes, claims for environmental cleanup began to be asserted against these policyholders. Often the claims related to contamination that had occurred as part of practices that, at the time, were state-of-the-art operations.³ In response, policyholders turned to their historical general liability

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1. See, e.g., Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. §§ 6901-6908a (2000); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. §§ 9601-9609 (2000); OR. REV. STAT. §§ 465.200-.510 (2001).

2. CGL policies provide extremely broad coverage against legal liability. As one commentator noted:

Standard form comprehensive general liability insurance is legal liability insurance. It is tortfeasor insurance. It is litigation insurance, and it is insurance that covers wrongdoers. Liability insurance has been essential to the development of our agricultural and industrial economy because it provides economic stability to farms, businesses and industries. In exchange for a fee paid by the policyholder in the form of a policy premium, liability insurance shifts the burden of risks that potentially could be economically devastating from the policyholder to the insurance company. Liability insurance protects not only the policyholder, but also the policyholder's customers, neighbors, employees, owners, creditors and the public.

Eugene R. Anderson et al., *Liability Insurance Coverage for Pollution Claims*, 12 U. HAW. L. REV. 83, 88 (1990).

3. See Carl A. Salisbury, *Pollution Liability Insurance Coverage, the Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia*, 21 ENVTL. L. 357, 358 n.2 (1991). "[E]ven spokespersons for the insurance industry acknowledge that most of the damage that is the subject of such [environmental property damage] claims occurred unintentionally." *Id.*

insurers to defend and indemnify them. Rather than accepting responsibility for these claims under their broad, all-risk policies, however, most CGL insurers refused to defend and indemnify their Oregon insureds. After paying premiums for decades, policyholders were deprived of the benefit of coverage when they most needed it. Policyholders had little choice but to commence extraordinarily costly and time-consuming coverage litigation while simultaneously paying out large sums to satisfy their statutory obligations to clean contaminated sites. Some companies were bankrupted in the face of this typically catastrophic financial burden.⁴ Others were simply unable to fund the work that the Oregon DEQ or the United States Environmental Protection Agency (EPA) requested.

In the wake of the Oregon Supreme Court's 1996 decision in *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*⁵ and the Oregon Legislature's enactment of the Oregon Environmental Cleanup Assistance Act,⁶ CGL insurers gradually have changed course and have begun to pay for environmental pollution claims. Currently, disputes between policyholders and carriers over coverage issues are infrequent. Instead, the contested arena has shifted to disputes over how much each carrier must pay of the policyholder's investigation and remediation costs. In other words, the issue is how to allocate those costs among all liable insurers. Unlike the coverage questions that were definitively resolved by Oregon's appellate courts and legislature,⁷ the issue of environmental insurance allocation is unresolved.

The uncertainty surrounding the allocation issue has a profound effect in Oregon. The absence of a rule that clearly allocates cleanup liability among insurers leads to prolonged litigation over the issue. This, in turn, results in years of delay in beginning cleanups, and wastes millions of dollars in legal fees in the process.⁸

The following example illustrates how cleanup cases typically arise in Oregon and how the absence of an allocation rule harms insurers, Oregon policyholders, and Oregon's public interest in quick and thorough cleanup of contaminated sites. A typical scenario involves a marginally profitable business that discovers contamination on its property. Most frequently, the contamination is completely unrelated to current operations. Instead, the contamination occurred twenty-five or more years ago, at a time when environmental regulations were inadequate (or nonexistent) and standard operating practices were not sufficiently rigorous to prevent the contamination. Whether it operated the business at the time of contamination, the business quickly discovers that it is liable as the current owner or operator of the site, that major environmental cleanups routinely carry multimillion-dollar price tags, and that even minor site contaminations can cost hundreds of thousands of dollars to remedy. Many such legally responsible entities simply cannot foot the bill without insurance funds. However, these companies (or their predecessors on the property) have one useful asset—the comprehensive general liability insurance policies they purchased at the time the contamination occurred. Thus, the responsible entities rely on their CGL insurance policies⁹

4. See, e.g., *St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co.*, 870 P.2d 260, 261 (Or. Ct. App. 1994), *aff'd in part, rev'd in part*, 923 P.2d 1200 (Or. 1996).

5. 870 P.2d at 269.

6. OR. REV. STAT. §§ 465.475-.510 (2001).

7. *Id.*; *St. Paul Fire*, 870 P.2d at 269.

8. The expense of determining allocation issues is immense. Insurance companies and property owners spend an estimated \$500 million annually to litigate insurance coverage disputes. *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 993 (N.J. 1994); Joren S. Bass, *The Montrose Decision and Long-Tail Environmental Liability: A New Approach to Allocating Risk Among Multiple Third-Party Insurers*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 209, 209 n.2 (1999).

9. Generally, CGL policies cover only costs incurred because of damage to the property of third parties and do not cover costs arising solely out of damage to the policyholder's own property. However, groundwater and surface water, which often are polluted by chemicals leaching out of the soil from hazardous sites, are considered third-party property that belongs to the State of Oregon and therefore is covered by CGL policies. *Lane Elec. Coop. v. Federated Rural Elec. Ins.*, 834 P.2d 502, 505

for financial assistance. Without insurance coverage, a significant portion of this financial burden would fall to the public,¹⁰ or alternatively, sites would be left unremediated and would continue to threaten the health of Oregonians and the Oregon environment.

Therefore, CGL policies play a critical role in restoring the health of Oregon's polluted lands and waters. Although it is clear that insurers must cover environmental cleanups, it is not easy to access these funds: the uncertainty under Oregon law as to the allocation of the policyholder's environmental liability among the policyholder's insurers leads to litigation and delays the cleanup. CGL policies that work well in the face of simple, one-time losses (such as fires or auto accidents) are more difficult to interpret when presented with the complex problem of long-term, indivisible environmental damage.

The first part of the allocation problem is the long-term nature of contamination. Pollution damage typically occurs over a long period of time, as numerous releases of contaminants, and their subsequent migration to new areas, causes ongoing environmental harm. Because policyholders commonly purchased CGL policies covering one or three-year periods, and may over the course of many years have obtained policies from a variety of different insurance companies, pollution damage claims potentially invoke coverage under many different insurance policies and from many different insurance companies. Oregon courts have adopted the "injury-in-fact" rule for determining which policies are triggered by a contamination.¹¹ The injury-in-fact rule means that every insurer is liable for investigation and cleanup costs, as long as some environmental property damage happened during the policy period.¹² This rule effectively triggers every policy that has been effective at any time from the first release of pollutants until (at the least) the date that the policyholder discovered the pollution.¹³

The second part of the problem is the indivisibility of the contamination. Due to pollution's gradual nature and the inherent difficulty of determining precisely when any portion of the harm occurred, it is usually impossible to break down the harm into distinct time periods and assign responsibility for each time period to any particular policy period.

The long-term, indivisible nature of pollution damage inevitably leads to the question of environmental insurance allocation: given enormous cleanup costs and many insurers who are obligated to cover those costs, how should those costs be allocated among the insurers? Many states' courts have confronted the issue,¹⁴ and two possible answers have emerged. Some courts hold that the total loss must be divided proportionally among all insurers that covered the risk, and that the insured must recover separately from each insurer (the "pro

(Or. Ct. App. 1992), *rev. denied*, 843 P.2d 454 (Or. 1992). Moreover, because pollution migrates from soils and causes ongoing water contamination, CGL policies cover remediation of the polluting soils in order to prevent further pollution of the waters. *See St. Paul Fire*, 870 P.2d at 266 n.10 ("[T]he pollution to the soil is . . . inextricably linked to the pollution of the groundwater, for example having to clean the soil to prevent pollution to the water filtering through the soil."); *Olds-Olympic, Inc. v. Commercial Union Ins. Co.*, 918 P.2d 923, 928, 931 n.20 (Wash. 1996); *Boeing Co. v. Aetna Cas. & Sur. Co.*, 784 P.2d 507, 410 (Wash. 1990). Thus CGL policies are an invaluable source of funds for anyone responsible for cleaning up a contaminated site.

10. The Oregon DEQ's Orphan Site Program, funded in part by Oregon taxpayers, contributes to cleanups when the legally responsible party cannot pay for all of the cost of investigating and cleaning up a contaminated site. Oregon DEQ, Orphan Site Program, at <http://www.deq.state.or.us/wmc/cleanup/orp0.htm> (last visited Feb. 8, 2003). Landfill orphan site cleanups are an exception, paid for through a special fund created by taxes on solid waste disposal. OR. REV. STAT. § 459.311 (2001).

11. *See St. Paul Fire*, 870 P.2d at 265. "[A]ll that is required to trigger coverage is damage to property *during* the policy period." *Id.*

12. *Id.*

13. The "known loss" rule, which prohibits future insurance coverage for known past liabilities, has been interpreted by a federal court applying Oregon law to preclude future environmental coverage once the insured discovers the past damage. *City of Corvallis v. Hartford Accident & Indem. Co.*, No. CIV 89-294-JU, 1991 WL 523876, at *8 (D. Or. May 30, 1991).

14. Insurance is a matter of contract law that is resolved on a state-by-state basis.

rata” rule). Other courts conclude that the policyholder may recover fully from the policy or policies of its choice, up to the limits of each policy, after which the chosen insurer(s) may seek contribution from other insurers (the “all sums” rule).

In Oregon, the allocation question remains unsettled. Oregon’s appellate courts have yet to face the question of environmental insurance allocation. The consequences of this gap in our case law are enormous—policyholders and insurers litigate the allocation issue time and time again, and in the process delay cleanups by months or years and consume funds that could be used more efficiently for remediation.¹⁵ Although the lack of a rule harms both policyholders and insurers, it also injures the Oregon public, as contaminated sites continue to threaten the health of Oregonians and our environment. Last, the lack of a clear rule also clogs Oregon courts and strains judicial resources. Judges recognize that the allocation issue is the most important unanswered question in environmental insurance law¹⁶ and, not surprisingly, it is often litigated.

Part II of this Article explains the all sums and pro rata approaches. Part III explores the legal and equitable analysis underlying the pro rata and all sums rules as developed by courts outside of Oregon. Finally, Part IV analyzes relevant Oregon law, and Part V concludes that existing Oregon insurance and contract law requires the adoption of the all sums rule, and that equitable concerns also favor all sums allocation.

15. *See Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 993 (N.J. 1994); *see Bass, supra* note 8.

16. A former Oregon Multnomah County Circuit Court judge who presided over several complex insurance cases has called the allocation question the most important environmental insurance question today. Judge William J. Keyes, Presentation at Ball Janik LLP, Portland, Oregon (Sept. 24, 2002).