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PRIVATE COST RECOVERY ACTIONS, INSURANCE CLAIMS AND THE MISSOURI UNDERGROUND STORAGE TANKS FUND[©]

by Sheldon D. Korlin

It can be very costly to remediate petroleum contamination. Often, more than one release event triggered the cleanup. At some properties, there has been more than one owner or operator of the underground storage tanks ("USTs"). The question for the UST owner or operator is how to recover some or all of the money spent to clean up the property.

I. PRIVATE COST RECOVERY ACTIONS

The environmental laws governing these types of claims are new when compared with other laws. Broadly speaking, there are four different types of claims: 1) Express Statutory Claim for Contribution or Indemnity; 2) Statutory Citizen Suits; 3) Implied Claims; and 4) Common Law Claims. Determining the proper parties and claims depend upon the particular facts of that site.

A) Federal Causes of Action

1) *CERCLA and The Petroleum Exclusion*. The Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"),² expressly recognizes the right

of a private party to bring a cost recovery action for contribution against another "potentially responsible party" ("PRP").³ To recover "response costs" from another PRP, a private party must show they incurred response costs because of a release or threatened release of "hazardous substances" and that the costs incurred were both necessary and consistent with the National Contingency Plan ("NCP").⁴ The term "hazardous substances" is defined in the statute and the regulations.⁵ Gasoline is produced from individual chemicals which are listed as hazardous substances in the regulations. But, CERCLA's definition of "hazardous substance" contains a "petroleum exclusion." The last sentence of the CERCLA "hazardous substance" statutory definition states:

the term ["hazardous substance"] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this

paragraph...⁶

Federal courts have interpreted this to mean that even waste oil cleanups are excluded unless it can be shown that the hazardous substances found in the oil or contaminated soils exceed the levels at which the substances might be mixed with oil during the refining process.⁷ Two Eastern District of Missouri cases indicated that when oil is mixed with other hazardous substances (e.g., PCBs) the petroleum exclusion does not apply and the mixture is to be treated as a hazardous substance.⁸ In *Portsmouth Redev. and Hous. Auth. v. BMI Apartments Assocs.*,⁹ the Court ruled, on a motion to dismiss, that CERCLA's petroleum exclusion did not apply to a complaint seeking cleanup of a site allegedly contaminated with "petroleum hydrocarbons" where other pleadings in the record asserted that contaminants at the site were not limited to petroleum hydrocarbons and it could not be determined whether petroleum hydrocarbons at the site were present at levels which would bring them within the scope of the exclusion.

The petroleum exclusion does not include petroleum with contaminants added to the oil through use.¹⁰ Courts will not entertain any actions based solely upon the levels of hazardous substances found in petroleum products as a result of the ordinary refining processes.¹¹ But in *Cose v. Getty Oil Co.*,¹² the Court found that crude oil tank bottoms containing chrysene (a listed CERCLA hazardous substance) are not petroleum and, therefore, not within CERCLA's petroleum exclusion even though Chrysene is indigenous to petroleum and present as a result of the petroleum release. Relying on its prior definition of "petroleum" in *Wilshire*

1 Copyright, 1994, Sheldon D. Korlin, Attorney at Law, St. Louis, Missouri.

2 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

3 42 U.S.C.A. § 9607(a) (1988); 42 U.S.C. § 9613(f)(1) (1988).

4 42 U.S.C. § 9607(a)(4)(B). See *General Elec. v. Litton*, 920 F.2d 1415, 1419-1420 (8th Cir. 1990), cert. denied, 111 S.Ct. 1390 (1991).

5 42 U.S.C. § 9601(14) and 40 C.F.R. § 302.4 (1993).

6 42 U.S.C. § 9601(14).

7 *Bunger v. Hartman*, 797 F.Supp. 968, 971-972 (S.D. Fla. 1992); *Mid Valley Bank v. North Valley Bank*, 764 F.Supp. 1377, 1384, 1386-87 (E.D. Cal. 1991); *Nlecko v. Emro Mktg. Co.*, 769 F.Supp. 973, 978 (E.D. Mich. 1991), aff'd, 973 F.2d 1296 (1992).

8 *United States v. Mexico Feed and Seed Co., Inc.*, 729 F.Supp. 1250 (E.D. Mo. 1990); *United States v. Bliss*, 667 F.Supp. 1298 (E.D. Mo. 1987).

9 827 F.Supp. 354, 356 (E.D. Va. 1993).

10 *United States v. Western Processing Co., Inc.*, 761 F.Supp. 713 (W.D. Wash. 1991) (waste oil from rinsing and cleaning oil tanks that contains nickel and chromium oxides in the tank's interior is not within the petroleum exclusion); and *United States v. Alcan Aluminum Corp.*, 755 F.Supp. 531, 539 (N.D. N.Y. 1991) (petroleum exclusion does not cover contaminants added to oil through use).

11 *City of New York v. Exxon Corp.*, 766 F.Supp. 177, 186 (S.D. N.Y. 1991); and *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801 (9th Cir. 1989).

12 23 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 21335 (9th Cir. 1993).

Westwood Associates,¹³ the Ninth Circuit concluded that since tank bottoms settle out of crude oil prior to the refining process they are never subjected to the refining processes as the petroleum definition requires.¹⁴ It also found that tank bottoms are not used for producing useful products and are simply discarded.¹⁵

2) *Resource Conservation Recovery Act*. The Resource Conservation and Recovery Act ("RCRA")¹⁶ governs the storage, treatment and disposal of solid and hazardous wastes. RCRA contains a citizen's suit provision which allows a private party to maintain an injunctive action to compel another person or entity to comply with the requirements of RCRA and its regulations if the regulatory agencies do not.¹⁷ The Statute requires 90 days written notice to EPA, the State and the alleged violators prior to filing suit.¹⁸ The RCRA citizen suit provision can be used against any past or present generator, transporter, owner or operator who contributed or is contributing to the past or present handling, storage, treatment or disposal or any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.¹⁹ Under RCRA, oil, gasoline and other petroleum products may be treated as hazardous or solid waste when they enter the soil or groundwater because even virgin oil or gasoline is incapable of being reused for

any useful purpose once it has mixed with the soil or the groundwater.²⁰ In *Zands v. Nelson*,²¹ the Court held that leaked gasoline is no longer a useful product when mixed with the soil and becomes solid waste for purposes of a RCRA citizen's suit action.²²

To prevail on a RCRA citizen's suit, a claimant must show an imminent and substantial endangerment to public health or the environment. CERCLA has an identical provision under its abatement authority of 42 U.S.C. § 9606. Some courts have construed these provisions more liberally than public nuisances.²³ The endangerment or potential endangerment does not have to be an emergency situation.²⁴ An endangerment may be "imminent" without any actual harm if the conditions giving rise to the potential endangerment are present.²⁵ The term "substantial endangerment" may not require quantitative proof of actual harm. According to one Missouri District Court, "an endangerment is substantial if there is reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or threatened release of a hazardous substance if a remedial action is not taken, keeping in mind protection of the public health, welfare and the environment is of primary importance."²⁶ It may still be an imminent and substantial endangerment even if cleanup activities have begun.²⁷ A RCRA citizen suit may not even be barred under 42

U.S.C. § 6972(b)(2)(B) or (C) where 1) the cleanup efforts have begun and 2) the EPA monitored replacement of a leaking pipeline to ensure no further leakage occurred and the state waived a water discharge requirement to help the responsible party facilitate and expedite the cleanup.²⁸

RCRA's language does not prohibit the assertion of damage claims. However, under RCRA, the argument for existence of an implied cause of action for private parties to recover damages is undercut because if Congress had intended such an action to exist, it could have expressly included such a provision. At least one court has refused to allow a private party action for recovery of legal damages.²⁹

B) Missouri Statutory Claims

1) *Missouri Hazardous Substance Emergency Response Act ("HSERA" or "Spill Bill")*. The Missouri Hazardous Substance Emergency Response Act³⁰ is similar to the federal CERCLA statute prior to the 1986 amendments. HSERA is written in the present tense and does not address past conduct or ownership. HSERA's definition of "hazardous substance" is more inclusive than CERCLA's definition. It includes "any substance or mixture of substances that presents a danger to the public health or safety or the environment . . ."³¹ Missouri regulations define waste oil as a hazardous sub-

13 881 F.2d 801 (9th Cir. 1989).

14 23 *Env'tl. L. Rep.* (Env'tl. L. Inst.) at 21337.

15 23 *Env'tl. L. Rep.* (Env'tl. L. Inst.) at 21337-21338. The U.S. v. Western Processing Co. case reached a similar conclusion, 761 F.Supp. at 721.

16 42 U.S.C. § 6901-6992k (1988 & Supp. V 1993).

17 42 U.S.C. § 6972.

18 42 U.S.C. § 6972(b).

19 42 U.S.C. § 6972(a)(1)(B).

20 42 U.S.C. § 9603 (definitions of "hazardous waste" and "recovered material").

21 779 F.Supp. 1254, 1262 (S.D. Cal. 1991).

22 *Id.*; See also *Pantry Inc. v. Stop-N-Go Foods, Inc.*, 796 F.Supp. 1171 (S.D. Ind. 1992) (when petroleum leaked from USTs without a permit, the petroleum products were waste under Kentucky statute). See also *Dominick's Finer Foods, Inc. v. Amoco Oil Co.*, 1993 WL 524,808, No. 93C-4210 (N.D. Ill. Dec. 17, 1993) (gasoline, fuel oil and waste oil leakage from USTs constitute disposal of solid waste for which a citizen suit may be brought under RCRA § 7002(a)(1)(B)).

23 *Middlesex County Bd. of Chosen Freeholders v. New Jersey Dep't of Env'tl. Protection*, 645 F.Supp. 715 (D. N.J. 1986).

24 *United States v. Conservation Chem. Co.*, 619 F.Supp. 162, 193 (W.D. Mo. 1985); *B.F. Goodrich Co. v. Murtha*, 697 F.Supp. 89, 95 (D. Conn. 1988).

25 *Conservation Chemical Company*, 619 F.Supp. at 193; *United States v. Northeastern Pharmaceutical and Chem. Co.*, 579 F.Supp. 823, 846 (W.D. Mo. 1984).

26 *Conservation Chemical Company*, 619 F.Supp. at 194.

27 *Paper Recycling Inc. v. Amoco Oil Co.*, No. 1:91-CV-3123-RHH slip op. (N.D. Ga. Aug. 23, 1993) (Not reported).

28 *Paper Recycling Inc.*, *supra* note 27.

29 *Walls v. Waste Resource Corp.*, 761 F.2d 311, 316 (6th Cir. 1985).

30 Mo. Rev. Stat., § 260.500-260.550 1983.

31 Mo. Rev. Stat. § 260.500(5).

stance.³² For purposes of HSERA, waste oil is a hazardous substance. HSERA also defines a "hazardous substance" to include any release of petroleum, including crude oil or any fraction of crude oil, in excess of fifty gallons.³³

HSERA applies to "any person [having control over] a hazardous substance . . . when a hazardous substance emergency occurs."³⁴ This means the owner of the hazardous substance or anyone operating under a lease, contract or "other agreement with the legal owner thereof." HSERA does not contain an express right for a private party cause of action.

The pre-1986 CERCLA allowed for strict liability to the government but did not address whether PRPs were jointly and severally liable and did not expressly authorize a private party cause of action. (Compare with § 260.530 RSMo.) Some early court decisions under CERCLA found that joint and several liability should be imposed where the harm is indivisible.³⁵ In *City of Philadelphia v. Stepan Chem. Co.*,³⁶ the District Court permitted the City of Philadelphia to maintain an action to recover the City's cleanup costs against entities which illegally dumped hazardous industrial waste on the city property.³⁷ The Court relied on the lack of prohibitive language and the language of § 9607(a)(4)(B) which permitted the recovery of other necessary response costs incurred "by any other person" and not just the

federal or state government.³⁸

HSERA lacks language similar to 42 U.S.C. § 9607(a)(4)(B) of CERCLA but the reasoning and logic to allow such private party suits seems equally applicable to HSERA. The lack of prohibitive language concerning private party actions also applies to HSERA. There is no reported decision on the issue of whether an action for contribution is implied in the terms of HSERA.

2) *Contribution*. The Missouri Contribution Statute provides for contribution between joint tortfeasors.³⁹ Where the Missouri Department of Natural Resources ("DNR") could potentially hold a private owner liable for petroleum contamination but only obtained a judgment against the current owner or operator, the current owner or operator should consider whether the contribution statute might apply. Illinois courts have upheld the use of Illinois' contribution statute as a basis for seeking contribution for cleanup costs.⁴⁰

3) *Waste*. "Waste" is lasting damage to a reversionary interest in property for the destruction of land by a tenant for life or years.⁴¹ The common law waste action is codified at §§ 537.420 to 537.510 RSMo. The Missouri statute provides that any tenant for life or years who commits waste will lose the thing wasted and pay treble damages.⁴²

Under the statute, a month-to-month tenant is not liable. But under the common law every tenant is liable for voluntary waste.⁴³

Voluntary waste is different from permissive waste because it consists of some action by a tenant which directly damages the property.⁴⁴ It is unclear whether the Missouri statute abolished the distinction but the *Lustig* court stated that it found no reason in either the law or public policy to impose it.⁴⁵

C) Common Law Claims

1) *Strict Liability*. A person may be strictly liable for damages when the damages arise out of some activity which is unduly dangerous and inappropriate to the place maintained in light of the surrounding circumstances.⁴⁶ Current owners have used this theory against prior owners who have abandoned hazardous materials on a theory that the disposal of hazardous waste is an ultrahazardous activity for which the disposers should be held strictly liable.⁴⁷ Also, some courts have ruled that the storage of gasoline in residential neighborhoods is an ultrahazardous activity justifying the imposition of strict liability for the tank's cleanup.⁴⁸

2) *Public Nuisance*. Public nuisance is an unreasonable interference with the common community rights such as the public health, safety, peace, morals or convenience.⁴⁹ Normally, a public nuisance is brought by an attorney general or prosecuting attorney. A private party may recover for public nuisance where the private party suffers some special or peculiar damage differing in kind, and not merely in degree, from

32 Mo. CODE REGS. tit. 10, § 25-11.010 (1993).

33 Mo. Rev. Stat. § 260.500(6)(b).

34 Mo. Rev. Stat. § 260.500(8).

35 See e.g. *United States v. Chem-Dyne*, 572 F.Supp. 802, 811 (S.D. Ohio 1983); *United States v. Wade*, 577 F.Supp. 1326, 1337-38 (E.D. Pa. 1983).

36 544 F.Supp. 1135, 12 *Env't. L. Rep.* (Env't. L. Inst.) 20915, 20917 (E.D. Pa. 1982).

37 *City of Philadelphia*, 12 *Env't. L. Rep.* at 20916, 20917.

38 *Id.* at 20917.

39 Section 537.060, RSMo 1988.

40 *People v. Brockman*, 550 N.E. 2d 222 (Ill. 1990).

41 *Profitt v. Henderson*, 29 Mo. 325 (1860).

42 Section 537.420, RSMo 1986.

43 *Boefer v. Sheridan*, 42 Mo. Ct. App. 226 (1890).

44 *Lustig v. U.M.C. Indus., Inc.*, 637 S.W.2d 55, 59 (Mo. Ct. App. 1982).

45 *Lustig*, 637 S.W.2d at 60.

46 *Bennett v. Mallinckrodt Inc.*, 698 S.W.2d 854, 868-869 (Mo. App. 1985), *cert. denied*, 476 U.S. 1176 (1986). Compare *Dominick's Finer Foods, Inc. v. Amoco Oil Co.*, 1993 WL 524,808, No. 93C-4210 (N.D. Ill. Dec. 17, 1993) (Operating a gas station and bulk petroleum storage facility in a commercial area is not an abnormally dangerous activity and does not trigger strict liability under Illinois law).

47 *Jersey City Redev. Auth. v. PPG Indus., Inc.*, 866 F.2d 1411 (not published), 17 *CHEM. LIT. REP.* 626 (3rd Cir. 1988).

48 *Yommer v. McKenzie*, 257 A.2d 138 (Md. 1969); *Siegler v. Kuhlman*, 502 P.2d 1181 (Wash. 1972), *cert. denied*, 411 U.S. 983 (1973); *City of Northglenn, Colo. v. Chevron U.S.A., Inc.*, 519 F.Supp. 515, 516 (D. Colo. 1981).

49 *City of Lee's Summit v. Browning*, 722 S.W.2d 114, 115 (Mo. Ct. App. 1986).

the general injury to the public.⁵⁰ A party may recover compensatory damages and punitive damages if a nuisance is knowingly and willfully maintained.⁵¹ The measure of damages is the diminution and value of property for damage caused by the public nuisance.

3) *Private Nuisance*. Private nuisance is the unreasonable, unusual or unnatural use of one's property such that it substantially impairs the right of another to the peaceful and quiet enjoyment of their property.⁵² Whether a particular use is an unreasonable invasion of another's use and enjoyment must be determined from the facts in each case.⁵³ The damages in a nuisance action depend upon whether the nuisance is deemed temporary or permanent. The character of the injury source, not the character of the injury itself, determines whether a nuisance is temporary or permanent.⁵⁴ A nuisance is temporary if it can be abated, and permanent if abatement is impractical or impossible.⁵⁵ Damages for permanent nuisance are measured by the difference in the land's market value immediately before and after the injury.⁵⁶ Damages for a temporary nuisance include the decrease in rental or usable value of the property during the injury.⁵⁷ Properly pleaded special damages may be recoverable in a nuisance action.⁵⁸ Punitive damages may be recoverable if the

nuisance is knowingly or willfully maintained.

4) *Trespass*. Trespass is a direct physical interference with the property of another.⁵⁹ Trespass actions are closely related to nuisance actions. The distinction is that a trespass involves a physical invasion onto the landowner's property.⁶⁰ A trespasser is liable for damages caused by the trespass regardless of whether the trespasser acted in good faith with reasonable care, acted in ignorance of the landowner's rights or acted under a misstatement of law or fact.⁶¹ Damages are measured as the cost of restoration of the property.⁶²

To recover, as in negligence, a plaintiff must show that an adjacent property owner or prior occupant 1) had a duty to protect the plaintiff from injury; 2) failed to perform that duty; and 3) that an injury to the plaintiff resulted from the failure.⁶³ The duty of care arises when there is a foreseeable likelihood that the particular acts or omissions will cause the injury.⁶⁴ The duty of care can also be shown by the existence of a statutory law or the existence of a duty at common law.⁶⁵

5) *Breach of Warranty, Contract or Lease*. Under this theory, the purchase agreement, deed, or written leases should be reviewed to determine if there is a potential breach of the obligations of the contract or warranties and covenants made in the agreement. These types of claims might be

brought against prior owners or current or prior tenants.

6) *Fraud and Misrepresentation*. This type of claim might be brought by a current owner against a former owner alleging a misrepresentation as to the condition of the property. This may take the form of an allegation of fraudulent concealment.⁶⁶ To prove fraudulent concealment, the current owner must demonstrate 1) deliberate concealment or nondisclosure by the seller, 2) of a material fact or defect which was not readily observable to the purchaser, and 3) that the buyer relied upon the seller to his detriment.⁶⁷ In Missouri, silence can be an act of fraud where matters are not as they appear and a true state of affairs is not discoverable by ordinary diligence.⁶⁸

II. INSURANCE CLAIMS

A) *Private Insurance* These claims usually arise under comprehensive general liability insurance policies ("CGLs") or, more recently, under environmental impairment liability policies ("EILs"). The policy terms of CGLs and EILs are generally standardized across the companies which insure such risks through use of ISO policy forms.

Some of the key provisions in policies issued by the private insurance companies include the coverage description, the exclusions to coverage from environmental re-

50 *Grommet v. St. Louis County*, 680 S.W.2d 246, 251-252 (Mo. Ct. App. 1984).

51 *Maryland Heights Leasing, Inc. v. Mallinckrodt Inc.*, 706 S.W.2d 218, 222 (Mo. Ct. App. 1985).

52 *Davis v. J.C. Nichols Co.*, 714 S.W.2d 679, 684 (Mo. Ct. App. 1986).

53 *Racine v. Glendale Shooting Club, Inc.*, 755 S.W.2d 369, 372 (Mo. Ct. App. 1988); *Chaveriat v. Williams Pipeline Co.*, 11 F.3d 1420, 24 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20217 (7th Cir. 1993) (Prior owner of a petroleum carrying pipeline is not liable for nuisance damages from a 1944 leak of unleaded gasoline under the plaintiff's land).

54 *Racine*, 755 S.W.2d at 374.

55 *Maryland Heights Leasing, Inc.*, 706 S.W.2d at 222.

56 *Frank v. Environmental Sanitation Mgmt, Inc.*, 687 S.W.2d 876, 883 (Mo. 1985).

57 *Id.*

58 *Maryland Heights Leasing*, 706 S.W.2d at 222.

59 *Looney v. Hindman*, 649 S.W.2d 207, 212 (Mo. 1983).

60 *Maryland Heights Leasing*, 706 S.W.2d at 226.

61 *Crook v. Sheehan Enters., Inc.*, 740 S.W.2d 333, 336 (Mo. Ct. App. 1987).

62 *Id.*

63 *Maryland Heights Leasing*, 706 S.W.2d at 223.

64 *Id.*

65 *Maryland Heights Leasing*, 706 S.W.2d 218.

66 *See Niecko v. Emro Mktg Co.*, 973 F.2d 1296, 1302 (6th Cir. 1992). *See also Braswell Shipyards, Inc. v. Beazer East, Inc.*, 2 F.3d 1331, 24 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,132 (4th Cir. 1993) (negligent nondisclosure claim under South Carolina law).

67 *Niecko*, 973 F.2d at 1302.

68 *Bayne v. Jenkins*, 593 S.W.2d 519, 529 (Mo. 1980).

lease occurrences, and the qualified exclusions for damage to property owned, occupied by or rented to the insured. Also, the definitions of "occurrence" and "property damage" can become important in an insurance coverage dispute. The qualified environmental release exclusion was rewritten to delete coverage of "sudden and accidental" release events. This absolute exclusion is now contained in nearly all CGL and EIL policies since approximately 1986. Early policies were written on an "occurrence" basis. More recent policies are written on a "claims-made" basis which generally require the claim to be made during the policy period and a short grace period.

B) Missouri UST Insurance Fund

In 1989 Missouri created the "Underground Storage Tank Insurance Fund" ("UST Insurance Fund") within the State Treasury.⁶⁹ The UST Insurance Fund is administered by the Director of the Department of Natural Resources.⁷⁰ The Missouri UST Insurance Fund is issued and written on a claims-made basis.⁷¹ Its coverage applies to bodily injury, "property damage," or "environmental damage" caused by a "pollution incident" that commenced after the stated date of coverage in the policy. Because of its purpose, the "pollution incident" must arise from a leaking petroleum UST or its connected piping or from a surface spill, overflow or release. Applications to participate in the insurance fund were not accepted until late spring and early summer of 1992 and the first tanks were not accepted until approximately the fall of 1992.

For an pre-existing tank to be eligible to participate in the UST Insurance Fund, the

owner/operator had to pay their \$100 per tank registration fee prior to December 31, 1989. The owner/operator of tanks coming into existence after August of 1989 had to pay their \$100 fee within thirty days of coming into use. The actual insurance premium is based upon the use, age and condition of the tanks.⁷²

In addition to premiums, there is an annual participation fee ranging between \$100 and \$200.⁷³ The fee varies based upon the type of construction and the extent to which existing tanks and new tanks meet upgrading and new construction requirements. An application is required for each facility wishing to participate in the UST Fund.⁷⁴ To participate, the applicant must demonstrate that they meet the financial responsibility requirements of 10 C.S.R. § 20-11.090 to 20-11.094 for the first \$25,000 in cleanup costs, compliance with the technical performance standards; and proof of the integrity (lack of leaking) of the tanks to be participating in the fund.⁷⁵ The DNR reviews the applications for completeness and accuracy within thirty days. It must notify the applicant of the status of its application within thirty days of receipt.⁷⁶ They must respond in writing to all the applications.⁷⁷ There is no time limit provided for final review and decision of the insurance application. Proof of integrity can be provided by a number of methods listed in 10 C.S.R. § 20-12.050.

The insurance fund provides coverage of \$1,000,000 per occurrence or \$2,000,000 aggregate per year.⁷⁸ The insurance fund does not pay until after the payment of the first \$25,000 by the tank

owner or operator. The fund also provides coverage for third-party claims for bodily injury or property damage caused by leaking USTs. Coverage for third-party bodily injury is \$100,000.00 per occurrence. The UST Insurance Fund compensates for property damage only to the extent required to contain and clean up a release. It does not compensate for intangible losses including interruption of business, pain and suffering, lost income, mental distress or punitive damages.⁷⁹

The claims procedure is set out in 10 C.S.R. § 20-12.060 to 20-12.062. Claims are subject to the availability of funds, limited by the coverage limits and the availability of money in the UST Insurance Fund. Cleanup costs are given priority over third-party damage claims.⁸⁰ Cleanup costs must be determined by the lowest responsive written bid and approved by the Department prior to the contract award.⁸¹

In order to obtain coverage the Department must be notified of the release within twenty-four hours of the time of discovery and the claimant must demonstrate that the incident response was properly carried out in an orderly fashion. This includes initial control of the release, subsequent investigation of the extent and magnitude of the release and development and implementation of an appropriate and cost effective corrective action plan. Eligible costs are listed in the regulation, and include the costs of excavation, transportation, treatment and disposal of contaminated soils; costs associated with implementation of an approved corrective action plan; cost of sample collection, preservation, transportation and analysis; cost of

69 Mo. Rev. Stat. § 319.129, Supp. 1993. For more information, contact the Missouri Underground Storage Tank Insurance Fund at (712) 252-5137.

70 Mo. Rev. Stat. § 319.129.4, Supp. 1993. Note that emergency and final rules to implement the operation of the insurance fund were not effective until April and May of 1992.

71 See Mo. Rev. Stat. § 319.129 Supp. 1993.

72 See Mo. CODE REGS. tit. 10, § 20-12.010- (1993).

73 Mo. CODE REGS. tit. 10, § 10-12.030 (1993).

74 Mo. CODE REGS. tit. 10, § 20-12.040(5) (1993).

75 Mo. CODE REGS. tit. 10, § 20-12.040(2)-(4) (1993).

76 Mo. CODE REGS. tit. 10, § 20-12.045(4) (1993).

77 Mo. CODE REGS. tit. 10, § 20-12.045(2) (1993).

78 Mo. Rev. Stat. § 319.131.4 Supp. 1993.

79 Mo. Rev. Stat. § 319.131.5 Supp. 1993.

80 Mo. CODE REGS. tit. 10, § 20-12.060(1)(C)(3) (1993).

81 Mo. CODE REGS. tit. 10, § 20-12.060(3)(B) (1993).

site investigation and corrective action performed in accordance with the UST site investigation and corrective action regulations and the DNR guidance documents, and cost of professional services required for proper performance of the investigation corrective action plan and properly invoiced.⁸² The UST Insurance Fund will also pay for restoring off-site impacts from the release or cleanup to the extent necessary.⁸³ The UST Insurance Fund does not pay for the costs of excavating, cleaning, disposing or transporting leaking USTs nor for the cost for excavating, transporting, treating nor disposing of uncontaminated soils except for the amount of soils necessary to expose the contamination.

Though not provided for in the statute or regulations, the policies issued by the Missouri UST Fund set a retroactive date in 1992 starting with the day the facility was accepted into the Insurance Fund. This practice may conflict with the implication of § 319.129.2 RSMo, which inferred that costs for responding to leaking USTs which were registered and paid their participation fee after August 28, 1989 would be covered by the UST Insurance Funds.

The Missouri UST Insurance Fund is a "claims made" insurance policy requiring that claims be entered within six months of the termination coverage period. The policy also requires approval by the DNR or its representatives before cleanup costs can be incurred which obligate the UST Insurance Fund. Unlike some of the private insurance companies, the Missouri UST Insurance Fund does allow payment of cleanup costs for environmental damage required under statu-

tory authority governed by the United States, State of Missouri, or its political subdivisions. Many private insurance companies require an actual civil suit, and in some cases a judgment, before they will agree that coverage for cleanup damages properly lies.

The State of Missouri has no obligations under the Insurance Fund. It is separately operated from the State Funds.

III. COVERAGE ISSUES

A) Has an "occurrence" taken place?

Post-1973 policies define "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 of the insured." The litigation of this provision has focused on the "neither expected nor intended" clause. Insurers take the position that a series of events of the same nature (e.g., leaks or spills) makes the resulting injury or damage "expected or intended" by the insured so that the insurance company has no duty to defend or indemnify under its policy.

Courts differ on their interpretation of this standard. Some have used an objective "knew or should have known" standard to hold that there is no coverage when the insured knew or should have known that its behavior was causing or would have caused environmental damage.⁸⁴ Other courts use a "substantial probability" test which requires the insurance carrier to show facts indicating a substantial probability or substantial certainty by the insured that off-site pollution would occur as a result of the insured's actions.⁸⁵ Other courts have held

that even intentional acts by the insured may be covered if the insured did not intend the resulting damage.⁸⁶

Policyholders which have taken some action to prevent the eventual environmental damage may be able to successfully preserve their coverage in response to a "neither expected nor intended" defense raised by the insurance carrier.⁸⁷ An insured which has maintained conditions at its business which it knew was or was likely to be causing bodily injury or property damage to its neighboring landowners or its employees is least likely to prevail when a "neither expected nor intended" defense is raised.⁸⁸

B) When Is Coverage Triggered?

Because CGL and EIL policies provide coverage for bodily injury or property damage that "occur" during the policy period, the issue is what event or events must take place during the policy period in order to obligate the insurance carrier to defend and indemnify the policyholder on a claim. In pollution coverage cases, including leaking UST cases, this is difficult to determine because if a leak commenced and continued over time, the effects of the leak and, therefore, the leak itself may not be discovered for many years. The facts alleged or proven in these claims are critical with respect to determining the insurance coverage issues.

Courts have developed at least four different explanations of when damage occurs for purposes of triggering insurance coverage. The first explanation is a "continuous trigger" approach. It first arose in litigation concerning latent injuries from asbestos exposure in *Keene Corp. v. Insurance Co. of N. Am.*,⁸⁹ where the Court held

82 Mo. CODE REGS. tit. 10, § 20-12.061(7)(A)-(E) (1993).

83 Mo. CODE REGS. tit. 10, § 20-12.061(7)(F) (1993).

84 *Summit Assocs., Inc. v. Liberty Mut. Fire Ins. Co.*, 550 A.2d 1235, 1239 (N.J. Super. 1988); and *Riehl v. Travelers Ins. Co.*, 772 F.2d 19, 24 (3rd Cir. 1985) (applying Pennsylvania Law).

85 *New Castle County v. Hartford Acc. & Indem. Co.*, 685 F.Supp. 1321 (D. Del. 1988) (applying Delaware law); *United States v. Conservation Chem. Co.*, 653 F.Supp. 152 (W.D. Mo. 1986) (applying Missouri law); and *County of Broome v. Aetna Cas. & Sur. Co.*, 540 N.Y.S.2d 620 (N.Y. App. Div. 1989).

86 *Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146 (2d Cir. 1989) (applying New York law); *Aetna Cas. & Surety Co. v. General Dynamics Corp.*, 783 F.Supp. 1199 (E.D. Mo. 1991); *Peppers Steel & Alloys, Inc. v. United States Fidelity & Guar. Co.*, 668 F.Supp. 1541 (S.D. Fla. 1987) (applying Florida law); *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991).

87 *New Castle County v. Hartford Accident and Indem. Co.*, 685 F.Supp. 1321 (D. Del. 1988); and *United States Fidelity & Guar. Co. v. Thomas Solvents Co.*, 683 F.Supp. 1139 (W.D. Mich. 1988) (applying Michigan law).

88 *American Motorists Ins. Co. v. General Host Co.*, 946 F.2d 1482 (10th Cir. 1991).

89 667 F.2d 1034 (D.C. Cir. 1981), cert. denied 455 U.S. 1007 (1982).

that all policies from the first exposure until manifestation of the injury were jointly and severally obligated to provide coverage.⁹⁰ It was also adopted in the *Asbestos Insurance Coverage Cases*.⁹¹ Recently other courts adopted this approach in environmental claims cases where the damage is allegedly caused by continuous and progressive exposure to hazardous materials.⁹² Policyholders favor a continuous trigger theory as it maximizes potential insurance coverage.

Insurers favor a "manifestation" or "discovery" explanation of when coverage is triggered because it tends to minimize available insurance coverage. Under this explanation, no coverage is obligated until the damage is discovered or manifests itself. It is used in some first party property damage claims but has not been applied very often in third party claim situations because of difficulty in deciding what constitutes "manifestation" of the injury.⁹³

A third explanation provides that coverage under a liability insurance policy is triggered at the point in time when the environment was exposed to the damaging pollution.⁹⁴

A fourth explanation requires a factual showing, usually by the insured, that the property damage occurred during the relevant policy period.⁹⁵ Under the "injury in fact" theory each policy during which the

injury actually occurred may be triggered to provide coverage.

C) Qualified Pollution Exclusion

Commencing in the 1970's, most CGL policies added a qualified pollution exclusion provision that provides:

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

The debate over this clause is whether "sudden and accidental" is a restatement of the definition of "occurrence" or whether it is descriptive of the potentially triggering event in terms of time and how the event happened. One court held that the fact that different courts have reached different interpretations of the pollution exclusion clause meant that the exclusion was ambiguous as a matter of law.⁹⁶

Some courts believe that because "sudden" is capable of more than one meaning it

is ambiguous and should be construed against the insurance carriers and in favor of coverage.⁹⁷ Some courts which ruled that the pollution exclusion is ambiguous relied on the drafting history of the provision contained in materials authored by the insurance industry which indicate that the qualified pollution exclusion clause was intended as a clarification of the "occurrence" definition.⁹⁸

Other courts have ruled in favor of the insurance carriers and against coverage on the "sudden and accidental" issue. Generally, these courts conclude that the plain meaning of "sudden" should apply and therefore exclude coverage of any pollution which occurred over time as inconsistent with the exclusion.⁹⁹ Other cases upholding the exclusion focus on the nature of the polluting acts. These courts have upheld the exclusion when the disposal or pollution arises as part of the insured's regular business activity and, therefore, the pollution is not "accidental".¹⁰⁰

In recent years, CGL and EIL policies modified this exclusion and replaced it with the absolute exclusion. This modified exclusion drops the "sudden and accidental" clause and adds exclusionary language for costs for cleanup, investigation, detoxification, monitoring and other similar costs. So far, most courts considering this provision have upheld it as clear and unambiguous.¹⁰¹ However, a few courts have either found the

90 *Keene Corp.*, 667 F.2d at 1045-1046.

91 JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 1072, CALIFORNIA SUPERIOR COURT, SAN FRANCISCO COUNTY, JUDGMENT AND STATEMENT OF REASONS FOR DECISIONS (All Phases) (Jan. 29, 1990) reported in MEALEY'S LITIGATION REPORTS - INSURANCE (Feb. 27, 1990 Supp.).

92 *Broderick Inv. Co. v. Hartford Acc. & Indem. Co.*, 742 F.Supp. 571 (D. Colo. 1989); *New Castle County v. Continental Cas. Co.*, 725 F.Supp. 800 (D. Del. 1989). Compare also *Montrose Chem. Corp. v. Canadian Universal Ins. Co.*, No. 5024390 (Cal. Nov. 22, 1993).

93 *Maryland Cas. Co. v. W.R. Grace & Co.*, 794 F.Supp. 1206 (S.D. N.Y. 1991); *Allstate Ins. Co. v. Quinn Constr. Co.*, 713 F.Supp. 35 (D. Mass. 1989).

94 *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir. 1988); *MAPCO Alaska Petroleum Inc. v. Central Nat'l Ins. Co. of Omaha*, 784 F.Supp. 1454 (D. Ala. 1991); and *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 662 F.Supp. 71 (E.D. Mich. 1987).

95 *United States v. Conservation Chem. Co.*, 653 F.Supp. 152 (W.D. Mo. 1986); *Triangle Publication Inc. v. Liberty Mut. Ins. Co.*, 703 F.Supp. 376 (E.D. Pa. 1989); *Centennial Ins. Co. v. Lumbermens Mut. Cas. Co.*, 677 F.Supp. 342 (E.D. Pa. 1987).

96 *Smith v. Hughes Aircraft Co. Corp.*, 783 F.Supp. 1222 (D. Ariz. 1991).

97 *New Castle County v. Hartford Acc. and Indem. Co.*, 933 F.2d 1162 (3rd Cir. 1991) (applying Delaware law); *Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686 (Ga. 1989); *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991).

98 *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 827 P.2d 1024, 1049 (Wash. Ct. App. 1992); *United States Fidelity & Guar. Co. v. Special Coatings Co.*, 535 N.E.2d 1071, 1077-78 (Ill. App. Ct. 1989); *Broadwell Realty Services, Inc. v. Fidelity & Cas. Co.*, 528 A.2d 76, 85 (N.J. Super. Ct. App. Div. 1987).

99 *Aetna Cas. & Sur. Co. v. General Dynamics Corp.*, 968 F.2d 707, 710 (8th Cir. 1992); *Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc.*, 938 F.2d 1423, 1425 (1st Cir. 1991) *reh'g. denied, cert. denied* 112 S.Ct. 969 (1992); *Northern Ins. Co. v. Aardvark Ass'n, Inc.*, 942 F.2d 189, 192 (3rd Cir. 1991); *Armotek Indus. Inc. v. Employers Ins. of Wausau*, 952 F.2d 756, 762 (3rd Cir. 1991) (meaning single abrupt event lasting only a short time).

100 *Bureau of Engraving, Inc. v. Federal Ins. Co.*, 5 F.3d 1175, 1177 (8th Cir. 1993) (applying Minnesota law); *Broderick Inv. Co. v. Hartford Acc. & Indem. Co.*, 954 F.2d 601, 604-5 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 189 (1992); *Liberty Mut. Ins. Co. v. Triangle Indus. Inc.*, 957 F.2d 1153, 1157 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 78 (1992) ("sudden and accidental" applies to discharge, not the damage); *American Motorists Ins. Co. v. General Host Corp.*, 946 F.2d 1489, 1490 (10th Cir. 1991).

101 *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1040 (7th Cir. 1992); *Park-Ohio Indus., Inc. v. Home Indem. Co.*, 975 F.2d 1215 (6th Cir. 1992).

"absolute exclusion" ambiguous and found in favor of coverage or found that a particular substance which caused the damage is not a "pollutant" as the term is defined in the policy.¹⁰²

D) The Owned, Rented, or Occupied Property Exclusion

Many policies contain an exclusion providing as follows: "This policy does not apply to...property damage to 1) property owned or occupied by or rented to the insured, 2) property used by the insured, or 3) property in the care, custody, or control of the insured or as to which the insured is for any purpose exercising physical control."

Some courts have limited the applicability of the exclusion in hazardous waste litigation.¹⁰³ Other courts refuse to apply the owned property exclusion when groundwater is contaminated because groundwater is not owned by the surface landowner.¹⁰⁴ Some courts have upheld the owned property exclusion where the waste contamination is confined to soils on the insured's own property.¹⁰⁵ One court has held that the term "water course or body of water" within the meaning of the exclusionary language in oil industry limitation endorsement to CGL policy includes groundwater.¹⁰⁶ In characterizing cleanup costs as legal or equitable damages, several courts have interpreted the term "damages" under Missouri law.¹⁰⁷

IV. CONCLUSION

While much depends upon individual factual circumstances, underground storage tank owners and operators may be able to recover some or all of the costs of corrective action at petroleum contaminated properties. CERCLA provides an express right of contribution. However, the "petroleum exclusion" in the CERCLA definition of hazardous substances may bar a private CERCLA cost recovery unless the leaked gasoline mixed with other hazardous substances.

A few courts have decided that petroleum and oil products are RCRA solid waste when mixed with soil. This means that some relief may be obtained under RCRA's citizen suit provisions. One hurdle is to fashion an acceptable remedy. At least one federal court declared that monetary damages are not available in a RCRA citizen suit. This means early notice to PRP's and providing them with an opportunity to participate in the corrective action process is important to obtaining a possible mandatory injunctive orders and other nonmonetary relief.

As occurred with the original CERCLA statute, an implied right to contribution may be found in the Missouri Hazardous Substance Emergency Response Act. Oil and gas would be a hazardous substance which may present a danger to the public health or

environment. There is no reported decision where a Missouri Circuit or Appellate Court has either considered or decided this issue. Other claims may exist under Missouri's contribution and waste statutes. Also different common law tort actions may exist to recover clean up costs for petroleum contaminated sites. Such tort action could vary based on the particular facts. Strict liability, nuisance and trespass claims have been pursued in other states.

Cost recovery efforts should pursue potential insurance coverage under comprehensive general liability or environmental impairment liability insurance policies. Insurance carriers strongly contest virtually every claim. Several major issues arise in pursuing these claims including disputes over when the triggering event or "occurrence" happened and whether such event was "sudden and accidental." Several other coverage and policy issues arise in these claims.

The uncertainty and highly contested nature of petroleum cost recovery efforts should be expected given the relative newness of the environmental laws. Some cases are worth greater effort and risk to affect a recovery than others. Each case should be evaluated and pursued based upon its individual facts and relative value to the potential plaintiff.

102 *Westchester Fire Ins. Co. v. City of Pittsburgh, Kansas*, 768 F.Supp. 1463 (D. Kan. 1991); *Titan Holdings Syndicate, Inc. v. City of Keene, N.H.*, 898 F.2d 265, 268-69 (1st Cir. 1990). 103 *Township of Glouster v. Maryland Cas. Co.*, 668 F.Supp. 394 (D. N.J. 1987); *Allstate Ins. Co. v. Quinn Constr. Co.*, 713 F.Supp. 35 (D. Mass. 1989) and *Bradwell Realty Servs., Inc. v. Fidelity & Cas. Co. of N.Y.*, 528 A.2d 76 (N.J. Super. Ct. 1987).

104 *United States v. Conservation Chem. Co.*, 653 F.Supp. 152, 199-201 (W.D. Mo. 1986); *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551 (9th Cir. 1991); and *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 997 F.2d 1023 (2d Cir. 1991).

105 *Western World Ins. Co. v. Dana*, 765 F.Supp. 1011 (E.D. Cal. 1991).

106 *MAPCO Alaska Petroleum, Inc. v. Central Nat'l Ins. Co. of Omaha*, 784 F.Supp. 1454 (D. Ala. 1991).

107 *Continental Ins. Co. v. Northeastern Pharmaceutical and Chem. Co. Inc.*, 842 F.2d 977 (8th Cir. 1988) (en banc) cert denied 488 U.S. 821 (1988) (applying Missouri law) (cleanup costs are "equitable damages and therefore not covered by CGL policy); *Parker Solvents Co., Inc. v. Royal Ins. Cos. of Am.*, 950 F.2d 57a (8th Cir. 1991) ("damages" does not include cleanup costs incurred as result of consent decree with EPA); *Aetna Casualty & Surety Co. v. General Dynamics Corp.*, 968 F.2d 707, 712 (8th Cir. 1992); and *Independent Petrochemical Co. v. Aetna Cas. & Sur. Co.*, 944 F.2d 940 (D.C. Cir. 1991) (applying Missouri law) (upholds term "damages" as including cleanup costs because term is not defined by policy and common understanding would include such costs); *Aetna Cas. & Sur. Co. Inc. v. Pintlar Corp.*, 948 F.2d 1507 (9th Cir. 1991) ("damages" in CGL is unambiguous and includes CERCLA response costs) (applying Idaho law); *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023 (2d Cir. 1991) (response costs for cleanup of gasoline leak constituted "damages" under CGL policy).