Insuring Against the Innovative Liabilities and Remedies Created by Superfund

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INTRODUCTION

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),[1] and in 1986, it enacted the Superfund Amendments and Reauthorization Act ("SARA").[2] Those enactments will be referred to together as Superfund. In addition to establishing a "Superfund" from which the costs of cleaning up hazardous substance releases can be paid,[3] the Superfund legislation also creates an innovative liability and remedial scheme. This scheme permits persons who lack the usual common law plaintiff's proprietary interest in the property harmed, and who have suffered no personal injury, to seek equitable relief from the party responsible for the release.[4] Liability and remedial provisions beyond those available at common law were necessary to accomplish the purposes of Superfund.[5] However, an examination of those provisions reveals that the very factors that make the stat-

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1. 42 U.S.C. §§ 9601-9657 (1985).

2. Pub. L. No. 99-499, 100 Stat. 1613 (1986), passed by the Senate on October 3, 1986, *see* 132 CONG. REC. S14,943 (daily ed. Oct. 3, 1986), and by the House on October 8, 1986, *see* 132 CONG. REC. H9634 (daily ed. Oct. 8, 1986). President Reagan signed SARA into law on October 17, 1986. Superfund Amendments and Reauthorization Act of 1986, President's Statement on signing H.R. 2005 into law, October 17, 1986, 22 WEEKLY COMP. PRES. DOC. 1412 (Oct. 27, 1986).

3. *See infra* notes 15-47 and accompanying text.

4. *See infra* notes 53-93, 166-82, 198-201 and accompanying text.

5. *See infra* notes 160-67, 200-01 and accompanying text.

ute valuable in addressing the problem of hazardous substance releases also place Superfund liability outside the scope of risks covered by commonly used liability insurance policies.[6] This consequence is particularly disturbing since many of the draftsmen of the original statute assumed that responsible parties could purchase private insurance against CERCLA liabilities and thus assure that funds would be available to pay for needed hazardous waste cleanup.[7] While SARA authorizes further study of the insurance problem[8] and thus acknowledges the unavailability of Superfund insurance, it leaves the liability and remedial scheme basically intact and fails to address the inherent uninsurability of Superfund's liability and remedial scheme. Moreover, many state environmental statutes have liability provisions similar to those of Superfund,[9] and any conclusions about the insurability of Superfund liabilities apply with equal force of those state statutes.

The purpose of this article is to analyze why the very aspects of the Superfund liability and remedial scheme that make it valuable in addressing hazardous substance releases also place it beyond the risks properly covered under currently used liability insurance poli-

6. *See infra* notes 243-79 and accompanying text. There has been a plethora of commentary concerning insurance against CERCLA liabilities, including: A Congressionally-authorized Treasury Department study group report, *see* U.S. DEP'T. OF TREASURY, ADEQUACY OF PRIVATE INSURANCE PROTECTION UNDER SECTION 107 OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980: A REPORT IN COMPLIANCE WITH SECTION 301(b) OF P.L. 96-510 (June 1983) [hereinafter FINAL TREASURY REPORT], which largely recapitulates an interim report prepared and submitted one year earlier, *see* U.S. DEP'T OF TREASURY, HAZARDOUS SUBSTANCE LIABILITY INSURANCE: A REPORT IN COMPLIANCE WITH SECTION 301(b) AND SECTION 107(k)(4)(A) of P.L. 96-510 (March 1982) [hereinafter INTERIM TREASURY REPORT]; Senate Committee hearings, *see Insurance Issues and Superfund: Hearing before the Committee on Environment and Public Works*, 99th Cong., 1st Sess. (1985) [hereinafter *Hearings*]; and law review commentary, *see, e.g.*, Committee on Business Management Liability Insurance, *Liability Insurance Against Environmental Damage: A Status Report*, 38 BUS. LAW. 217 (1982); Hadzi-Antich, *Coverage for Environmental Liabilities Under the Comprehensive General Liability Insurance Policy: How to Walk a Bull Through a China Shop*, 17 CONN. L. REV. 769 (1985); Hourihan, *Insurance Coverage for Environmental Damage Claims*, 15 FORUM 551 (1980); Jernberg, *Insurance for Environmental and Toxic Risks: A Basic Analysis of the Gap Between Liability and Coverage*, 34 FED. INS. COUNS. Q. 123 (1984). *See also* articles cited *infra* notes 283-84. However, very little attention has been paid to whether currently used liability policies do cover or should cover responsible parties for the innovative Superfund liabilities and remedies.

7. *See infra* notes 208-19 and accompanying text.

8. *See infra* note 224 and accompanying text.

9. For a summary of state statutes with liability provisions similar to those of CERCLA, *see* Hadzi-Antich, *supra* note 4, at 774-75; Zazzali & Grad, *Hazardous Wastes: New Rights and Remedies? The Report and Recommendations of the Superfund Study Group*, 13 SETON HALL L. REV. 446, 458-60 (1983).

cies. Part I will outline the liability and remedial provisions of Superfund and compare them to theories of recovery and remedies generally available at common law. Part II will discuss currently used liability insurance policy language and the longstanding public policies embodied therein which place Superfund liability outside the scope of coverage. Part III will demonstrate how potentially responsible parties may insure against the risks associated with Superfund through limited private insurance and the formation of risk retention groups, without running afoul of the important public policy concerns.

PART I—THE INNOVATIVE CERCLA LIABILITY PROVISIONS

A. THE LIABILITY PROVISIONS OF CERCLA

(1) The General Statutory Scheme

(a) *Authorized Response Action*

On December 11, 1980, President Carter signed CERCLA into law.[10] While CERCLA has a rather unusual legislative history,[11] a review of pertinent legislative materials reveals that the purpose of the Act was to plug a gap in existing environmental legislation, regarded as inadequate in several respects. Moreover, although SARA's legislative history is as unusual as that of the original legislation,[12] the amendments were intended to further the purpose of

10. Remarks on Signing H.R. 7020 Into Law, December 11, 1980, 16 WEEKLY COMP. PRES. DOC. 2797-801 (Dec. 15, 1980), *reprinted in* SENATE COMM. ON ENVIRONMENTAL AND PUBLIC WORKS, 97th Cong., 2d Sess., 1 A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980 (SUPERFUND), P.L. 96-510, at 48-51 (Comm. Print 1983) [hereinafter LEGISLATIVE HISTORY OF CERCLA].

11. The bill ultimately enacted into law was hurriedly put together by a bipartisan group of senators, passed in lieu of all other pending measures, and placed before the House in the form of a Senate amendment to an earlier House bill. House consideration took place during the closing days of the lame duck session of an outgoing Congress. House passage occurred after only limited debate under a suspension of the rules in a situation which allowed for no amendments. *See* Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982) [hereinafter Grad]. The House and Senate Reports accompanying the bills that the Committees of the respective houses reported and recommended for passage do not explain the compromise version, and there is no committee report explaining that version. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985).

12. The convoluted legislative history of SARA is recounted in Atkeson, Goldberg, Ellrod and Connors, *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 16 ENVTL. L. REP. (Envtl. L. Inst.) 10363 (1986) [hereinafter Atkeson, *et al*]. Numerous bills to reauthorize CERCLA were in-

CERCLA.

One inadequacy of the major environmental statutes enacted in the 1970's is that they are geared to regulating and limiting pollution, but provide little or no affirmative authority to ameliorate the conditions created by the pollution.[13] Those statutes that do provide affirmative authority to clean up spills are restricted to particular types of pollutants, such as oil, or apply to limited environmental media.[14]

Superfund addresses this shortcoming by covering releases of hazardous substances from all sources into all environmental media, granting governmental authority to respond to hazards arising from inactive and abandoned waste sites, and providing a mecha-

troduced in the House and in the Senate in both the Ninety-Eighth and Ninety-Ninth Congress. Ultimately, each house passed its own version of H.R. 2005. *See* 131 CONG. REC. S12,184 (daily ed. Sept. 26, 1985), and 131 CONG. REC. H11,595 (daily ed. Dec. 10, 1985). H.R. 2005 was referred to conference for the spring and summer of 1986, and released from conference in October, 1986, accompanied by a conference report. CONFERENCE REPORT TO ACCOMPANY H.R. 2005, H.R. REP. NO. 962, 99th Cong., 2d Sess. (1986), 132 CONG. REC. H9032-131 (daily ed. Oct. 3, 1986) [hereinafter SARA CONFERENCE REPORT]. The conference report, the only official version of what transpired in the conference committee, was agreed to by the Senate on October 3, 132 CONG. REC. S14943 (daily ed. Oct. 3, 1986), and by the House five days later, 132 CONG. REC. H9634 (daily ed. Oct. 8, 1986). President Reagan signed H.R. 2005 into law on October 17, 1986. *See supra* note 2.

13. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1041 (2d Cir. 1985) (comparing Clean Air Act, 42 U.S.C. §§ 7401-7642, a regulatory standard-setting statute, and CERCLA). *See also* U.S. COMPTROLLER GENERAL, CLEANING UP HAZARDOUS WASTES: AN OVERVIEW OF SUPERFUND REAUTHORIZATION ISSUES (1985) at i, 53-54 [hereinafter REAUTHORIZATION ISSUES].

14. For example, Section 311 of the Clean Water Act, 33 U.S.C. § 1321 (1982), creates a spill fund and imposes liability on responsible parties to pay for cleanup costs, but is limited to spills of oil or hazardous substances into navigable water and does not deal with releases into other environmental media. Section 504 of the Clean Water Act, 33 U.S.C. § 1364 (1982), provides emergency powers allowing the EPA to address releases beyond those in navigable waters, but that provision limits authorized funding and cost recovery, and the section has never been funded. Even the Resource Conservation and Recovery Act ("RCRA") 42 U.S.C. §§ 6901-6987 (1982), enacted in 1976 to regulate comprehensively the treatment, storage, transportation and disposal of hazardous wastes having adverse effects on health and the environment, operates prospectively and does not apply to inactive waste sites unless they pose an imminent hazard and does not address situations where an owner is unknown or is unable to pay the costs to clean up the results of spills, illegal dumping or releases generally. *See* S. REP. NO. 848, 96th Cong., 2d Sess. 1-12 (1980), *reprinted in* 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 317-19; H.R. REP. NO. 1016, Part I, 96th Cong. 2d Sess. 17-22 (1980), *reprinted in* 2 LEGISLATIVE HISTORY OF CERCLA, *supra* note 7, at 48-53. However, 1984 amendments to RCRA Section 7003 of 42 U.S.C. § 6973, allow that section to operate retroactively, in that it applies to inactive sites and imposes strict liability on past operators, generators and transporters. *See* United States v. Conservation Chemical Co., 619 F. Supp. 162, 197 (W.D. Mo. 1985); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1399-401 (D.N.H. 1985).

nism for funding cleanup activity.[15] Section 104[16] authorizes the President, who has delegated his authority under the statute to the Environmental Protection Agency ("EPA"),[17] to respond to a release or substantial threat of a release into the environment of any hazardous substance or of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare. "Hazardous substance" is defined broadly to include substances and waste regulated by other federal legislation, as well as additional substances designated under Superfund.[18] "Environment" is also defined broadly such that Superfund covers releases into all environmental media.[19]

The response authority conferred by section 104 includes authority to undertake both removal of the hazardous substances and remedial action, that is, action consistent with a permanent remedy.[20]

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15. *See, e.g.*, H.R. REP. No. 1016, 96th Cong., 2d Sess. 25 (1980), *reprinted in* 2 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 56; S. REP. No. 848, 96th Cong., 2d Sess. 11 (1980), *reprinted in* 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 318; New York v. Shore Realty Corp., 759 F.2d 1032, 1040-41 (2d Cir. 1985); United States v. Shell Oil Co., 605 F. Supp. 1064, 1070-71 (D. Col. 1985); Bulk Distribution Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1441 (S.D. Fla. 1984); Jones v. Inmont Corp., 584 F. Supp. 1425, 1428 (S.D. Ohio 1984); United States v. Wade, 546 F. Supp. 785, 792-93 (E.D. Pa. 1982).

16. 42 U.S.C. § 9604(a)(1).

17. Executive Order No. 12316, 46 Fed. Reg. 42237 (1981).

18. 42 U.S.C. §§ 9601(14), 9602(a). *See also* Eagle-Picher Industries, Inc. v. EPA, 759 F.2d 922 (D.C. Cir. 1985). Oil products are, however, excluded from the definition of "hazardous substance." *Id.* §§ 9601(14). *See also* the definition of the term "pollutant or contaminant" in SARA § 101(33) (to be codified at 42 U.S.C. § 9601(33)).

19. 42 U.S.C. § 9601(8). The term environment is defined to include:

> (A) The navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act [16 U.S.C.A. § 1801 *et seq.*], and
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> (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

Id.

20. *Id.* § 9604(a)(1). *See also* the definitions of "remove" or "removal," "remedy" or "remedial action," and "respond" or "response" at *id.* § 9601(23)-(25); Eagle-Picher Industries, Inc. v. EPA, 759 F.2d 922, 925-26 (D.C. Cir. 1985); New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985). SARA preserves the distinction between removal and remedial action, but expands the time and monetary limits for removal. SARA § 104(e) (to be codified at 42 U.S.C. § 9604(c)); SARA CONFERENCE REPORT, *supra* note 12, at H9086. Courts interpreting CERCLA refused to allow potentially responsible parties to seek judicial review of contemplated response action because to do so would debilitate CERCLA's central function of promptly cleaning up hazardous waste sites. *See* Wheaton Industries v. EPA, 781 F.2d 354 (3d Cir. 1986); J.V. Peters & Co. v. Administrator, EPA, 767 F.2d 263, 264 (6th Cir. 1985). This case law was codified in SARA § 113(c) (to be codified at 42 U.S.C. § 9613(h)). *See* SARA

The EPA may also take any other response measure, consistent with the national contingency plan ("NCP"),[21] that is necessary to protect the public health or welfare or the environment.[22] Section 121 of SARA sets forth complex cleanup standards that the EPA must follow in selecting remedial action.[23] The inclusion of this new section evidences congressional preference for long term, permanent remedial action as the appropriate manner in which the EPA should exercise its response authority under Section 104, rather than short term temporary removal.[24]

SARA amended section 104(a) to provide:

CONFERENCE Report, *supra* note 12 at 9095; 132 CONG. REC. S14928-29 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond); 132 CONG. REC. H9582 (daily ed. Oct. 8, 1986) (statement of Rep. Glickman).

21. Section 105 of CERCLA, 42 U.S.C. § 9605, mandated the revision of the NCP prepared pursuant to Section 311(c)(2) of the Clean Water Act, 33 U.S.C. § 1321 (c)(2), and required the NCP to include a "national hazardous response contingency plan which shall establish procedures and standards for respondings to releases of hazardous substances, pollutants, and contaminants . . . ." 42 U.S.C. § 9605. Section 105 also required the preparation of a National Priorities List ("NPL") of known and threatened releases for the purpose of taking remedial action. *Id.*

In revising the NCP, the EPA afforded itself great flexibility and discretion in determining the appropriate response action. *See* 40 C.F.R. Pt. 300 (1984); United States v. Ward, 618 F. Supp. 884, 900 (E.D.N.C. 1985) (holding that the NCP allows the EPA broad discretion in determining the appropriate remedial action and that the agency's decision is entitled to great deference). Indeed, critics claimed that the resulting NCP contained procedures that were too flexible and did not achieve satisfactory results. This criticism fell into two broad categories. First, when EPA undertook removal actions at sites on the NPL, it allowed hazardous substances to remain on site in anticipation of permanent remedial action. This approach often led to recurring releases and repeated temporary removal which was more expensive than remedying the hazard in the first place. *See* GENERAL ACCOUNTING OFFICE, CLEARER EPA SUPERFUND PROGRAM POLICIES SHOULD IMPROVE CLEANUP EFFORTS 2-17 (1985) [hereinafter CLEARER EPA POLICIES]; REAUTHORIZATION ISSUES, *supra* note 13, at ii-iv, 26-36; 131 CONG. REC. H976 (daily ed. March 5, 1985) (statement of Rep. Florio).

Additionally, the NCP lacked nationwide standards for cleanup, leaving the EPA to determine the adequacy of cleanup at a particular site on an ad hoc basis by reference to standards in other statutes. *See* REAUTHORIZATION ISSUES, *supra* note 13, at ii-iv, 31-38; 132 CONG. REC. H9571 (daily ed. Oct. 8, 1986) (statement of Rep. Strangeland); 131 CONG. REC. H11073 (daily ed. Dec. 5, 1985) (statement of Rep. Eckhart). In response to these criticisms, the EPA promulgated revisions to the NCP in 1985. *See* 50 Fed. Reg. 47912 (1985). Also, SARA addresses these criticisms by enacting cleanup standards. *See infra* notes 23-24 and accompanying text.

22. 42 U.S.C. § 9604(a)(1).

23. SARA § 121 (to be codified at 42 U.S.C. § 9621).

24. *See, e.g.*, 132 CONG. REC. S14914 (daily ed. Oct. 3, 1986) (statement of Sen. Mitchell); 132 CONG. REC. H9574 (daily ed. Oct. 8, 1986) (statement of Rep. Snyder); *id.* at H9587 (statement of Rep. Florio). New Section 121 also provides minimum cleanup standards to avoid the ad hoc decisionmaking that occurred in the past. *See generally* 132 CONG. REC. S14913-18 (daily ed. Oct. 3, 1986) (statement of Sen. Mitchell); 132 CONG. REC. H9571 (daily ed. Oct. 8, 1986) (statement of Rep. Strangeland); *id.* H9600 (statement of Rep. Roe).

> When the President determines that such [response] action will be done properly and promptly by the . . . responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 122. . . . In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or . . . benefit from any such arrangements as a response action contractor. . . . The President shall give primary attention to those releases which the President deems may present a public health threat.[25]

This provision, in conjunction with section 122(e),[26] places responsibility for overseeing the actual response on the United States,[27] without changing the responsible party's legal liability under section 107(a).[28] Thus, a responsible party will not take action inconsistent with the final remedy.[29] This provision also emphasizes that protection of health is the major factor considered in determining at which sites to undertake response action.[30]

(b) *The Fund*

To finance the broad response authority conferred by section 104,

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25. SARA § 104(a) (to be codified at 42 U.S.C. § 9604(a)).

26. SARA § 122(e) (to be codified at 42 U.S.C. § 9622(e)).

27. *See* SARA CONFERENCE REPORT, *supra* note 12, at H9085.

28. 42 U.S.C. § 9607(a) (as amended). *See also* SARA § 112(a) (to be codified at 42 U.S.C. § 9612(a)) (requires a claimant seeking reimbursement from the Fund to first present the claim to a responsible party, if known). The Superfund liability provisions will be discussed below. *See infra* text accompanying notes 53-93.

29. *See, e.g.*, 132 CONG. REC. S14919 (daily ed. Oct. 3, 1986) (statement of Sen. Mitchell). The legislative history of the original response authority provision of CERCLA § 104(a), 42 U.S.C. § 9604(a), suggests that Congress hoped to encourage responsible parties to respond without government involvement. The sponsors of an earlier version of S.1480, the Senate bill that bears the greatest resemblance to CERCLA as enacted, *see supra* note 11, contemplated that "[t]he fund will be used for emergency responses to contain or clean up a chemical release when the original owner or operator cannot be found or persuaded to act." 125 CONG. REC. S9173, (July 11, 1979) (statement of Sen. John C. Culver on introducing S.1480), *reprinted in* 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 149. Also, in communications to the Senate Committee to which S.1480 had been reported, one of the two key features that the Administration had proposed, and that then-President Jimmy Carter encouraged the committee to retain, was "a strong system of liability to encourage responsible parties to undertake cleanup activities themselves." Letter from Jimmy Carter to Hon. Jennings Randolph, Chairman, Senate Committee on the Environment and Public Works (June 5, 1980), S. REP. NO. 848, 96th Cong. 2d Sess. 96 (1980), *reprinted in* 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 403.

SARA recognizes that effective response action without government oversight is unlikely to occur. *See supra* notes 25-29 and accompanying text.

30. *See infra* text accompanying notes 43-47, concerning expansion of health-related authorities.

section 221, as amended, creates a Hazardous Substances Superfund ("the Fund").[31] Under section 111(a)[32] the EPA may use money in the Fund for payment of governmental costs of responding to a release or threatened release of a hazardous substance.[33] Money for the fund was originally provided through appropriations and excise taxes imposed on manufacturers, producers, and importers of certain petroleum products and chemicals.[34] Under SARA, the appropriations were substantially increased[35] and the tax base was broadened.[36]

In addition to using the fund to pay for response undertaken by the EPA, Fund money may be used to pay claims for "necessary response costs incurred by any other person as a result of carrying out the national contingency plan . . . [provided that such costs are] approved under said plan and certified by the responsible Federal official . . . ."[37] Thus, the statute contemplates nongovernmental entities responding to releases, but places some restriction on the use of Fund money for such purposes.

The statute also contemplates use of Fund money to pay "for injury to, or destruction or loss of, natural resources . . . ."[38] "Natural resources" are defined broadly,[39] but the statute limits recovery

31. CERCLA § 221, 42 U.S.C. § 9631 (as amended), SARA § 204 (to be codified at 42 U.S.C. § 9631).

32. 42 U.S.C. § 9611(a).

33. The authorized uses of Fund money will be discussed *infra* text accompanying notes 37-47. It should be noted that CERCLA established a Post-Closure Liability Fund that was created to assume the liabilities of owners and operators of closed hazardous waste disposal facilities. CERCLA § 107(k), 42 U.S.C. § 9607(k). SARA § 201 (to be codified at 42 U.S.C. § 107(k)) suspended the transfer of liability to this fund pending the completion of a study by the Comptroller General.

34. 42 U.S.C. § 9631(b)(1) (1980). *See also* 26 U.S.C. §§ 4611, 4661 (1982). Another source of money for the Fund is amounts recovered from responsible parties. *See infra* notes 48-51 and accompanying text.

35. After the taxation and appropriations provisions of the original legislation expired on September 30, 1985, the President, on April 1, 1986, approved a joint resolution making a repayable advance to the Fund. Nonetheless, the funding expired on May 31, 1986. *See* Pub. L. No. 99-270, 100 Stat. 80 (1986). Under SARA § 111(a), up to $8.5 billion is appropriated for the five year period beginning in October 1986. Additional provisions setting forth appropriations and taxation authority are found in the Superfund Revenue Act of 1986, P.L. No. 99-499, 100 Stat. 1760 (1986) (to be codified at 26 U.S.C. §§ 59A, 4611, 4661-62, 4671-72, 9507).

36. *See* Superfund Revenue Act of 1986, Pub. L. No. 99-499, 100 Stat. 1760 (1986) (to be codified at 26 U.S.C. §§ 59A, 4611, 4661-62, 4671-72).

37. 42 U.S.C. § 9611(a).

38. *Id.* § 9611(b).

39. *Id.* § 9601(16):

> "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust

of natural resource damages from the Fund to those resulting from releases occurring after CERCLA's enactment.[40] Claims for natural resource damages may be asserted against the Fund only by the federal agency designated as trustee for natural resources, by a state or by an Indian tribe,[41] and may be paid only after the claimant has exhausted all administrative and judicial remedies to recover the amount of the claim from the party responsible for the release.[42]

Superfund also authorizes use of Fund money for health-related activities. SARA § 111(h)[43] specifically authorizes the use of at least $50 to $60 million for each fiscal year through 1991 by the Agency for a Toxic Substances and Disease Registry ("ATSDR") to carry out the activities described in sections 111(c)(4)[44] and 104(i).[45] Section 111(c)(4) contemplates the use of Fund money by the ATSDR for "epidemiologic and laboratory studies, health assessments, preparation of toxicologic profiles, development and maintenance of a registry of persons exposed to hazardous substances to allow long-term health effect studies, and diagnostic services. . . ."[46] Section 104(i) elaborates upon the activities described in section 111(c)(4) and adds to the ATSDR's mandate the responsibility of providing medical care and testing to exposed individuals in cases of public health emergencies, providing consultations to other federal and state and local officials on health issues relating to exposure to hazardous substances, initiating research programs to determine health effects of exposure to hazardous substances, and initiating health surveillance programs for populations determined to be at risk based on a health assessment, epidemiologic study or exposure registry.[47]

(c) *Uniqueness of the Legislation*

Superfund, therefore, goes beyond existing legislation by granting affirmative authority to the government to respond to hazardous

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by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishing Conservation and Management Act), any State or local government, any foreign government, and Indian Tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian Tribe.

40. *See id.* § 9611(d)(1).
41. 42 U.S.C. § 9611(b), *as amended by* SARA § 207(d). *See infra* notes 54-56.
42. SARA § 111(c) (to be codified at 42 U.S.C. § 9611(b)(2)).
43. To be codified at 42 U.S.C. § 9611(m).
44. 42 U.S.C. § 9611(c)(4) (as amended).
45. 42 U.S.C. § 9604(i) (as amended).
46. 42 U.S.C. § 9611(c)(4) (as amended).
47. 42 U.S.C. § 9604(i) (as amended).

waste releases, to ameliorate damage to natural resources, to undertake health-related activities, and, provide funds for those purposes. Superfund also corrects another perceived inadequacy in existing law by providing an "explicit mechanism for recovering expenditures from responsible parties."[48] Superfund allows the government to replenish the Fund by recovering response costs, natural resource damages, and costs of health assessment and health effects studies from the party or parties responsible for the release.[49] A justification for this liability scheme is that "society should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner or operator who has profited or otherwise benefited from commerce involving these substances . . ."[50] Instead, "those responsible for problems caused by the disposal of chemical poisons [should] bear the costs and responsibility for remedying the harmful conditions they created."[51] Moreover, as will be discussed below,[52] the liability provisions of Superfund not only allow the government to replenish the fund, but they also impose upon responsible parties costs beyond those covered by the Fund.

(2) The Liability Provisions of Superfund

(a) *Introduction*

The liability of parties responsible for hazardous substance releases is set forth in section 107 of Superfund.[53] Costs that can be

48. S. REP. No. 96-848, 96th Cong., 2d Sess. 57 (1980), *reprinted in* 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 364.

49. Section 221 of CERCLA, 42 U.S.C. § 9631(b)(1)(B) (1982), provides for the transfer to the Fund of amounts recovered on behalf of the Fund under CERCLA. Section 107, 42 U.S.C. § 9607 (1982) (as amended) provides for recovery of those amounts.

50. Letter from Douglas M. Costle to Hon. Jennings Randolph (Sept. 25, 1979), S. REP. No. 848, 96th Cong., 2d Sess. 98 (1980), *reprinted in* 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 405. *See also* S. REP. No. 848, 96th Cong., 2d Sess. 33-34 (1980), *reprinted in* 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 340-41.

51. United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982). *See also* S. REP. No. 848, 96th Cong., 2d Sess. 13 (1980), *reprinted in* 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 320; H.R. REP. No. 1016, 96th Cong., 2d Sess. 17 (1980), *reprinted in* 2 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 48; Walls v. Waste Resource Corp., 761 F.2d 311, 318 (6th Cir. 1985); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D. Idaho 1986); United States v. Shell Oil Co., 605 F. Supp. 1064, 1072 (D. Colo. 1985); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985). This aspect of CERCLA was maintained by SARA. *See, e.g.*, 132 CONG. REC. § 14934-35 (daily ed. Oct. 3, 1986) (statement of Sen. Durenberger); *id.* at S14923 (statement of Sen. Chafee).

52. *See infra* notes 62-93 and accompanying text.

53. 42 U.S.C. § 9607. Responsible parties include:

recovered under the statute are:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under Section 104(i).[54]

Under section 107(f),[55] natural resource damages may be recovered only by the United States government, by any State for natural resources within the State or belonging to, managed by, controlled by or appertaining to such State, or by any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe. The reference to section 104(i) in the health-related

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> (1) the owner and operator of a vessel . . . or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .

Id. § 9607(a) (as amended).

SARA added provisions that settled the liability of response action contractors. Response action contractors are relieved from liability under federal law, except in the case of a release caused by conduct of the response action contractor which is negligent, grossly negligent or which constitutes intentional misconduct. SARA § 119 (to be codified at 42 U.S.C. § 9619). With respect to response action contractors, Congress clearly intended to treat their liability differently from that of responsible parties under section 107(a), but it is unclear what effect the new federal standard of liability is intended to have on state law. *Compare* 132 CONG. REC. S14901 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford) and 132 CONG. REC. H9591-92 (daily ed. Oct. 8, 1986) (statement of Rep. Fish). Given that the standard of liability is negligence, it is not markedly different from that generally available at common law.

54. 42 U.S.C. § 9607(a) (1982) (as amended by SARA § 207(c)). SARA § 207(c) added "or an Indian tribe" to Section 107(a)(A), the governmental response cost recovery provision, thereby allowing Indian tribes, as defined in SARA § 101(f) (to be codified at 42 U.S.C. § 9601(36)), to seek recovery against a responsible party on the same basis as a state. Thus, discussions of the rights and remedies of governmental entities under Superfund also apply to Indian tribes. *See also* SARA § 207(e) (to be codified at 42 U.S.C. § 9626).

55. *Id.* § 9607(f).

costs recovery provision indicates that such costs can be incurred in the first instance only pursuant to governmental response authority and therefore can be recovered only by the United States, a state or an Indian tribe.[56]

In addition to the recovery provided under section 107, section 106[57] authorizes the United States to secure relief necessary to abate "an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility."[58] SARA adds a citizens suit provision authorizing citizens to bring actions to enforce the requirements of the Act against those alleged to be in violation of any requirement which is made effective pursuant to the Act, and against Federal government officials who have allegedly failed to perform nondiscretionary duties under the Act.[59] This new provision, along with section 7002 of the Solid Waste Disposal Act, authorizing any person to seek relief, including abatement, where the past or present handling, storage, treatment, transportation or disposal of any hazardous waste may present an imminent and substantial endangerment to health or the environment,[60] gives private parties the authority to seek relief similar to that available to the federal government under section 106.

The scope of recovery from a responsible party available under section 107 to governmental entities and to private parties is discussed in greater detail below.

(b) *Liability to Governmental Entities*

Section 107(a) makes three types of awards available to the federal or a state government: response costs, natural resource damages and health-related costs.[61] With regard to recovery of response

56. *See* SARA CONFERENCE REPORT, *supra* note 12, at H9089; 132 CONG. REC. S14921 (daily ed. Oct. 3, 1986) (statement of Sen. Simpson suggesting that only the government can undertake health assessments and that information discovered is not to be used in private causes of action); SARA § 207(e) (to be codified at 42 U.S.C. § 9626).

57. 42 U.S.C. § 9606.

58. *Id.* In United States v. Conservation Chemical Co., 619 F. Supp. 162, 191-92 (W.D. Mo. 1985), the court construed the "imminent and substantial endangerment" language liberally to allow the United States to seek relief under Section 106 not only when people are threatened with actual danger, but when possible endangerment to the public welfare or the environment is present.

59. SARA § 206 (to be codified at 42 U.S.C. § 9659). *See also* SARA CONFERENCE REPORT, *supra* note 12, at H91110.

60. 42 U.S.C. § 6973.

61. *See supra* notes 53-56 and accompanying text. For purposes of section 107 recovery, an Indian tribe may be treated as a state. *See* SARA § 207(c) (to be codified at 42 U.S.C. §§ 9607(a), 9607(f)). In Mayor and Bd. of Alderman of Boonton v. Drew

costs, the general language of section 107(a)(A) in no way restricts recovery to the costs for which Fund money may be used under section 111(a).[62] Indeed, courts have agreed that "[a]n action brought pursuant to sections 106(a) and 107(a) [sic] are independent and separate of the provisions authorizing use of the [Fund], sections 104(c)(3) and 111."[63] Thus, liability for response costs incurred by a governmental entity may be imposed on a responsible party, even though some of those costs are not payable from the Fund.

The amounts recoverable from the Fund are more limited than the response costs which can be recovered from a responsible party in several ways. First, section 104(c), as amended, provides that ". . . obligations from the Fund . . . shall not continue after $2,000,000 has been obligated for response actions or twelve months has elapsed from the date of initial response to a release or threatened release of hazardous substance."[64] The independent liability provisions prevent these limits from restricting either the scope of a decree to compel a responsible party to abate the danger from an actual or threatened release under section 106(a),[65] or the amount of a judgment to pay response costs expected to be incurred in the future.[66] State recovery from the Fund is also restricted. Section 111 authorizes the use of Fund money for "payment of governmental response costs incurred pursuant to section [104]."[67]

Chemical Corp., 621 F. Supp. 663 (D.N.J. 1985), the court held that a municipality also may be treated as a state in a § 107 cost recovery action. *See also* City of New York v. Exxon Corp., 633 F. Supp. 609, 619 (S.D.N.Y. 1986). The SARA conference committee rejected a House amendment that would have amended CERCLA § 101(27), 42 U.S.C. § 9601(27), to exclude units of local government from the definition of "state," *see* SARA CONFERENCE REPORT, *supra* note 12 at H9084, and therefore upheld the *Boonton* decision allowing municipalities to sue for cost recovery under section 107(a)(A) and to serve as trustees for natural resource damages. 132 CONG. REC. S14912 (daily ed. Oct. 3, 1986) (statement of Sen. Lautenberg).

62. 42 U.S.C. § 9611(a) (1982).

63. United States v. Northeastern Pharmaceutical & Chemical Co., Inc., 579 F. Supp. 823, 850 (W.D. Mo. 1984). Courts have upheld the independence of the liability provisions and the provisions governing use of the Fund for both federal government recovery, *see* United States v. Conservation Chemical Co., 619 F. Supp. 162, 207-08 (W.D. Mo. 1985) and United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985), and state recovery, *see* New York v. Shore Realty Corp., 759 F.2d 1032, 1045-48 (2d Cir. 1985), New York v. General Electric Co., 592 F. Supp. 291, 301-304 (N.D.N.Y. 1984), and Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1315 (N.D. Ohio 1983).

64. 42 U.S.C. § 9604(c) (as amended).

65. 42 U.S.C. § 9606(a). *See, e.g.*, United States v. Price, 577 F. Supp. 1103, 1110-14 (D.N.J. 1983) (U.S. may bring action under section 106 even though no response costs incurred so long as facts indicate imminent and substantial endangerment).

66. *See* United States v. Wade, 577 F. Supp. 1326, 1334-36 (E.D. Pa. 1983).

67. 42 U.S.C. § 9611(a)(1).

The only governmental response costs that section 104 authorizes a state to incur are those pursuant to a contract or a cooperative agreement entered into between the state and the EPA.[68] However, under section 107(a)(A) a state may recover from a responsible party response costs that are incurred outside the context of a contract or cooperative agreement with the EPA.

Second, Fund-financed cleanup must adhere strictly to the National Contingency Plan (NCP) and the new cleanup standards enacted under SARA,[69] whereas governmental entities may recover costs for response activity less strictly compliant with the NCP.

As mentioned above,[70] Fund money may be used to pay only those governmental response costs incurred pursuant to section 104, which generally authorizes the EPA to take response measures "consistent with the national contingency plan."[71] The NCP, in turn, is to be revised to reflect the tighter cleanup standards which were enacted under SARA.[72] Section 104 further requires the EPA to select "remedial actions to carry out this section in accordance with section 121 of this Act (relating to cleanup standards)."[73] Thus Fund-financed cleanup must adhere strictly to the NCP and the cleanup standards of section 121.

In contrast, section 107(a)(A) allows recovery from responsible parties of governmental response costs "*not inconsistent with* the national contingency plan."[74] This wording suggests that a governmental authority need not carefully adhere to the NCP in incurring costs recovered from a responsible party so long as the costs are not inconsistent with the NCP.[75] Thus, a governmental entity may re-

68. *See* 42 U.S.C. §§ 9604(c)(3), 9604(d).

69. *See supra* notes 21-24 and accompanying text. Also, Section 105 of SARA requires further revisions to the NCP "to provide procedures and standards for remedial actions undertaken pursuant to this Act which are consistent with Amendments made by [SARA] relating to the selection of remedial action." SARA § 105(b) (to be codified at 42 U.S.C. § 9605(b)). This provision requires conformity between the NCP and the cleanup standards of Section 121.

70. *See supra* notes 31-33 and accompanying text.

71. Section 104(a), 42 U.S.C. § 9604(a).

72. *See supra* note 69 and accompanying text; *supra* notes 21-24 and accompanying text.

73. SARA § 104(g) (to be codified at 42 U.S.C. § 9604(c)(4)).

74. 42 U.S.C. § 9607(a)(A) (emphasis added). This requirement has been construed to mean that government actions are presumed to be consistent with the NCP and that the burden of raising and proving inconsistency is thus on defendants. United States v. Northeastern Pharmaceutical & Chemical Co., Inc., 810 F.2d 726, 747-48 (8th Cir. 1986); United States v. Ottati and Goss, Inc., 630 F. Supp. 1361, 1395 (D.N.H. 1985).

75. *See, e.g.*, NL Industries v. Kaplan, 792 F.2d 896 (9th Cir. 1986) and Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887 (9th Cir. 1986) (consistency with the NCP does not require strict compliance). SARA's legislative history affirms this view. Sev-

cover from a responsible party amounts greater than response recovery from the Fund, and under section 107(a)(A), the state or Federal government may recovery for types of response not specifically permitted by the NCP or under the section 121 cleanup standards.[76]

There is also some difference between the amount of natural resource damages payable from the Fund and the amount recoverable by a governmental entity under section 107(a)(C).[77] Section 111(e)(2)[78] provides that 85 percent of money credited to the Fund is available for purposes other than natural resource damages, and forbids the use of any Fund money for natural resource damages in any fiscal year during which Fund money is needed for response to threats to public health from hazardous substance releases. While there are some limitations on recovery of natural resource damages from a responsible party,[79] "the measure of damages in any action under [section 107(a)(C)] shall not be limited by the sums which can be used to restore or replace such resources,"[80] and are not subject to the monetary limits for use of Fund money. Indeed, the intent of the amendments to CERCLA is "that for the short term, the financial burden [of natural resource damage claims] should be placed exclusively and immediately on the shoulders of responsible parties [rather than on the Fund]."[81] Thus, amounts recoverable from responsible parties as natural resource damages exceed available recovery from the Fund.

SARA added the costs of any health assessment or health effects study carried out under section 104(i) to the types of liability recov-

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eral senators expressed the view that alleged failure to comply with the NCP is not available as a defense to any liability asserted in an enforcement proceeding brought under sections 106 or 107. *See, e.g.*, 132 CONG. REC. S14914 (daily ed. Oct. 3, 1986) (statement of Sen. Mitchell); *id.* at S14925 (statement of Sen. Chafee).

76. In New York v. Shore Realty Corp., 759 F.2d 1032, 1046 (2d Cir. 1985), the court also suggests that use of Fund money may be limited to cleanup of sites on the national priority list while section 107(a)(A) is not so limited.

77. 42 U.S.C. § 9607(a)(C).

78. 42 U.S.C. § 9611(e)(2) (as amended by SARA § 111(e), to be codified at 42 U.S.C. § 9611(e)(2)).

79. Section 107(f), 42 U.S.C. § 9607(f), does not allow recovery for damages to natural resources when such damages "were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environmental analysis . . . [and] where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly [before CERCLA's enactment]."

80. 42 U.S.C. § 9607(f)(1) (as amended by SARA § 107(d) to be codified at 42 U.S.C. § 9607(f)).

81. 132 CONG. REC. S14930 (daily ed. Oct. 3, 1986) (statement of Sen. Baucus).

erable by governmental entities from responsible parties.[82] The recoverable costs are actually narrower than the corresponding permissible uses of Fund money, since section 111 authorizes the use of Fund money for a wide range of purposes related to health.[83] Thus a responsible party cannot be held liable for all health-related costs that the ATSDR may charge to the Fund. However, if courts interpret section 107(a)(D) consistently with the provisions governing recovery of response costs, they will permit recovery of costs incurred in carrying out health assessments and health effects studies even if those costs exceed amounts available from the Fund for such purposes.[84]

In summary, section 107 provides very few limitations on the amount of response costs, natural resource damages and health assessment costs recoverable by governmental entities from responsible parties, and permits the government to recover from responsible parties types of response costs which cannot be paid from the Fund.

(c) *Liability to Private Parties*

In addition to the recovery available to governmental entities, section 107(a)(B) of Superfund permits private parties who incur response costs to recover them from responsible parties. This section imposes liability "for any other necessary costs of response incurred by any other person consistent with the national contingency plan."[85] Courts have interpreted this provision to allow private parties to recover response costs under a variety of circumstances.[86] Generally, the only prerequisites to recovery by private parties under section 107(a)(B) are that there be the actual outlay of money for response action and that such costs be incurred consistently with the NCP.[87] A few courts have held that section 107 liability

82. *See supra* note 54 and accompanying text.

83. *See supra* notes 43-47 and accompanying text.

84. *See supra* notes 62-68 and accompanying text.

85. 42 U.S.C. § 9607(a)(B). However, there is no provision for private recovery of natural resource damages or health assessment costs. In contrast to governmental response, which is presumed to be consistent with the NCP, *see supra* note 74 and accompanying text, the requirement of consistency with the NCP implies that the actions of private parties are not entitled to the benefit of this presumption. United States v. Ward, 618 F. Supp. 884, 899 (E.D.N.C. 1985).

86. *See, e.g.*, Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887 (9th Cir. 1986), *rev'g* 590 F. Supp. 72 (N.D. Cal. 1984); NL Industries, Inc. v. Kaplan, 792 F.2d 896 (9th Cir. 1986); Walls v. Waste Resource Corp., 761 F.2d 311, 317-19 (6th Cir. 9185). *See also* cases cited *infra* note 87.

87. *See* New York v. Shore Realty Corp., 648 F. Supp. 255, 261-62 (E.D.N.Y. 1986); United States v. Conservation Chemical Co., 628 F. Supp. 391, 405 (W.D. Mo. 1985); Fishel v. Westinghouse Electric Corp., 617 F. Supp. 1531 (M.D. Pa. 1985); Ded-

may be imposed only when the private party has incurred governmentally approved costs, apparently reading into section 107(a)(B) the requirement of section 111(a)(2)[88] that payment of claims from the Fund are restricted to those approved under the NCP and certified by the responsible Federal official.[89] In addition, since the NCP provides for remedial responses only at sites listed on the national priority list ("NPL"), some courts have limited private parties' recovery under section 107 to costs incurred for cleanup of sites on the NPL.[90] While the latter limitations do apply to a private party's recovery against the Fund,[91] the imposition of these additional requirements for 107(a)(B) recovery is inconsistent with Superfund's bifurcated statutory scheme differentiating between recovery from the Fund and from responsible parties under section 107(a),[92] and with the EPA's regulations implementing the statute.[93]

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ham Water Co. v. Cumberland Farms Dairy, Inc., 588 F. Supp. 515 (D. Mass. 1983); Jones v. Inmont Corp., 584 F. Supp. 1425, 1429-30 (S.D. Ohio 1984). *Cf.* Levin Metals Corp. v. Parr-Richmond Terminal Co., 608 F. Supp. 1272 (N.D. Cal. 1985) (complaint dismissed because plaintiff, who purchased land from defendant without knowledge that it was being investigated by a state agency for possible contamination, did not allege that it had actually incurred necessary costs of response consistent with the NCP).

88. 42 U.S.C. § 9611(a)(2).

89. *See, e.g.*, Bulk Distribution Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437 (S.D. Fla. 1984) (government is in a better position than are private parties to pass judgment on efficacy of a cleanup proposal). Artesian Water Co. v. New Castle County, 605 F. Supp. 1348 (D. Del. 1985), attempted to reconcile *Bulk* with the line of cases cited *supra* note 87 by holding that although Superfund itself does not require prior government approval, since recoverable response costs must be consistent with the NCP, the NCP might impose such a requirement. The court concluded that a requirement of prior government authorization as a prerequisite to recovery of removal costs from responsible parties could needlessly discourage emergency response actions by private entities. *Id.* at 1359. The court held, however, that to ensure that costs incurred for remedial action produce a cost-effective, environmentally sound remedy, it must be approved as appropriate by the lead agency in order to be consistent with the plan and recoverable. *Id.* at 1360. *See also supra* note 20 and accompanying text for the difference between removal and remedial action.

90. *See, e.g.*, Cadillac Fairview/California, Inc. v. Dow Chemical Co., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20376 (C.D. Cal. 1984). This view was rejected in Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 289-90 (N.D. Cal. 1984).

91. *See supra* note 37 and accompanying text.

92. *See supra* note 63, citing cases that analyze Superfund's bifurcated scheme for use of the Fund and claims against the Fund as distinct from the liability imposed under Section 107(a). *See also* City of New York v. Exxon Corp., 633 F. Supp. 609, 616 (S.D.N.Y. 1986); United States v. Conservation Chemical Co., 628 F. Supp. 391, 405 (W.D. Mo. 1985); Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 288 (N.D. Cal. 1984) (section 107 provides cause of action distinct and independent from sections 111 and 112 requirements for use of the Fund); Wehner v. Syntex Corp., 622 F. Supp. 302 (E.D. Mo. 1983).

93. *See* National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.25 (1985). In amendments to the NCP promulgated in 1985, the EPA

(3) Conclusion

Superfund creates a logical scheme where governmental entities or private persons may respond to a hazardous substance release and recover costs incurred from the responsible party. In addition, government can recover natural resource damages to pay the costs of restoring the environment to its precontamination state, and certain health-related costs. This right to recover from responsible parties is, in general, broader than the right to recover from the Fund. The broad liability provisions give enormous discretion to the responding party in deciding how to incur response costs with virtually no limit on the amounts recoverable.

Despite the logic of Superfund's liability scheme, the liability provisions are inadequate in several ways. First, there has been much litigation about the precise scope of liability.[94] Second, many expressed disappointment that CERCLA failed to provide compensation to individuals for personal injury, property damages and economic losses resulting from releases of hazardous substances.[95]

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expressly eliminated any preconditions, such as the listing of a site on the NPL, to any enforcement action. *See* 50 Fed. Reg. 5862, 5879 (1985) proposing revisions to 40 C.F.R. §300.61(e), adopted as a final rule, 50 Fed. Reg. 47912, 47969-70 (Nov. 20, 1985). *See also* New York v. Shore Realty Corp., 648 F. Supp. 225, 263-64 (E.D.N.Y. 1986); Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 891-92 (9th Cir. 1986), *rev'g* 590 F. Supp. 72 (N.D. Cal. 1984); Allied Towing Corp. v. Great E. Petroleum Corp., 642 F. Supp. 1339, 1349 (E.D. Va. 1986).

Courts interpreting section 107(a)(B) of CERCLA refused to allow recovery by one potentially responsible party against another. *See, e.g.*, Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049 (D. Ariz. 1984); D'Imperio v. United States, 575 F. Supp. 248 (D.N.J. 1983). However, this interpretation has been overruled by SARA § 113(b) (to be codified at 42 U.S.C. § 9613(f)), allowing any person, including one who has resolved its own liability for response costs, to seek contribution from any other person liable or potentially liable under section 107(a). Even before the amendment, courts allowed potentially responsible governmental entities to seek response cost recovery under section 107(a)(B). *See* United States v. Conservation Chemical Co., 619 F. Supp. 162, 206 (W.D. Mo. 1985); City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982).

94. For example, courts have struggled over whether section 107 applies retroactively to acts performed and to expenses incurred prior to CERCLA's enactment. *See, e.g.*, United States v. Northeastern Pharmaceutical Chemical Co., Inc., 810 F.2d 726, 732-37 (8th Cir. 1986); United States v. Dickerson, 640 F. Supp. 448 (D. Md. 1986). There has also been uncertainty over what, if any, causation requirements must be met before a court may impose section 107 liability. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 674 (D. Idaho 1986); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 576 (D. Md. 1986); United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983).

95. For example, Section 4(a) of S. 1480, 96th Cong., 1st Sess. 125 CONG. REC. 17991 (1979), *reprinted in* 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 487-88, as it was reported to the Senate from the Committee on Environment and Public Works on July 11, 1980, provided broad recovery for personal injury, property dam-

Although SARA allows recovery of certain health-related costs, the reauthorization measure also rejected any victim compensation provisions.[96] Finally, CERCLA's effectiveness was limited because of lack of money in the Fund and the difficulty of recovering costs from responsible parties.[97] It remains to be seen whether SARA will resolve this problem of deficient funding.[98]

Despite these inadequacies, by emphasizing consistency with the NCP as the only prerequisite for response cost recovery and providing for recovery of natural resource damage and health-related costs, Superfund does take an important step beyond the common law theories of liability and remedies for both property damage and personal injury. The significance of this step will now be addressed by comparing common law recovery for property damage to response cost and natural resource damage recovery, and by comparing common law recovery for personal injury to health-related cost recovery.

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age and economic loss resulting from a hazardous substance release. This expansive liability provision was eliminated in the version of S. 1480 that was approved by the Senate on November 24, 1980. *See* 126 CONG. REC. 30,897 *et seq.* (1980), 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 563 *et seq.*, causing one Senator to remark:

> Under this bill, if a toxic waste discharge injures both a tree and a person, the tree's owner, if it is a government, can promptly recover from the fund for the cost of repairing the damage, but the person cannot. In effect, at least as to the superfund, it is all right to kill people, but not trees.

126 CONG. REC. 30,941 (1980) (statement of Sen. Mitchell), *reprinted in* 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 711-12.

96. A victim compensation program in the Senate reauthorization bill was deleted. 131 CONG. REC. S12003-04 (daily ed. Sept. 24, 1985). *See also infra* note 197 and accompanying text.

97. There are a number of reasons that the original funds were depleted. First, many believe that the scope of the hazardous waste problem was vastly underestimated when CERCLA was enacted in 1980, and that the full significance and extent of the problem is still unknown. *See, e.g.*, REAUTHORIZATION ISSUES, *supra* note 13, at 5; *Superfund Reauthorization: Hearings Before the Senate Comm. on Finance*, 99th Cong., 1st Sess. (1985) 76-77 (statement of Sen. Mitchell); 132 CONG. REC. H9569 (daily ed. October 8, 1986) (statement of Rep. Anderson); 132 CONG. REC. S14920 (daily ed. October 3, 1986) (statement of Sen. Moynihan); 131 CONG. REC. H11070 (daily ed. December 5, 1985) (statement of Rep. Dingell); Letter from Governors of the Northeast-Midwest Region to Hon. Robert T. Stafford (February 25, 1985), *reprinted in* 131 CONG. REC. E1231 (daily ed. March 28, 1985); 131 CONG. REC. E796-97 (daily ed. March 6, 1985) (statement of Rep. Florio); 131 CONG. REC. S1758-59 (daily ed. February 21, 1985) (statement of Sen. Lautenberg); 131 CONG. REC. S159-60 (daily ed. January 3, 1985) (statement of Sen. Mitchell).

Second, many believe EPA did not spend Fund money cost-effectively. *See supra* note 21.

98. Other difficulties in implementing CERCLA are recounted in Note, *The Political Economy of Superfund Implementation*, 59 S. CAL. L. REV. 875 (1986).

B. THE LIMITATIONS OF COMMON LAW LIABILITY AND REMEDIES IN ADDRESSING PROPERTY DAMAGE CAUSED BY HAZARDOUS WASTE RELEASES

(1) Limitations of Common Law Theories of Liability for Damage to Property and Comparison to the Superfund Theory of Liability

As discussed above, the prerequisites for imposing liability for response costs and natural resource damages on a responsible party under section 107 are limited. Most significantly, there is no inquiry into the nature of the plaintiff's interest in the property harmed. As such, section 107 liability differs markedly from common law theories of recovery.[99]

The common law theories of recovery most closely analogous to response cost and natural resource damage liability under section 107(a) are trespass, public and private nuisance, and strict liability for an abnormally dangerous activity.[100] While the circumstances giving rise to Superfund liability are probably actionable in most jurisdictions under one of these theories, the common law restricts the ability of parties to assert these theories and limits the scope of the remedy usually awarded against common law defendants. As will be shown below, a private party seeking common law recovery must have a property interest in the environmental medium harmed. Common law theories of recovery, therefore, are generally unavailable to governmental entities in their sovereign capacity because they lack the requisite property interest. Similarly, remedies at common law are generally limited to an amount that compensates for the harm to the property interest.

(a) *Recovery by Private Parties*

The release of a hazardous substance may give rise to an action in

99. Other differences between tort rights and remedies and those under Superfund are discussed in Seng, *The Quasi-Contractual Nature of Cost Recovery Actions under CERCLA*, 5 VA. J. NAT. RES. L. 85 (1985).

100. *See, e.g.*, State of N.J. Dep't of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (1983) for a good overview of how common law principles of trespass, nuisance, and strict liability apply to toxic waste pollution harming the land of others. While analogies to other common law theories are, of course, possible, these are the common law theories most often referred to as expressing the roots of modern environmental law generally. *See, e.g.*, W. RODGERS, ENVIRONMENTAL LAW §§ 2.1-2.14 (1977); 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW §§ 2.02, 2.09[5][b][ii], 3.05[3] 1984), and indeed many plaintiffs asserting Superfund liability have also asserted causes of action under these theories. *See infra* notes 101, 105, 110, 116.

trespass,[101] a tort which descended from one of the earliest forms of action. "Historically, the requirements for recovery for trespass to land under the common law action of trespass were an invasion (a) which interfered with the right of exclusive possession of the land, and (b) which was a direct result of some act committed by the defendant."[102] The historical requirement that an invasion must constitute an interference with the plaintiff's interest in exclusive possession of property in order to be actionable has persisted.[103] A plaintiff lacking a possessory interest in property cannot maintain an action in trespass.[104]

One might also characterize a hazardous substance release as a private nuisance.[105] However, like trespass, private nuisance has generally served to compensate or protect the plaintiff's proprietary interests. According to one noted treatise, "the word [nuisance] first emerges in English law to describe interferences with servitudes or other rights to the free use of land."[106] Over time, an action on the case for nuisance emerged. "The remedy was limited strictly to interference with the use or enjoyment of land, and thus was the parent of the law of private nuisance as it stands today."[107] Courts have shown some flexibility in allowing almost any interest sufficient to be dignified as a property interest to support a private nuisance action, but the requirement of an invasion of some interest in land has been preserved; "the protection is limited to the interest of

101. At least one CERCLA plaintiff has claimed defendants' liability on a trespass theory as well. *See* City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982).

102. W.P. KEETON, D.B. DOBBS, R.E. KEETON, D.G. OWEN, PROSSER AND KEETON ON TORTS § 13 at 67 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON ON TORTS].

103. *Id.* at 70-71. *See also* RESTATEMENT (SECOND) OF TORTS §§ 157-58 (1979), and SUPERFUND SECTION 301(E) STUDY GROUP, INJURIES AND DAMAGES FROM HAZARDOUS WASTE-ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES: A REPORT TO CONGRESS IN COMPLIANCE WITH SECTION 301(E) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (P.L. 96-510) 101 (1982) [hereinafter SECTION 301(E) STUDY GROUP REPORT], which describe the nature of the property interest whose interference gives rise to liability for trespass and the abandonment of the requirement of directness.

104. SECTION 301(E) STUDY GROUP REPORT, *supra* note 103, at 101.

105. Some Superfund plaintiffs have asserted private nuisance theories. *See, e.g.*, Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283 (N.D. Cal. 1984). However, in *Pinole Point Properties, id.* at 292, n.5, the court noted that a private nuisance claim was unavailable against a prior owner of the property: "[L]iability for a private nuisance arises upon the invasion of *another's* interest in the use and enjoyment of land. . . . At the time that defendant was using the waste disposal pond, defendant owned the pond." The plaintiff could, however, maintain a Superfund action.

106. PROSSER & KEETON & TORTS, *supra* note 102, § 86, at 617.

107. *Id.*

the plaintiff . . . [and] anyone who has no interest in the property affected . . . cannot maintain an action based on private nuisance."[108] Thus, common law theories of trespass and private nuisance are designed to protect plaintiffs' proprietary interests, possession in the case of trespass and use and enjoyment in the case of private nuisance; a proprietary interest is necessary in order to maintain a cause of action under those theories.[109]

A common law theory more closely analogous to section 107 liability is public nuisance.[110] A public nuisance is not an interference with a private property right, but rather involves "an unreasonable interference with a right common to the general public."[111] Generally, however, in order for an individual to recovery damages or to bring an action to abate a public nuisance, the individual must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of the interference.[112] Under this requirement individual plaintiffs seeking to bring actions concerning public nuisances are hampered by the need to show something not unlike the proprietary interest requirement for actions involving private nuisance.[113]

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108. *Id.* § 87 at 621. *See also* RESTATEMENT (SECOND) OF TORTS § 821E (1977).

109. *See* SECTION 301(e) STUDY GROUP REPORT, *supra* note 103, at 126-27.

110. Indeed, many states that have sought response costs under Superfund have included in their complaints a count seeking to enjoin a public nuisance. *See. e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); Missouri v. Indep. Petrochemical Corp., 610 F. Supp. 4 (E.D. Mo. 1985); New York v. General Elec. Co., 592 F. Supp. 291 N.D.N.Y. 1984); Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983). *See also* Halper, *Public Nuisances and Public Plaintiffs: Rediscovering the Common Law (Part I)*, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10292 (1986).

111. RESTATEMENT (SECOND) OF TORTS § 821B(1). *See also* PROSSER & KEETON ON TORTS, *supra* note 102, § 90; SECTION 301(e) STUDY GROUP REPORT, *supra* note 103, at 107.

112. RESTATEMENT (SECOND) OF TORTS § 821C. *See also* Burgess v. M/V Tamano, 370 F. Supp. 247 D. Me. 1973); PROSSER & KEETON ON TORTS, *supra* note 102, § 90, at 646.

113. *See supra* notes 106-109 and accompanying text. However, in Town of East Troy v. Soo Line Railroad Co., 653 F.2d 1123 (7th Cir. 1980), *cert. denied*, 450 U.S. 922 (1981), a town sought to recover on a public nuisance theory expenses incurred as a result of an oil spill. The oil spilled onto the ground from a tank car carrying 20,000 gallons of phenol and eventually migrated into well water of nearby residents. The expenses included those incurred to build a public water supply system. The court held that the action was not barred by a Wisconsin nuisance statute providing that "[a]ny person . . . or town may maintain an action to recover damages or to abate a public nuisance from which injuries peculiar to the complainant are suffered, . . ." 653 F.2d at 1127. In predicting how the Wisconsin courts would construe the statute, the court concluded that "not only a property interest, but any 'other special injury or interest' was sufficient to maintain a nuisance action," since there was a compelling governmental interest and duty on the party of the town to ameliorate quickly the hazardous situa-

The law of public nuisance, however, may be changing. Section 821C(2) of the Restatement (Second) of Torts recognizes that an action to enjoin or abate a public nuisance may be brought by one who has "standing to sue as a representative of the general public, as a citizen in a citizen's action, or as a member of a class in a class action."[114] However, such a plaintiff is limited to actions to enjoin or abate.[115] Thus, the common law may be moving away from premising an individual's recovery for public nuisance on property interests, but the move is not yet established in most jurisdictions.

Private parties may also ask the court to impose strict liability for an abnormally dangerous activity or for an ultrahazardous activity—as the tort is called in some jurisdictions—to address the harm associated with a hazardous substance release.[116] One formu-

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tion, all necessary and reasonable expenses incurred in the exercise of the town's lawfully delegated powers were recoverable under the statute. This case might be read as consistent with those allowing a city to recover abatement costs when authorized by statute or as marking a departure from those refusing recovery when a municipality performs a public duty. *See* cases cited *infra* notes 120, 150-52 and accompanying text.

114. RESTATEMENT (SECOND) OF TORTS § 821C(2)(c) (1977). *See also* RODGERS, *supra* note 100, § 2.2, at 105-06. Many courts, however, are still reluctant to recognize public nuisance actions by public representatives. *See, e.g.*, Philadelphia Electric Co. v. Hercules, Inc., 762 F.2d 303 (3d Cir. 1985); People of Illinois v. City of Milwaukee, 751 F.2d 403, 414-15 (7th Cir. 1984).

115. RESTATEMENT (SECOND) OF TORTS § 821C(2). The significance of this limitation will be explored below. *See infra* notes 148-52 and accompanying text.

116. A good discussion of the history of this tort appears in State of N.J. Dept. of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 487-93, 468 A.2d 150 (1983), in which the court expressly recognizes that the law has evolved so that a landowner is strictly liable to others for harm caused by toxic wastes that are stored on his property and flow onto the property of others. *See also* SECTION 301(e) STUDY GROUP REPORT, *supra* note 103, Appendix K. Indeed, a number of Superfund plaintiffs have sought recovery on a strict liability theory as well as under the statute. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982). *But see* Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 292 n.5 (N.D. Cal. 1984), where the court, which denied a motion to dismiss plaintiffs' claims under section 107, held that even if plaintiffs' tort claims were not barred by the applicable statute of limitations:

> The claim for ultrahazardous activity would . . . fail. Strict liability in tort is "limited to the kind of harm the possibility of which makes the activity abnormally dangerous." Restatement 2d, Torts, § 519. The harm alleged by plaintiff here, that is, the cost of cleaning up the pond and diminished property value, is not the type of harm for which strict liability generally attaches.

The court in *Pinole Point* seems to have confused the nature of the activity that gives rise to strict liability and the available remedy to redress the harm caused by that activity.

It should also be noted that without referring to common law strict liability, many courts have concluded that section 107 of CERCLA creates a standard of strict liability, rather than a standard of liability based on negligence. *See, e.g.*, J.V. Peters v. EPA, 767 F.2d 263, 266 (6th Cir. 1985); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); United States v. Dickerson, 640 F. Supp. 448, 451 (D. Md. 1986); Ohio

lation of the general principle of this form of strict liability is that "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm."[117] Jurisdictions differ as to what activities may give rise to strict liability,[118] and some jurisdictions seem to combine actionable nuisance and this type of strict liability.[119] Perhaps because of the close relationship between strict liability for an abnormally dangerous activity and nuisance, recovery under a strict liability theory is generally limited to one who has suffered harm to property,[120] a limitation not unlike the property interest requirement in trespass and nuisance.[121]

In summary, then, the common law does recognize actionable

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ex rel. Brown v. Georgeoff, 562 F. Supp. 1300, 1305-06 (N.D. Ohio 1983); United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1118 (D. Minn. 1982). Since strict liability may be imposed for liability arising from hazardous substance release, thereby eliminating the need to prove negligence and easing the plaintiff's burden of proof, negligence will not be discussed as a possible theory of recovery.

117. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

118. *See* PROSSER & KEETON ON TORTS, *supra* note 102, § 78.

119. *See, e.g., id.* § 78, at 552-56; § 91, at 652-54. *See also* RODGERS, *supra* note 100, § 2.14, at 160-61; New York v. Shore Realty Corp., 759 F.2d 1032, 1051-52 (2d Cir. 1985) (court holds that under New York law, defendant's maintenance of a hazardous waste site constitutes an abnormally dangerous activity and thus is a public nuisance).

120. *See In re* TMI Litigation Governmental Entities Claims, 544 F. Supp. 853, 858 (M.D. Pa. 1982), *vacated and remanded sub nom* Pennsylvania v. General Public Utilities Corp., 710 F.2d 117 (3d Cir. 1983) (governmental entities cannot recover in strict liability for costs incurred in responding to a nuclear incident in the absence of allegations that government's property was actually injured); City of Bridgeton v. B.P. Oil, Inc., 146 N.J. Super. 169, 177, 369 A.2d 49, 54 (1976) (a city, which had expended money and used its employees to prevent the spread of an oil spill caused by leaks in defendant's gasoline or fuel oil tanks, was not a "proper plaintiff" at common law to seek recovery in strict liability).

121. *See supra* notes 103-13 and accompanying text. This observation must, however, be qualified. Courts sometimes allow recovery to plaintiffs without an interest in the property harmed against defendants engaged in activities characterized as "ultrahazardous" or "inherently dangerous," thus giving rise to strict liability. *See, e.g.*, Indiana Harbor Belt Railroad Co. v. American Cyanamid Co., 517 F. Supp. 314 (N.D. Ill. 1981) (court imposed strict liability on defendant whose hazardous chemical leaked from a railroad car while in transit at one of the plaintiffs' freight yards, resulting in damage to property, equipment and water supply, and the evacuation of 3000 people from the surrounding area and interference with railway operations); Cities Service Co. v. State, 312 So.2d 799 (D. Ct. App. Fla. 1975) (state entitled to injunctive relief and compensatory damages arising out of breaking of dam in one of defendant's settling ponds on theory of strict liability). While the plaintiffs in those cases could probably bring public nuisance actions, they may have pursued strict liability claims for monetary recovery not usually awarded on a public nuisance theory. *See infra* notes 150-52 and accompanying text.

rights in circumstances giving rise to liability under section 107(a) of Superfund. As a practical matter, individuals with standing to sue at common law will probably be section 107(a)(B) plaintiffs.[122] However, the range of potential plaintiffs is much narrower under the common law than under section 107(a). Only "Hohfeldian plaintiffs,"[123] that is, plaintiffs with property rights in the environmental medium affected by the defendant's release, may seek recovery at common law.

In contrast, Superfund's liability scheme does not require the person incurring response costs and seeking to recover them under section 107(a)(B) to have any property interest. Removal of this common law limitation creates the possibility that other kinds of persons will begin to involve themselves in the problems of hazardous substance cleanup.[124] For example, a citizens group without any proprietary interest in property affected by a release could maintain a Superfund action under section 107(a)(B), even though such a group would be unable to maintain actions in trespass, nuisance or strict liability for an abnormally dangerous activity.[125] Moreover, as will be discussed below, the common law's emphasis

122. *See* cases cited *supra* notes 86-87. Even the class actions generally include landowners.

123. The term "Hohfeldian plaintiff" is borrowed from Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968). He differentiates between a Hohfeldian plaintiff, that is, a plaintiff seeking a determination that he has a right, a privilege, an immunity or a power, and the non-Hohfeldian or ideological plaintiff who sues as a representative of the public interest. While Professor Jaffe discusses non-Hohfeldian or ideological plaintiffs only in relation to suits challenging government action, there is no reason why his terminology cannot be extended to actions against private parties.

124. The legislative history of CERCLA reinforces this view of the liability provisions. The liability provision in the Senate bill from which CERCLA was derived allowed recovery of "any loss of income or profits or impairment of earning capacity resulting from injury to or destruction of real or personal property or natural resources, *without regard to the ownership of such property or resources.*" Section 4(a)(E), S.1480, *supra* note 95 (emphasis added). Although the scope of recoverable damages was cut back in the compromise version of the statute as enacted, it continued to make recovery available to plaintiffs who did not have a proprietary interest. *See also* H.R. REP. NO. 172, 96th Cong., 2d Sess., pt. 1 (1979), *reprinted in* 2 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 550-51 (discussing liability provisions in H.R. 85 which affirm that a claimant need not own property harmed by pollution to have standing to bring a claim for damages, as was required at common law).

125. In fact, in U.S. v. Stringfellow, 55 U.S.L.W. 4299 (Mar. 9, 1987) (Supreme Court held that District Court order denying intervention as of right but permitting invervention was not immediately appealable), *vacating and remanding* 755 F.2d 1383, *opinion published at* 783 F.2d 821 (9th Cir. 1986), a citizens group, formed to ensure adequate cleanup of a hazardous waste site, to monitor the performance of government agencies involved in cleanup efforts and to protect the health of its members, was permitted to intervene in a section 107 action brought by the United States and the State of

on property interests in recognizing actionable rights has profoundly influenced the type of remedies usually awarded to tort plaintiffs. Superfund's shift away from that emphasis and grant of broad discretion to courts in awarding remedies has removed significant limits on the scope of available remedies.

(b) *Governmental Recovery*

The common law emphasis on providing rights of action only to "Hohfeldian" plaintiffs has seriously hampered the ability of governmental entities to use the common law in addressing harms to the environment. In general, "a governmental entity cannot sue in tort in its political or governmental capacity, although as the owner of property it may resort to the same tort actions as any individual proprietor to recover for injuries to the property, or to recover the property itself."[126] One exception to this generalization is that a public official or agency with authority to represent the appropriate political subdivision may bring an action to enjoin or abate a public nuisance, much like a representative of the general public.[127] As noted above, a court may regard a release of a hazardous substance giving rise to section 107 liability as a public nuisance.[128] However, the response cost recovery available to a governmental entity under Superfund is quite different than the injunction or abatement remedies available prior to CERCLA's enactment.[129]

There are no apt common law analogies with respect to governmental actions for natural resources damages. Congress did not intend natural resource damage recovery to be available to a private individual suffering a private loss addressed by tort law.[130] Moreover, since neither a state nor the federal government has a property

California. Evidently, the group was permitted to intervene even though it did not allege expenditure of response costs.

126. PROSSER & KEETON ON TORTS, *supra* note 102, § 2, at 7. *See also supra* note 120.

127. *See supra* notes 114-15 and accompanying text. *See also* PROSSER & KEETON ON TORTS, *supra* note 102, § 86, at 617-18.

128. *See supra* note 110 and accompanying text. *But see* Mass. v. Pace, 616 F. Supp. 815, 821 (D. Mass. 1985) (although a transporter of hazardous waste could be held liable under the Commonwealth's counterpart to CERCLA, the transporter's conduct did not create nor contribute to the creation of a nuisance).

129. *See, e.g.*, Town of Freetown v. New Bedford Wholesale Tire, Inc., 384 Mass. 60, 423 N.E.2d 997 (1981) (where no claim is made for fire damage to town property of a type that would give rise to damage liability to a private owner for negligence or nuisance, town cannot recover costs of fire fighting on private land in the absence of statute). *See infra* notes 150-52 and accompanying text.

130. *See* 132 CONG. REC. S14930-31 (daily ed. Oct. 8, 1986) (statement of Sen. Baucus).

interest in natural resources or the environment generally, each is barred from asserting a common law tort right. The proposition that the government has no property interest in natural resources or the environment was recently affirmed in a series of Supreme Court decisions culminating in *Hughes v. Oklahoma*.[131] In *Hughes*, the Court expressly rejected the fiction that the state's power to regulate natural resources is based on its ownership of such resources.[132] Instead, a state's regulation of natural resources is now examined solely as an exercise of the police power in the state's sovereign capacity rather than by reference to the fiction of state ownership of natural resources.[133] The same conclusion ought to apply to the

131. 441 U.S. 323 (1979) (Brennan, J.). In *Hughes*, the Court held repugnant to the Commerce Clause of the Constitution, Art. I, § 8, an Oklahoma statute forbidding the transport or shipping of minnows procured within the state for sale outside the state.

132. *Hughes* expressly overruled Geer v. Connecticut, 161 U.S. 519 (1896), an early Commerce Clause case upholding a statute forbidding the transportation beyond the state of game birds that had been lawfully killed within the state, reasoning that the state statute did not involve interstate commerce because "the State had the power, as representative for its citizens, who 'owned' in common all wild animals within the State, to control not only the *taking* of game but also ownership of game that had been lawfully reduced to possession." *Hughes*, 441 U.S. at 322, *citing Geer*, 161 U.S. at 522-29. Years later in Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977), Justice Marshall described why the state ownership theory lacked vitality:

> A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. *Geer v. Connecticut*, 161 U.S. 519, 539-40 (1896) (Field, J., dissenting). The "ownership" language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Toomer v. Witsell*, 334 U.S. at 402; see also *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420-21 (1948). Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.

Hughes, 441 U.S. at 334-35, *quoting Seacoast Products*, 431 U.S. 265. *See also* Sporhase v. Nebraska, 458 U.S. 941, 102 S. Ct. 3456, 73 L.Ed. 2d. 1254 (1982).

133. *See Hughes*, 441 U.S. at 335-36, quoting *Seacoast Products*, 431 U.S. 265. *See also* Puerto Rico v. S.S. Zoe Colocotroni, 628 F.2d 652, 670-72 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), discussed *infra* notes 163-65 and accompanying text, in which the court rejected an argument that Puerto Rico's assertion of a recoverable interest in natural resources was undercut by *Douglas* and *Hughes*, because although the ownership fiction was rejected, the state's interest was not.

It is also interesting to note that recent Supreme Court decisions distinguish between a state acting as a market participant, which is gauged by the same standards as other private market participation, and a state acting in its soveriegn capacity, which is subject to Commerce Clause scrutiny. *See, e.g.*, South-Central Timber Development, Inc v. Wunnicke,—U.S.—, 104 S. Ct. 2237, 2243 (1984), *citing* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810, 96 S. Ct. 2488, 2498, 49 L.Ed. 2d 220 (1976). In *South-Central Timber*, the Court assumed that when the state's activity involves natural re-

federal government. Except for land actually owned by the government, the federal government's interest in natural resources is not any more proprietary than that of a state.

Hughes implies that an action concerning harm to natural resources or the environment is brought by one seeking to assert some "interest" that transcends individual property rights.[134] Therefore, the remedies available in such an action ought not be limited by the measure of the harm to the plaintiff's interest in the property, the measure of the remedy usually recoverable in tort. Rather, remedies must be calculated on some other basis to reflect the non-Hohfeldian value of natural resources to the public.[135]

(2) Limitations on Remedies Available at Common Law

As discussed above,[136] most tort causes of action analogous to the Superfund liability scheme can be asserted only by a plaintiff with a property interest in the harmed property that is the subject of the cause of action. Thus, it is not surprising that the nature of the remedies recoverable in actions for trespass, nuisance and strict liability for abnormally dangerous activities is closely related to the amount of harm done to the property interest.

In general, the primary purpose of tort law is to force the wrongdoer to compensate the plaintiff for the damage suffered at the expense of the wrongdoer.[137] Similarly, tort remedies are calculated to compensate the plaintiff for the loss sustained.[138] Indeed, when the substantive basis of plaintiff's recovery is the tortfeasor's interference with plaintiff's property interest, the general remedy is a substitutional money damages award[139] measured by the harm to

sources, the state is most likely acting in its sovereign capacity, rather than as a market participant. This analysis buttresses the conclusion that a governmental entity seeking natural resource damages is acting in its sovereign capacity and is not seeking to vindicate the violation of a proprietary interest. Therefore the state cannot maintain a common law action for natural resource damages.

134. *See* Warren & Zackrison, *Natural Resource Damage Provisions of CERCLA*, 1 NAT. RES. & ENVT. 18, 20-21 (1985), who argue that natural resource damage recovery excludes private resources and thus support the conclusion that an action for harm to natural resources does not seek to vindicate property rights.

135. More general descriptions of the implications of *Hughes* and its progeny for a state's regulation of natural resources appear in Tarlock, *So Its Not 'Ours'—Why Can't We Still Keep It? A First Look at Sporhase v. Nebraska*, 18 LAND & WATER L. REV. 137 (1983); Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 SUP. CT. REV. 51 (1979).

136. *See supra* notes 99-123 and accompanying text.

137. *See* PROSSER & KEETON ON TORTS, *supra* note 102, § 2, at 7.

138. D. DOBBS, REMEDIES § 1.2, at 3 *et seq.* (1973).

139. *Id.* § 1.2, at 3; § 3.1, at 135-36.

plaintiff's property interest. To calculate the appropriate measure of damages, the substantive theory is irrelevant. "What is important is to identify the landowner's interests and to compensate for the damage done to them."[140]

Courts basically apply two measures of damage when injury is done to land or to structures on it. The most common measure is diminution in value, that is, the difference in the value of the property immediately before and after the injury. The second measure awards the plaintiff the reasonable costs of restoring or repairing the damage.[141] While courts show some flexibility in applying these damage rules so that the plaintiff is most likely to receive full compensation for the loss, "[m]ost courts follow the rule that repair costs, when used as a measure, may not exceed the diminution in value of the property."[142] Even when courts have allowed repair or restoration costs to exceed the diminution in value of the property, such costs are limited to the total pre-tort value of the property.[143]

Thus, where the resulting damage is permanent, which would probably be the situation when damage results from a hazardous waste release, the defendant is allowed to exercise powers similar to eminent domain: upon a single payment of damages, the defendant is permitted to continue the invasion. The measure of damages is limited by the value of the property before the commission of the tort, without any recognition given to the hazard posed by the continued presence of invasion.[144]

When the interference with plaintiff's property interest is tempo-

140. *Id.* § 5.1, at 310-11; § 5.2, at 331. In describing damages for injury to interests in land, Professor Dobbs concludes that the measure varies with the property interest harmed, not the theory of liability, so that his analysis applies equally to trespass, nuisance and strict liability. The same measures also apply to a plaintiff who suffers special damage because of a public nuisance. *See* PROSSER & KEETON ON TORTS, *supra* note 102, § 89, at 642; RESTATEMENT (SECOND) OF TORTS § 821C.

141. D. DOBBS, *supra* note 138, § 5.1, at 312. *Cf.* Puerto Rico v. S.S. Zoe Colocotroni, 628 F.2d 652 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), discussed *infra* notes 161-65 and accompanying text, where the court, citing RESTATEMENT (SECOND) OF TORTS § 929(1)(a) (1979), described the traditional damages but rejected them as inappropriate in a case involving environmental harm.

142. D. DOBBS, *supra* note 138, § 5.1, at 317. *See also* Baker & Markoff, *By-Products Liability: Using Common Law Private Actions to Clean Up Hazardous Waste Sites*, 10 HARV. ENVTL. L. REV. 99, 112 (1986).

143. D. DOBBS, *supra* note 138, § 5.1, at 317.

144. D. DOBBS, *supra* note 138, § 5.4, at 337. *See also id.* § 5.1, at 312-13; SECTION 301(e) STUDY GROUP REPORT, *supra* note 103, at 113-14. One characteristic of a permanent nuisance or trespass is that the source of the invasion is likely to remain indefinitely. Hazardous waste releases would probably be regarded as permanent because they often involve chemicals whose characteristics allow them to persist and retain their toxicity. A remedy that in effect allows a polluter to condemn surrounding lands was

rary and has been or can be abated, yet another measure of damages may be employed. In this situation, the court usually awards depreciation in the rental or use value of the property during the period in which the interference existed plus special damages, which may include plaintiff's reasonable cost to prevent future injury.[145] Also, those whose interests in the enjoyment of land are interfered with are privileged to abate a private nuisance by self help, analogous to the privilege of using reasonable force to protect the exclusive possession of land against trespass.[146] But these privileges may be exercised only by one with a proprietary interest in the land threatened to be harmed. Furthermore, the existence of a privilege does not necessarily mean that the cost of abatement can be recovered. Where courts have allowed recovery of costs of abatement, the pretort value of the land tends to create an upper limit to recovery.[147]

When the damages described above are deemed to be inadequate,[148] a court in equity or a court of law exercising its powers of equity may enjoin an interference or threatened interference with the plaintiff's interest in land.[149] Such an injunction, by itself, does not involve the payment of money to the plaintiff.

A governmental entity, or one who has standing to sue as a representative of the public, cannot recover compensatory damages because, having no traditional proprietary interest in property harmed or threatened to be harmed, they have suffered no loss.[150] Instead,

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criticized in Boomer v. Atlantic Cement Co., 26 N.Y. 2d 219, 257 N.E. 2d 870, 309 N.Y.S. 2d 312 (1970) (Jasen, J., dissenting).

145. D. DOBBS, *supra* note 138, § 5.3, at 332-35.

146. PROSSER & KEETON ON TORTS, *supra* note 102, § 89, at 641-43.

147. *Id. But see* Earl v. Clark, 219 N.W.2d 487 (Iowa 1974) (court allowed recovery of costs incurred to remove offensive nuisance deposits from plaintiff's land as an element of special damages); C.R.T., Inc. v. Brown, 602 S.W.2d 409 (1980) (plaintiffs entitled to recover cleanup costs as sanction for defendant's contempt in violating order to enjoin the discharge of petroleum waste); Bousquet v. Commonwealth of Mass., 374 Mass. 824, 372 N.E.2d 257 (1978) (in private nuisance case plaintiff entitled to recover loss of value of property and reasonable expenses in abating results of defendant's acts so long as items of damage not duplicated).

148. *See* D. DOBBS, *supra* note 138, § 2.1, at 27; § 2.5, at 57-60. The adequacy test arises only when the substantive basis of a plaintiff's claim rests at law; when the substantive basis of the plaintiff's claim is in equity, the adequacy test is not applied. *Id.* at 60-61. One justification for preferring legal to equitable remedies is that it is, as a practical matter, somewhat easier to execute a legal money judgment than to enforce a coercive equitable decree. *Id.* at 62-63. *See also* PROSSER & KEETON ON TORTS, *supra* note 102, § 89, at 640-41.

149. D. DOBBS, *supra* note 138, § 2.5, at 59-60. Injunctions are available whether the interference is actionable as a trespass or as a nuisance. *See also* PROSSER & KEETON ON TORTS, *supra* note 102, § 89 at 640-41, 647 (injunctive relief particularly appropriate in pollution cases).

150. For example, a number of recent cases have denied recovery of costs incurred

the remedies available to such plaintiffs are usually limited to orders enjoining or abating the nuisance.[151] When a defendant refuses to abate the nuisance a governmental entity may sometimes undertake the abatement and recover the costs from the defendant. But in most jurisdictions, this remedy is available only to municipal authorities acting pursuant to authority conferred by statute, ordinance or regulation.[152]

Restitution is another remedial alternative that has not been widely applied in environmental law.[153] The general principle underlying restitution is that a person who has been unjustly enriched at the expense of another is required to make restitution to the other.[154] It is widely accepted that although a benefit has been con-

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by a municipality acting in its governmental and not proprietary capacity as a result of defendants' otherwise actionable ultrahazardous activities. *See, e.g.*, City of Flagstaff v. Atchison, Topeka and Santa Fe Ry. Co., 719 F.2d 322 (9th Cir. 1983); Mayor & Council of Morgan City v. Fontenot, 460 So. 2d 685 (La. Ct. App. 1984); City of Bridgeton v B.P. Oil, Inc., 146 N.J. Super. 169, 369 A.2d 49 (1976).

151. *See* PROSSER & KEETON ON TORTS, *supra* note 102, § 89, at 640; RESTATEMENT (SECOND) OF TORTS § 821C. However, in City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008, 1017-19 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980), the city sought recovery under a number of statutory theories and under the federal common law of nuisance for damages incurred because of defendants' discharge of contaminants into a river. The court rejected the city's statutory claims but held that a municipality can state a claim for relief under the federal common law of interstate water pollution. The opinion suggests that damages are available to a municipality seeking recovery concerning a public nuisance, but does not explicitly address the available elements of damages. *See also* United States v. Illinois Terminal R.R. Co., 501 F Supp. 18, 21 (E.D. Mo. 1980) (the court, in dictum, cited *Evansville* and found "nothing to support the railroad's conclusion that equitable relief is the exclusive remedy under a public nuisance theory").

Evansville might have hailed a new trend expanding recovery by a governmental entity for nuisance cases. However, Superfund allows the type of recovery sought in *Evansville*, so that a municipality need not resort to federal common law.

152. *See, e.g.*, City of Paterson v. Fargo Realty, Inc., 174 N.J. Super. 178, 415 A.2d 1210 (1980); Brandon Twp. v. Jerome Builders, Inc., 80 Mich. App. 180, 263 N.W.2d 326 (1977); Local Board of Health v. Wood, 243 N.W.2d 862 (Iowa 1976). *Cf.* District of Columbia v. Air Florida, Inc., 750 F.2d 1077 (D.C. Cir. 1984) (in the absence of authorizing legislation or a governmental proprietary interest, a governmental entity may not recover costs of tax-supported emergency services including cleanup costs from negligent tortfeasors); Town of Freetown v. New Bedford Wholesale Tire, Inc., 384 Mass. 60, 423 N.E.2d 997 (1981).

153. Three cases in which a governmental entity recovered cleanup costs on an unjust enrichment theory, apart from any statutory rights to recovery, are State v. General Elec. Co., 103 A.D.2d 985, 479 N.Y.S.2d 1008 (N.Y. App. Div. 1984); State v. Schenectady Chemical, Inc., 103 A.D.2d 33, 479 N.Y.S.2d 1010 (N.Y. App. Div. 1984); Brandon Twp. v. Jerome Builders, Inc., 80 Mich. App. 180, 263 N.W.2d 326 (1977). *See also* Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I)*, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10292 (1986).

154. RESTATEMENT OF RESTITUTION § 2 (1937); D. DOBBS, *supra* note 138, § 4.9, at 298-309; Wade, *Restitution for Benefits Conferred Without Request*, 19 VAND. L.

ferred, the enrichment is not "unjust" when one officiously confers a benefit upon another without affording an opportunity to reject the benefit.[155] This opportunity to reject need not be given when the benefit was conferred under circumstances making such action necessary for the protection of the beneficiary or of third persons.[156] Such circumstances include performance of another's duty to a third person in an emergency and duty to the public.[157]

A restitutionary award may, like compensatory damages, be payable in money. Restitution differs from compensatory damages, however, in that it is measured by the defendant's gain, not by the plaintiff's loss.[158] Since restitution is not limited in amount by the value of the property harmed, a plaintiff who performs the duty of another to abate a nuisance could recover the costs incurred to abate on a restitution theory, even though those costs are generally not recoverable by a plaintiff at common law.[159]

REV. 1183 (1966). *See also* RESTATEMENT (SECOND) OF RESTITUTION, § 1 comment h (Tent. Draft No. 1, 1983).

155. *See* materials cited *supra* note 154.

156. D. DOBBS, *supra* note 138, § 4.9, at 298-305; RESTATEMENT OF RESTITUTION § 5 (1937). *See also* RESTATEMENT (SECOND) OF RESTITUTION, § 3 (Tent. Draft No. 1, 1983).

157. RESTATEMENT OF RESTITUTION §§ 114-15 (1937); D. DOBBS, *supra* note 138, § 4.9, at 305-09; Wade, *supra* note 154, at 1195-98.

158. *Id.* § 3.1, at 135-37; RESTATEMENT OF RESTITUTION § 150 (1937). Professor Dobbs believes that "the restitutionary remedies for the most part could just as well be enforced by procedures known to the law courts," D. DOBBS, *supra* note 138, § 2.1, at 26, and that the coercive means of enforcing monetary restitutionary remedies are something of an historical accident. *Id.*

159. Restitution may begin to take the place of the more traditional compensatory damage remedies. In THE ATTORNEY GENERAL'S ASBESTOS LIABILITY REPORT TO THE CONGRESS PURSUANT TO SECTION 8(b) OF THE ASBESTOS SCHOOL HAZARD DETECTION AND CONTROL ACT OF 1980 (Comm. Print 1981), recovery in restitution on a theory patterned after RESTATEMENT OF RESTITUTION § 115 was characterized as the most desirable remedy from the standpoint of a plaintiff who sought to recover from manufacturers of asbestos-containing building materials for the costs of repairing or replacing those materials. ATTORNEY GENERAL'S ASBESTOS LIABILITY REPORT at 118-22, *citing* Brandon Twp. v. Jerome Builders, Inc., 80 Mich. App. 180, 263 N.W.2d 326 (1977); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967). It is possible that attorneys familiar with the Attorney General's Report will begin to seek recovery in restitution, not only in the asbestos removal context, but other contexts as well, when there are obstacles to other theories of recovery. *See also* Baker & Markoff, *By-Products Liability: Using Common Law Private Actions to Clean Up Hazardous Waste Sites*, 10 HARV. ENVTL. L. REV. 99 (1986) (urging greater use of theories of restitution and implied warranty in cleanup cases). *But see* Mayor of Morgan City v. Jesse J. Fontenot, Inc., 460 So. 2d 685, 688-89 (La. Ct. App. 1984), and Massachusetts v. Pace, 616 F. Supp. 815, 822 (D. Mass. 1985), which refused to consider the applicability of theories of equity where there is some other express or positive law governing; and Town of Hooksett School Dist. v. W.R. Grace & Co., 617 F. Supp. 126, 134 (D.N.H. 1984)

In its remedial scheme, Superfund provides a restitutionary remedy rather than compensatory damage awards.

C. SUPERFUND REMEDIES FOR PROPERTY DAMAGE

As noted above,[160] the common law is primarily concerned with providing compensation for interference with interests in property. The measure of recovery is usually limited by the value of the property before the interference. Other measures are theoretically available but have not been widely used.

It would be inappropriate for Superfund remedies to be measured by the value of a property interest. To base Superfund remedies on property values would in effect allow dischargers of hazardous substances to condemn surrounding areas,[161] would allow the threat to human health to remain and would preclude attempts to restore the ecological balance. Legal remedies are insufficient to address the threat posed by hazardous waste releases.

The limited pre-CERCLA authority that exists underscores the importance of providing remedies beyond compensatory damages in order to ameliorate conditions created by pollution, even if no obvious personal injury or property loss has occurred.[162] As explained by the court in *Puerto Rico v. S.S. Zoe Colocotroni*,[163]

> Many unspoiled natural areas of considerable ecological value have little or no commercial or market value. Indeed, to the extent such areas have a commercial value, it is logical to assume they will not long remain unspoiled, absent some governmental or philanthropic protection. A strict application of the diminution in value rule would deny the state any right to recover meaningful damages for harm to such areas, and would frustrate appropriate measures to restore or

(plaintiff school district acted as a volunteer in removing asbestos-containing materials from schools, and its restitution claim to recover those costs was dismissed).

160. *See supra* notes 137-38 and accompanying text.

161. In *Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), *see supra* note 141 and *infra* notes 163-65 and accompanying text, the court discussed the inappropriateness of applying the traditional measure of damages in a case brought by Puerto Rico for damage to its coastal environment caused by an oil spill.

162. *See infra* note 165 and accompanying text.

163. 628 F.2d 652 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). In *Zoe Colocotroni*, the Commonwealth of Puerto Rico, invoking the admiralty jurisdiction of the court, sought to recover damages for harm to the coastal environment when an oil tanker grounded on a reef south of Puerto Rico and the captain allowed the dumping of 5000 tons of crude oil to refloat the vessel. The Commonwealth, as the owner of the real property affected by the oil spill, could have sought damages under conventional principles for its private economic loss as measured by depreciation of market value in the coastal land, but chose not to do so.

rehabilitate the environment.[164]

The court concluded that even in a case where the sovereign has an ownership interest in the real property where the environmental damages occurred, the appropriate primary standard for determining damages is the cost reasonably to be incurred by the sovereign or its designated agent to restore or rehabilitate the environment in the affected area to its pre-existing condition.[165]

In fact, the remedies available under Superfund are not the limited compensatory damages available at common law. Rather, Superfund allows governmental and nongovernmental entities to recover response costs, measured by the amount necessary to mitigate and permanently remedy the harm to the public generally. In addi-

164. 628 F.2d at 673. The court confirmed its perception of meaningful natural resource damage recovery by reviewing recent federal legislation concerning oil pollution, including the Clean Water Act Amendments of 1977, 33 U.S.C. § 1321(f)(4) (1982), the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1813(a)(2) (1982) and the Submerged Lands Act, 43 U.S.C. § 1301(e) (1982). Zoe Colocotroni, 628 F.2d at 673-74. *But see* Idaho v. Bunker Hill Co., 635 F. Supp. 665, 675-76 (D. Idaho 1986), wherein the court suggested that the appropriate measure of natural resource damages is the lesser of either a value-based measure or a cost-of-restoration basis.

165. Zoe Colocotroni, 628 F.2d at 675. Other cases decided before *Zoe Colocotroni* have suggested that legal damages are not appropriate when a governmental entity sues in its *parens patriae* capacity. For example, in Maine v. M/V Tamano, 357 F. Supp. 1097 (D. Me. 1973), Judge Gignoux distinguished a state's right to protect its proprietary interests and to seek recovery for damage to property owned by the state, from its right to maintain an action *parens patriae* on behalf of its citizens to recover for damages to natural resources. The court also noted that all but two of the Supreme Court *parens patriae* cases were actions solely for injunctive relief, and in both of its *parens patriae* damages suits, the Supreme Court denied recovery. Maine v. M/V Tamano, 357 F. Supp. at 1101, *citing* Hawaii v. Standard Oil Co. of Calif., 405 U.S. 251 (1972) and Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945). The court in *M/V Tamano* failed to find a bar to the recovery of damages, but in fact, the U.S. Supreme Court has never permitted a damages award in subsequent *parens patriae* cases. *See, e.g.*, Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982); Maryland v. Louisiana, 451 U.S. 725 (1981); Pennsylvania v. New Jersey, 426 U.S. 660 (1976).

More recently, courts have characterized as equitable the remedies available to clean up environmental harm, thus permitting considerable judicial discretion in decreeing the appropriate measure of recovery. *See, e.g.*, United States v. Dae Rim Fishery Co., Ltd., 794 F.2d 1392 (9th Cir. 1986) and United States v. P/B STCO 213, ON 527 979, 756 F.2d 364 (5th Cir. 1985), *citing* Wyandotte Transp. Co. v. U.S., 389 U.S. 191, 88 S. Ct. 379, 19 L.Ed.2d 407 (1967) [Federal Water Pollution Control Act imposes on polluters primary duty to clean up waters they have polluted; thus when U.S. undertakes cleanup, recovery against polluter is in the nature of quasi-contract as embodied in *Restatement of Restitution* § 115 (1937)]; United States v. Price, 688 F.2d 204 (3rd Cir. 1982) [asserting equitable powers of court to fashion remedy in action brought under RCRA § 7003, 42 U.S.C.A. § 6973 (1982, Supp. III 1985)]. *Cf.* Weinberger v. Romero-Barcelo, 456 U.S. 305, 102 S. Ct. 1798, 72 L.Ed.2d 91 (1982) (the Federal Water Pollution Control Act permits the exercise of a court's equitable discretion to refuse to issue an injunction to enjoin discharges in violation of the Act).

tion, governmental entities may recover natural resource damages. In effect, the Superfund remedies allow responding parties, knowing they will be entitled to cover their costs, to act quickly to mitigate harm and avert the type of personal injury and property damage that would give rise to tort claims for compensatory damages.[166] Courts have considerable discretion in deciding the amounts and types of costs awarded under Superfund.[167]

Given that Superfund allows non-Hohfeldian plaintiffs to recover response costs, it is not surprising that every district court that has considered the question has held that liability under section 107 for response costs is restitutionary in nature and not a compensatory damages award.[168] Although the United States is responsible for overseeing the actual response to a hazardous substance release, the statute imposes legal liability on the responsible party.[169] When a party, governmental or nongovernmental, incurs response costs it is performing the duty of the responsible party. In seeking recovery of those costs under section 107(a), that party is asking for the return of money spent on behalf of the responsible party to safeguard public health.[170] Thus, response cost recovery restores the status quo by returning to the plaintiff what rightfully belongs to it, rather than compensating the plaintiff for loss sustained to its interests as a result of the responsible party's wrongful conduct, and is a classic example of equitable restitution.[171]

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166. *See supra* notes 25, 30 and accompanying text. In the debates on the version of S1480 as ultimately enacted into law, senators, in order to support the need for a Superfund statute, repeatedly cite dangers posed to human health and property by the unmitigated release of hazardous substances. *See generally* 126 CONG. REC. 30, 897-987 (1980), *reprinted* in 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 553 *et seq.* *See also* United States v. Dickerson, 640 F. Supp. 448, 453 (D. Md. 1986).

167. *See supra* notes 61-93 and accompanying text.

168. *See* cases cited *infra* notes 170-71. The precise issue in most of those cases is whether CERCLA affords essentially equitable relief in the nature of restitution, such that the defendants' right to a jury under the Seventh Amendment of the U.S. Constitution does not attach. The Seventh Amendment preserves the right of trial by jury only in suits at common law, not in proceedings in the courts of equity.

One court has also held that because a CERCLA suit for reimbursement of response costs is equitable in nature, only the doctrine of laches, and no analogous legal limitations period, applies to limit such suits. *See* United States v. Dickerson, 640 F. Supp. 448 (D. Md. 1986).

169. *See supra* notes 25-29 and accompanying text.

170. *See* United States v. Reilly Tar & Chemical Corp., 13 Envtl. L. Rep. (Envtl. L. Inst.) 20897, 20898 (D. Minn. 1983); United States v. Northeastern Pharmaceutical & Chemical Co., Inc., No. 80-5066-CV-504, slip op. at 3 (W.D. Mo. Sept. 30, 1983), *quoting* RESTATEMENT (SECOND) OF RESTITUTION § 115 (1937). *See supra* notes 153-57, 151-53 and accompanying text.

171. *See* United States v. Argent Corp., Civil No. 83-523-1413, slip op. (D.N.M. Dec. 20, 1983); Northeastern Pharmaceutical, slip op. at 3-4; Reilly-Tar, 13 Envtl. L.

This characterization of response costs recovery as restitutionary is particularly appropriate where a responsible party improperly disposed of hazardous substances over a long period of time in the regular course of its business. Such a responsible party profited by the activity resulting in the generation, transportation or storage of hazardous substances, but never paid a cost of that activity, that is, the cost of proper disposal. When another pays that cost today, the responsible party is enriched. It is restitution when the responsible party bears the cost of remedying the problem[172] by returning the remedial costs incurred by others.

With regard to recovery of natural resource damage under section 107(a)(C), the characterization of the nature of the damages is more difficult since Congress used the label "damages" as opposed to "costs." The designation is not, however, dispositive regarding the nature of the remedy,[173] and natural resource damages are appropriately characterized as restitution for several reasons.

First, in order to provide effective cost recovery, natural resource damages ought to be characterized as something other than compensatory damages. Moreover, if the resources have no market value, there could be no recovery for damages to such resources.[174] SARA's legislative history makes clear that reliance on market values in assessing natural resource damages is unjustified.[175] Since the government does not generaly own natural resources,[176] damage to natural resources would not result in loss to the government that is compensable by a damages award.

Second, the context in which Superfund allows recovery of natural resource damages suggests they are not compensatory in nature. CERCLA permits only governmental entities, and not private parties, to recover natural resource damages.[177] The statute makes

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Rep. (Envtl. L. Inst.) at 20898-99. *See also* United States v. Ward, 618 F. Sup. 884, 913 (E.D.N.C. 1985); United States v. Conservation Chemical Co., 619 F. Supp. 162, 205 (W.D. Mo. 1985); United States v. Mottolo, 605 F. Supp. 898, 912-13 (D.N.H. 1985); Artesian Water Co. v. New Castle County, 605 F. Supp. 1348, 1353-54 (D. Del. 1985); United States v. Tyson, 22 Env't Rep. Cas. (BNA) 1471 (E.D. Pa. 1984); United States v. Georgeoff, 22 Env't Rep. Cas. (BNA) 1601 (N.D. Ohio 1984); United States v. Union Gas Co., 22 Env't Rep. Cas. (BNA) 1603 (E.D. Pa. 1984); United States v. Wade, 653 F. Supp. 11, 13 (E.D. Pa. 1984).

172. *See supra* notes 48-51 and accompanying text discussing purpose of CERCLA liability scheme.

173. *See* United States v. Wade, 653 F. Supp. 11, 13 (E.D. Pa. 1984), *citing* United States v. Long, 537 F.2d 1151 (4th Cir. 1975), *cert. denied*, 429 U.S. 871 (1976).

174. *See supra* note 162 and accompanying text.

175. 132 CONG. REC. S14931 (daily ed. Oct. 3, 1986) (statement of Sen. Baucus).

176. *See supra* notes 131-33 and accompanying text.

177. *See supra* note 55 and accompanying text.

clear that the government's interest in natural resources is not proprietary in providing that the government acts not as owner of natural resources for purposes of section 107(a)(C) recovery, but rather "on behalf of the public as trustee of such natural resources."[178] The characterization of the role of a governmental entity as trustee does not, of course, determine the nature of the remedy available in an action against a third party, since a trustee is generally empowered to bring proceedings as "if he held the trust property free of trust."[179] However, the legislative history characterizes natural resource damage recovery as restitution.[180] In addition, the measurement of the remedy is cast more in terms of restoring the status quo,[181] than compensation for loss, a characteristic of a restitutionary remedy.[182] Thus Congress regarded this remedy not as compensatory damages recoverable by one with a proprietary interest, but rather as a remedy that is not measured by proprietary interests.

To conclude that the remedies for harm to the environment under Superfund are restitutionary does not necessarily provide the measure that should be applied by a trial court in a given case. As expressed by the Court of Appeals in *Zoe Colocotroni*, "[t]o say that the law on this question [of the appropriate theory of damages] is unsettled is vastly to understate the situation . . . and we ourselves

178. 42 U.S.C. § 9607(f) (1980). *See also* 42 U.S.C. § 9611(b) (1980), providing that natural resource damage claims against the Fund "may be asserted only by the President, as trustee, for natural resources over which the United States has sovereign rights, or natural resources within the territory or the fishery conservation zone of the United States to the extent they are managed or protected by the United States, or by any state for natural resources within the boundary of that State belonging to, managed by, controlled by, or appertaining to the State."

179. RESTATEMENT (SECOND) OF TRUSTS § 280 (1959).

180. *See* SEN. REP. NO. 848, 96th Cong., 2d Sess. 84 (1980), where the Committee on Environment and Public Works indicated that "it was appropriate and necessary for the State or in some instances the Federal government acting as trustee for such resources to seek restitution for such damages or restoration of such resources," *reprinted in* 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 391. *See also* 132 CONG. REC. H9673 (daily ed. Oct. 8, 1986) (statement of Rep. Jones).

181. *See supra* note 80 and accompanying text.

182. *See supra* notes 158, 171 and accompanying text. This conclusion is reached more directly by Judge Newcomer in United States v. Wade, No. 79-1426, slip op. (E.D. Pa. Feb. 2, 1984). *But see* United States v. Georgeoff, 22 Env't Rep. Cas. (BNA) 1601 (N.D. Ohio 1984), wherein the court noted that "[p]rovision is also made for damages, 42 U.S.C. § 9607(a)(1)(C), for injury to natural resources in the process of removing hazardous wastes but plaintiff in this case only seeks the response costs it incurred." 22 Env't Rep. Cas. (BNA) at 1602. This sentence suggests that, in the court's opinion, natural resource damage may not be an equitable remedy. However, the court does not reach the issue since the government claims only its response costs.

have ventured far into uncharted waters."[183] The lack of available precedent will provide Superfund plaintiffs with a certain amount of freedom to seek the remedy best able to address the dangers created by hazardous waste releases, and to avoid the limits that the inevitable references to market values impose on common law recovery. However, it is precisely this aspect of Superfund, providing plaintiffs with recovery no longer limited to one measurable by market place standards, that makes it difficult for Superfund defendants and their insurers to predict their potential exposure to Superfund liability. The difficulty of insuring Superfund liabilities and restitutionary remedies will be addressed in Part II.

D. THE LIMITATIONS OF COMMON LAW LIABILITY AND REMEDIES IN ADDRESSING PERSONAL INJURY CAUSED BY HAZARDOUS SUBSTANCE RELEASES AND COMPARISON TO SUPERFUND LIABILITY AND REMEDIES.

As noted above, SARA amended section 107(a) of Superfund to allow governmental entities to recover the costs of health assessments and health effects studies carried out under section 104(i).[184] The term health assessments includes:

> preliminary assessments of the potential risk to human health posed by individual sites and facilities, based on such factors as the nature and extent of contamination, the existence of potential pathways of human exposure . . . , the size and potential susceptibility of the community within the likely pathways of exposure, the comparison of expected human exposure levels to the . . . health effects associated with identified hazardous substances and any available recommended exposure or tolerance limits for such hazardous substances, and the comparison of existing morbidity and mortality data on diseases that may be associated with the observed levels of exposure.[185]

Amendments to section 104(i) require the ATSDR to perform a health assessment for each facility on the NPL.[186] Since the NPL may include facilities where releases either have occurred or are threatened,[187] the ATSDR may conduct health assessments at facil-

183. Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 678 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

184. *See supra* notes 54, 56 and accompanying text.

185. SARA § 110(4) (to be codified at 42 U.S.C. § 9604(i)(6)(F)).

186. SARA § 110(4) (to be codified at 42 U.S.C. § 9604(i)(6)). *See also* SARA CONFERENCE REPORT, *supra* note 12, at H9092.

187. CERCLA § 105(8), 42 U.S.C. § 9605(8) (1980).

ities where individuals have not necessarily been exposed to hazardous substances.

The ATSDR must also conduct health effects studies for selected groups of exposed individuals whenever, in the judgment of the Administrator of ATSDR, it is appropriate on the basis of the results of a health assessment.[188] Thus, health effects studies are undertaken under narrower circumstances than health assessments.[189]

The government could not recover an analogous remedy at common law. Most courts, without discussing particular theories of liability, have limited common law recovery for personal injury to parties who can prove an actual, present injury or future damages that are reasonably certain to occur.[190] A few jurisdictions have advanced the common law and have allowed individuals who have been exposed to toxic chemicals released by the defendants and have sustained an "enhanced risk of injury" to seek recovery on theories of negligence, trespass, nuisance, battery and strict liability in tort.[191] However, these theories may be asserted only by individuals who have sustained the enhanced risk and have alleged expo-

188. SARA § 110(4) (to be codified at 42 U.S.C. § 9604(i)(7)).

189. SARA § 110(4), adds a paragraph to CERCLA § 104(i)(5)(A) (to be codified at 42 U.S.C. § 9604(i)(5)(A)). This amendment requires the Administrator of the ATSDR to assess whether adequate information on the health effects of hazardous substances listed by the ATSDR is available and, if not available, to initiate a research program to determine the health effects of such substances. It does not appear that such research programs are included within the term "health effects study," the costs of which are recoverable under section 107(a)(D). However, amended paragraph 104(i)(5)(D) provides that:

> It is the sense of the Congress that the costs of research programs under this paragraph be borne by the manufacturers and processors of the hazardous substance in question. . . . Within 1 year after the enactment of [SARA], the Administrator of EPA shall promulgate regulations which provide, where appropriate for . . recovery of such costs from responsible parties under this Act.

SARA § 110(4) (to be codified at 42 U.S.C. § 104(i)(5)(D)). It is questionable whether SARA permits recovery of research program costs, unless research programs are included within the meaning of "health effects study." In that case, a showing that individuals have been exposed to the substance under research is not required, since human exposure is not a requirement for testing of a hazardous substance.

190. *See, e.g.*, Amader v. Johns-Manville Corp., 514 F. Supp. 1031 (E.D. Pa. 1981); Mink v. University of Chicago, 460 F. Supp. 713, 719 (N.D. Ill. 1978); Bennett v. Mallinckrodt, Inc., 698 S.W.2d 854, 866 (Mo. Ct. App. 1985); Sease v. Taylor's Pets, Inc., 700 P.2d 1054, 1060 (Or. App. 1985); Peterman v. Techalloy Co., No. 81-9762 (C.P. Montg. Co. Pa. Feb. 26, 1982).

191. Hagarty v. L & L Marine Services, Inc., 788 F.2d 315 (5th Cir. 1986) *reh'g denied*, 797 F.2d 256 (5th Cir. 1986); Sterling v. Velsicol Chemical Corp., 647 F. Supp. 303 (W.D. Tenn. 1986); Ayers v. Township of Jackson, 189 N.J. Super. 561, 565, 461 A.2d 184 (1983). Possibly, an exposed individual could also seek recovery for an assault, which generally requires only the apprehension of a harmful contact, not actual contact or physical harm.

sure to the hazardous substance.[192] In the absence of actual injury, courts have limited recovery to the medical costs for future testing of exposed individuals[193] or present mental distress and anxiety arising from the fear of developing disease.[194]

In the same way that a governmental entity cannot recover for property damage in its political or governmental capacity,[195] it cannot recover for personal injury because it has no "person" which could sustain actual present injury, future damages reasonably certain to occur, or even exposure to a hazardous substance. Perhaps the most far reaching acknowledgement of a governmental entity's ability to recover is set forth in *United States v. Price*,[196] where the court recognized that a court of equity has discretion to award the United States funds to conduct a diagnostic study of the threat posed to a public water supply by toxic chemicals emanating from a landfill. However, the Court of Appeals in *Price* made clear that such award would be an exercise of the court's equitable discretion and not a recovery of compensatory damages, and affirmed the trial court's refusal to make such an award.

Thus, in the area of recovery for personal injury, Superfund goes beyond the common law in allowing the government, rather than an exposed or injured individual, to recover costs of health assessments and health effects studies. In effect, Superfund requires responsible parties to finance an investigation of the potential risks to human health created by a particular site, without a showing that individuals are at risk or have been exposed.[197]

It remains unclear how courts will characterize health-related cost recovery. The court in *Price* characterized the request for funding of a diagnostic study as a request for an injunction to pay

192. *See, e.g. In re* Moorenovich, 634 F. Supp. 634 (D. Me. 1986) (recovery of damages for present fear of developing cancer in the future as a result of exposure to asbestos requires the following prerequisites: (1) anxiety proximately caused by plaintiff's exposure; (2) anxiety must be reasonable; and (3) defendant must be legally responsible for the plaintiff's exposure.

193. *See* Askey v. Occidental Chem. Corp., 102 A.D.2d 130, 477 N.Y.S. 2d 242 (1984); Ayers, 189 N.J. Super. at 572-73.

194. *See, e.g.*, Herber v. Johns-Manville Corp., 785 F.2d 79 (3d Cir. 1986); Eagle-Picher Industries, Inc. v. Cox, 481 So.2d 517 (Fla. Dist. Ct. App. 1985).

195. *See supra* text accompanying note 126.

196. 688 F.2d 204 (3d Cir. 1982).

197. Thus, recoverable health-related costs differ from the individual medical testing costs, recoverable in some jurisdictions, which, according to one congressman, are not part of a health assessment. *See* 132 CONG. REC. H9565 (daily ed. Oct. 8, 1986) (statement of Rep. Lent). Indeed, another congressman stated that health-related costs recoverable under section 107 are not compensatory damages recoverable in tort. 132 CONG. REC. H9591 (daily ed. Oct. 8, 1986) (statement of Rep. Fish).

money.[198] However, the Superfund health-related cost recovery provision contemplates that the responsible party will reimburse the government for costs of "any health assessment or health effects study *carried* out."[199] The use of the past tense indicates that only funds already spent can be recovered. Thus, the injunction analysis is inappropriate.

Courts should apply the same restitution analysis to health-related cost recovery as is applied to response cost and natural resource damage recovery. Congressional intent in amending section 104(i) was to require the ATSDR to carry out health assessments and health effects studies and thereby eliminate or prevent actual or potential adverse health effects caused by human exposure to hazardous substances.[200] Because health-related costs, like response costs, are preventative and not compensatory,[201] the recovery of such costs is more appropriately characterized as equitable restitution.

In conclusion, Superfund's innovative remedy for recovery health-related costs goes far beyond even the most advanced personal injury remedies recognized by common law courts. As such, it presents similar difficulties for insurers to those posed by the property damage remedies. These difficulties will now be addressed.

PART II—INSURANCE AGAINST SUPERFUND LIABILITIES

Unfortunately, the creation of innovative remedies will not, by itself, achieve Superfund's purpose of requiring responsible parties to bear the costs of remedying the harmful conditions they created. Neither response costs, natural resource damages nor health-related costs can be collected from a party who is responsible at law, but who does not have sufficient funds to pay a judgment of liability. Congress clearly recognized this problem and sought to address it by establishing financial responsibility requirements for those parties engaged in activities involving hazardous substances.[202]

198. 688 F.2d at 210-13.

199. SARA § 107(b) (to be codified at 42 U.S.C. § 9607(a)(D)) (emphasis added).

200. 132 CONG. REC. S14897-98 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford).

201. *See supra* notes 166-71 and accompanying text.

202. The financial responsibility requirements appear in Section 108 of Superfund, 42 U.S.C. § 9608 (1980), and are modelled on section 311(p) of the Clean Water Act, 33 U.S.C. § 1321(p) (1982, Supp. III 1985), and the financial responsibility requirements of the Solid Waste Disposal Act, 42 U.S.C. § 6924 (1982). *See* S. REP. NO. 848, 96th Cong., 2d Sess. 92 (1980), *reprinted in* 1 LEGISLATIVE HISTORY OF CERCLA, *supra*

As will be discussed below, Congress contemplated that parties potentially subject to Superfund liability could use insurance to satisfy those financial responsibility requirements.[203] However, Congress failed to consider that typical liability insurance policies do not cover the restitutionary remedies of Superfund, nor do they cover liabilities arising from longstanding improper disposal practices occurring before Superfund's enactment. Furthermore, important public policies preclude such coverage.

A. THE FINANCIAL RESPONSIBILITY REQUIREMENTS OF SUPERFUND

Section 108(b)[204] establishes financial responsibility requirements under Superfund.[205] With respect to facilities,[206] the statute, as

note 10, at 399. However, despite the obvious importance of financial responsibility to the success of the Superfund liability scheme, there is virtually no legislative history of the provisions upon which Section 108 was modeled. *See also* Andersen, *The Resource Conservation and Recovery Act of 1976: Closing the Gap*, 1 WIS. L. REV. 633, 657 (1978). The legislative history of Section 108 itself is scant.

203. *See infra* notes 208-12 and accompanying text.

204. 42 U.S.C. § 9608 (1980).

205. Section 108 also sets financial responsibility requirements for vessels. The level of financial responsibility for vessels is "$300 per gross ton (or for a vessel carrying hazardous substances as cargo, or $5,000,000, whichever is greater)." 42 U.S.C. § 9608(a)(1) (1980). The requirements for vessels were patterned after Section 311(p) of the Clean Water Act, 33 U.S.C. § 1321(p) (1982, Supp. III 1985).

The reason that vessels are treated separately from facilities appears to be twofold. First, vessels were already regulated and subject to financial responsibility requirements under section 311(p) of the Clean Water Act, 33 U.S.C. § 1321(p). Thus there was an existing model for financial responsibility for vessels that was not available for facilities. *See* S. REP. NO. 848, 97th Cong., 2d Sess. 92 (1980), *reprinted in* 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 399.

Second, the market for marine insurance that covers vessels has traditionally been treated as distinct from the property and casualty insurance market for facilities. The marine insurance market has been better able to respond to the need for insurance against liability arising from oil and hazardous substance release. *See generally*, FINAL TREASURY REPORT, *supra* note 6, at 31-45; INTERIM TREASURY REPORT, *supra* note 6, at 49-64; U.S. DEPARTMENT OF JUSTICE, LAND AND NATURAL RESOURCE DIVISION, THE SUPERFUND CONCEPT: REPORT OF THE INTERAGENCY TASK FORCE ON COMPENSATION AND LIABILITY FOR RELEASES OF HAZARDOUS SUBSTANCES (June 1979) 138-40 [hereinafter INTERAGENCY REPORT]. One reason that the marine insurance industry may be better able to respond to this need is that liability for vessels tends to be more limited than that for facilities. For example, under Superfund, liability for vessels is limited to $300 per gross ton, or $5,000,000, whichever is greater, while liability for facilities, except for motor vehicles, is limited to the total of all costs of response plus $50,000,000. 42 U.S.C. § 9607(c) (1980).

206. "Facilities" are defined as:

> (A) Any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft,

amended, does not actually set specific levels of financial responsibility, but rather requires that the President adopt regulations which incrementally impose financial responsibility requirements no later than four years after the date of promulgation.[207] Amendments to section 108(b) establish that insurance is one means by which a facility may satisfy the financial responsibility requirements.[208] Indeed, the statute itself, its legislative history, and reports mandated by the statute indicate that insurance is the single most important means of demonstrating financial responsibility.

In addition to providing that facilities may use insurance to establish financial responsibility, section 108(b)(2) states that ". . . the President shall cooperate with and seek the advice of the commercial insurance industry in developing financial responsibility requirements."[209] Section 301(b)[210] of CERCLA mandated a study, which was submitted by the Treasury Department in interim form in March 1982[211] and in final form in June 1983,[212] to determine the availability of adequate private insurance protection on reasonable terms and conditions to the owners and operators of vessels and facilities subject to liability under section 107, and the competitiveness of the insurance market. Because of continuing unavailability of such private insurance,[213] section 208 of SARA mandates further study by the Comptroller General to determine the insurability, and effects on the standard of care, of persons subject to Superfund liability as well as those liable for injury to persons or property caused

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or (B) Any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9) (1980). However, while a motor vehicle is a facility within the meaning of section 101(9), 42 U.S.C. § 9601(9) (1980), section 108(b)(5), 42 U.S.C. § 9608(b)(5) (1980) provides that requirements for evidence of financial responsibility of motor carriers is to be determined under the Motor Carrier Act of 1980, 49 U.S.C. § 10927 (1982, Supp. III 1985), not Superfund.

207. 42 U.S.C. § 9608(b)(3) (1980) (as amended by SARA § 108(b)).

208. 42 U.S.C. § 9608(b)(2) (1980). Other means of satisfying the requirements include guarantee, surety bond, letter of credit and qualification as a self-insurer.

209. 42 U.S.C. § 9608(b)(2).

210. 42 U.S.C. § 9651(b).

211. INTERIM TREASURY REPORT, *supra* note 6. This report also fulfilled the requirements of Section 107(k)(4), 42 U.S.C. § 9607(k)(4) (1980), which required the Secretary of the Treasury to study the feasibility of establishing or qualifying a system of private insurance for facilities that have received a permit under Subtitle C of the Solid Waste Disposal Act, 42 U.S.C. § 6925 (1982), and whose liability is transferred to and assumed by the Post Closure Liability Fund established by 42 U.S.C. § 9641 (1980).

212. FINAL TREASURY REPORT, *supra* note 6.

213. *See infra* note 290 and accompanying text.

by hazardous substances releases.[214]

The legislative history of CERCLA further supports the conclusion that Congress considered private insurance an important means of assuring that facilities would satisfy their Superfund liabilities. For example, several Senators expressed concern that the expansive liability provisions of the original legislation would expose small businesses to losses they would be unable to absorb, that no insurance would be available to protect those businesses, and that Superfund's acceleration of the development and application of concepts of strict, joint and several liability would prevent the private sector from assessing its liabilities and risks in an orderly manner.[215] CERCLA, as originally enacted, addressed this concern by phasing in the financial responsibility requirements over a period of three to six years "to allow time for the accumulation of information while keeping this market open to commercial insurers. There will be five years in which claims experience can be built up, then another three-year period in which insurers can gradually enter the market."[216]

The reports submitted under section 301(b)[217] further affirm the importance of commercially-purchased liability insurance to demonstrate financial responsibility. The Final Treasury Report considered such insurance as "the single most important means of demonstrating . . . financial responsibility."[218] The Interim Treasury Report also regarded traditional liability insurance agreements as a desirable alternative for demonstrating financial responsibility.[219]

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214. SARA § 208 (to be codified at 42 U.S.C. § 9651(g)).

215. *See* Additional views of Senators Domenici, Bentsen, and Baker, S. REP. No. 848, 96th Cong., 2d Sess. 121-22 (1980), *reprinted in* 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 428-29.

216. S. REP. No. 848, 96th Cong., 2d Sess. 92-93 (1980), *reprinted in* 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 399-400. Also, the report of an interagency task force formed under the Carter Administration to study compensation and liability for releases of hazardous substances focused on the availability of commercial insurance coverage in considering the current mechanisms to assure that parties subject to liability under the proposed hazardous substance liability system were able to meet their liability when it arises. *See* INTERAGENCY REPORT, *supra* note 205, at 135-51.

217. 42 U.S.C. § 9651(b) (1980), discussed *supra* notes 210-12 and accompanying text.

218. FINAL TREASURY REPORT, *supra* note 6, at 3.

219. This conclusion was based on a number of attributes of insurance. These attributes include the large size of the insurance industry in terms of overall assets, minimizing concern that liabilities will be left unpaid and impose a financial burden on the public, and the ability of insurers to police their insured's practices to minimize liability exposure and reduce the frequency of injurious mishaps. INTERIM TREASURY REPORT, *supra* note 6, at 23-24.

Despite the overwhelming consensus that liability insurance is an attractive alternative for demonstrating financial responsibility, insurance against Superfund liabilities is unavailable.[220] Both the Interim and Final Treasury Reports discuss some serious impediments to the availability of adequate insurance coverage at reasonable costs. For example, Superfund's unique combination of liability and financial responsibility provisions tends to render the liability exposure of the insurer too uncertain for traditional underwriting practices.[221] Specifically, liability under section 107 is strict, joint and several and retroactive in nature, and section 108 allows direct action against the indemnifying party and sets aside many normal contractual defenses.[222] Additional impediments to insurance coverage are: Superfund's financial responsibility requirements overlap with those of other state and federal statutes; definitions in the statute and in currently used policies lack uniformity; Superfund's claims settlement procedure provides insurers and responsible parties little opportunity to assess the reasonableness of claims; and insurers lack the experience to assess the potential risk and to price policies accordingly.[223]

Congress acknowledged these problems, and others, in mandating the Comptroller General's study of

> (A) Current economic conditions in, and the future outlook for, the commercial market for insurance and reinsurance.
>
> (B) Current trends in statutory and common law remedies.
>
> (C) The impact of possible changes in traditional standards of liability, proof, evidence, and damages on existing statutory and common law remedies.
>
> (D) The effect of the standard of liability and extent of the persons upon whom it is imposed under [Superfund] on the protection of human health and the environment and on the availability, underwriting, and pricing of insurance coverage.
>
> (E) Current trends, if any, in the judicial interpretation and construction of applicable insurance contracts, together with the degree to which amendments in the language of such contracts and the description of the risks assumed, could affect such trends.
>
> (F) The frequency and severity of a representative sample of claims closed during the calendar year immediately preceding the enactment of this subsection.
>
> (G) Impediments to the acquisition of insurance or other means

220. *See infra* note 290 and accompanying text.

221. INTERIM TREASURY REPORT, *supra* note 6, at v, 80-82.

222. *Id.* at v, 45-48, 80-82.

223. FINAL TREASURY REPORT, *supra* note 6, at 69-92.

of obtaining liability coverage other than those referred to in the preceding subparagraphs.

(H) The effects of the standards of liability and financial responsibility requirements imposed pursuant to [Superfund] on the cost of, and incentives for, developing and demonstrating alternative and innovative treatment technologies, as well as waste generation minimization.[224]

This article will begin to address some of the Comptroller General's mandated areas of study by examining judicial interpretation and construction of generally used liability insurance policy language. As will be shown below, these interpretations reveal a number of practical problems and public policy concerns presented by insurance against the equitable restitutionary remedies that may be imposed on a responsible party under Superfund.[225]

B. COVERAGE OF SUPERFUND LIABILITIES UNDER STANDARD FORM COMPREHENSIVE GENERAL LIABILITY POLICIES

(1) The language of the Standard Form CGL Policy

Until the late 1960's and early 1970's, when facilities began to be subject to liability for pollution incidents, many facilities were insured by commercial liability insurance carriers.[226] The terms of most insurance policies were expressed in standard form language developed by the industry's principal statistical and rating organization, the Insurance Services Office ("ISO"), to which many insurance companies belong.[227]

Pursuant to these so-called comprehensive general liability ("CGL") policies, the insurance company agrees to:

pay on behalf of the insured all sums which the insured shall become obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence . . . [228]

224. SARA § 208 (to be codified at 42 U.S.C. § 9651(g)(3)(A-H)).

225. The Interim and Final Treasury Reports probably failed to identify the concerns expressed below because the cases that characterized Superfund remedies as restitutionary had not yet been decided. *See supra* notes 168-71 and accompanying text.

226. FINAL TREASURY REPORT, *supra* note 6, at 47-48; INTERIM TREASURY REPORT, *supra* note 6, at 65-66. Some of these pollution incidents are described in the INTERIM TREASURY REPORT, *supra* note 6, at 1, 65.

227. FINAL TREASURY REPORT, *supra* note 6, at 48-49; INTERIM TREASURY REPORT, *supra* note 6, at 65-66, *citing Long-Term Risks of Hazardous Waste Sites: Hearing Before the Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. (1980), at 39 (statement of American Insurance Association).

228. Product Distribution Division, Insurance Services Office, General Liability Sample Forms, Form GL00-02-01-73 (1983) [hereinafter *Sample Forms*]. *See also* FI-

" 'Bodily injury' means bodily injury, sickness, or disease sustained by any person which occurs during the policy period . . . ."[229] " 'Property damage' means physical injury to or destruction of tangible property which occurs during the policy period . . . ."[230] An " 'occurrence' means 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."[231]

By 1973, facilities were beginning to be subject to liability for pollution incidents. In response, insurance companies began to incorporate a pollution exclusion into their standard form policies. This exclusion eliminates from coverage

> 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, dispersal, release or escape is sudden and accidental.[232]

(2) Coverage of Equitable Superfund Liabilities

As noted above,[233] liability under section 107 of Superfund may be imposed retroactively on a responsible party for a hazardous substance release that occurred prior to Superfund's enactment. The responsible parties, in turn, will likely seek indemnification of their

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NAL TREASURY REPORT, *supra* note 6, at 48-49; INTERIM TREASURY REPORT, *supra* note 6, at 66; Tinker, *Comprehensive General Liability Insurance—Perspective and Overview*, 25 FED'N INS. COUNS. Q. 217 (1975).

229. *Sample Forms, supra* note 228, Form GL00-00-01-73.

230. *Id.*

231. *Id.*; Tinker, *supra* note 228, at 231. This form of the policy was developed by the ISO in 1967. Prior to 1966, standard form liability policies provided indemnity against "accidents." The change to coverage of "occurrences" clarified the parties' intent to cover unexpected and unintended damages resulting from both sudden and gradual conditions. Tinker, *supra* note 228, at 231, 254-60; American Home Products Corp. v. Liberty Mutual Ins. Co., 565 F. Supp. 1485, 1499-1501 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984). For purposes of this analysis the author assumes that coverage of Superfund liabilities would be the same under the pre-1966 accident policies and the post-1967 occurrence policies.

232. *Sample Forms, supra* note 228, Form GL00-02-01-73. *See also* FINAL TREASURY REPORT, *supra* note 6, at 49; INTERIM TREASURY REPORT, *supra* note 6, at 67. With respect to oil discharges for onshore facilities, insurers began to incorporate an even more restrictive exclusion which did *not* except from the exclusion coverage for sudden and accidental discharges, dispersals, releases, or escapes. FINAL TREASURY REPORT, *supra* note 6, at 49-50; INTERIM TREASURY REPORT, *supra* note 6, at 67-68.

233. *See supra* notes 15, 48-51, 94 and accompanying text.

liability from insurers covering them at the time when the release took place,[234] because under the policies, insurers are obligated to pay damages because of property damage which occurred during the policy period.[235] Thus, if property damage resulting from a release took place in 1970, the insurance policy for 1970 would cover liabilities resulting from this release, even if the claim against the insured is not made until 1987. However, the issue of when property damage took place in the Superfund context is difficult to resolve. Most courts interpreting CGL policies have held that an occurrence takes place in the policy year when the complaining party was *actually* damaged, that is, when damage became apparent or when a reasonable person was put on notice that damage was occurring.[236] However, Superfund plaintiffs may not suffer *actual*

234. Superfund defendants are already demanding that past insurers defend the action and indemnify them for any resulting liabilities. Most courts have held that there is no coverage. *See, e.g.*, Mraz v. American Universal Ins. Co., 804 F.2d 1326 (4th Cir. 1986), *rev'g* 616 F. Supp. 1173 (D. Md. 1985); Riehl v. Travelers Ins. Co., 772 F.2d 19 (3d Cir. 1985) (court reversed district court's grant of summary judgment in favor of insured and remanded the case for trial); Maryland Cas. Co. v. Armco, Inc., 643 F. Supp. 430 (D. Md. 1986) (no duty to defend action seeking equitable remedy of restitution); Continental Ins. Cos. v. Northeastern Pharmaceutical and Chemical Co., 15 Envtl. L. Rep. (Envtl. L. Inst.) 20756 (W.D. Mo. 1985) (no coverage because no loss during the policy period; other issues not ripe for summary judgment) *aff'd in part and rev'd in part*, 811 F.2d 1180 (8th Cir. 1987), *rehearing en banc granted*, 815 F.2d 51 (Mar. 30, 1987). *But see* National Grange Mutual Ins. Co. v. Continental Casualty Ins. Co., 650 F. Supp. 1404 (S.D.N.Y. 1986) (insurer has a duty to defend CERCLA against its insured); United States v. Conservation Chemical Co., 653 F. Supp. 152 (W.D. Mo. 1986) (insurer has a duty to defend insured, although some issues not ripe for summary judgment); Industrial Steel Container Co. v. Fireman's Fund Ins. Co., 1987 Fire & Casualty Cas. (CCH) 595 (Minn. Ct. App. 1987) (CERCLA action alleged occurrence under policy; other issues not ripe for summary judgment); CPS Chemical Co., Inc. v. Continental Ins. Cos., 203 N.J. Super. 15, 495 A.2d 886 (1985) (matter not ripe for summary judgment); Buckeye Union Ins. Co. v. Liberty Solvents and Chemicals Co. Inc., 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984) (insurer has duty to defend CERCLA action against its insured).

235. *See supra* notes 228-31 and accompanying text.

236. *See, e.g.*, Mraz, 804 F.2d at 1328; Continental Ins. Cos. v. Northeastern Pharmaceutical and Chemical Co., 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20758; Honeycomb Sys., Inc. v. Admiral Ins. Co., 567 F. Supp. 1400, 1405 (D. Me. 1983); American Motorists Ins. Co. v. Trane Co., 544 F. Supp. 669, 683 (W.D. Wis. 1982), *aff'd*, 718 F.2d 842 (7th Cir. 1983); Bartholomew v. Insurance Co. of North America, 502 F. Supp. 246, 252 (D.R.I. 1980), *aff'd sub nom* Bartholomew v. Appalachian Ins. Co., 655 F.2d 27 (1st Cir. 1981); United States Fidelity & Guar. Co. v. American Ins. Co., 169 Ind. App. 1, 7, 345 N.E.2d 267, 270 (1976). A minority of courts have held that an "occurrence" may take place in any policy year when any property damage occurs. Thus when a single occurrence causes property damage in more than one policy year, more than one policy may be triggered by a single claim. *See, e.g.*, Lac D'Amiante Du Quebec, Ltee. v. American Home Assurance Co., 613 F. Supp. 1549, 1561 (D.N.J. 1985); Gruol Construction Co., Inc. v. Insurance Co. of North America, 11 Wash. App. 632, 524 P.2d 427 (1974).

damage, as they often have no interest in the property affected by the release, and thus sustain no diminution in property value or other property loss.[237]

Similar problems exist in a Superfund action seeking health-related costs. Assuming a responsible party is obligated to pay such costs because of "bodily injury" within the meaning of the policy, such bodily injury, like property damage, must occur during the policy period in order for costs to be covered under a responsible party's CGL policy.[238] Most courts would probably agree that bodily injury occurs when injury in fact occurs.[239] However, some courts have held that in the context of insidious disease, bodily injury occurs when a claimant is exposed to a hazardous substance,[240] others have held that bodily injury occurs when a disease becomes manifest,[241] and still others have held that bodily injury occurs continuously from time of exposure to manifestation.[242] The issue of when bodily injury occurs in the Superfund context is particularly difficult to resolve because the government seeking health-related costs is incapable of suffering injury in fact. Moreover, Superfund permits recovery of costs even when individuals have neither been exposed to hazardous substances nor have manifested a disease. In those cases where no injury in fact has occurred, no CGL policy will cover the ensuing damages.

Even if the issues of whether and when property damage and

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237. *See, e.g.*, Mraz v. American Universal Ins. Co., 804 F.2d at 1328-29; Continental Ins. Cos. v. Northeastern Pharmaceutical and Chemical Co., 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20758 (court held that governmental entities in CERCLA action, as distinguished from private individuals seeking personal injury and property damage remedies, did not seek compensation for bodily injury or property damage; court suggests that time of occurrence is when compensable loss takes place, that is, when governmental entity incurs response costs). *But see* Maryland Cas. Co. v. Armco, Inc., 643 F. Supp. 430 (D. Md. 1986) (court held that toxic waste dumps contaminating the environment cause property damage), Industrial Steel Container Co. v. Fireman's Fund Ins. Co., 1987 Fire & Casualty Cas. (CCH) at 597 (court suggests that damage occurred when waste leaked from landfill and contaminated ground water and soil), and cases cited *infra* note 255.

238. *See supra* notes 228-31 and accompanying text.

239. *See, e.g.*, American Home Products Corp. v. Liberty Mutual Ins. Co., 748 F.2d 760 (2d Cir. 1984), *modifying* 565 F. Supp. 1485 (S.D.N.Y. 1983).

240. The leading case for this interpretation is Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *reh'g granted in part and denied in part*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981).

241. *See, e.g.*, Eagle-Picher Industries, Inc. v. Liberty Mutual Ins. Co., 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983).

242. The leading case for this interpretation is Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), *reh'g denied*, 456 U.S. 951 (1982).

bodily injury occur in the Superfund context were resolved, a more fundamental barrier to coverage exists. CGL policies only obligate the insurer to pay damages, not equitable judgments requiring the payment of money. A long line of cases has held that an insurer cannot be required to pay the costs of complying with a mandatory injunction.[243] For example, in *Ladd Construction Co. v. Ins. Co. of North America*,[244] the Illinois court found that the liability insurance policy purchased by the insured obligated the insurer to pay "all sums which the insured shall become legally liable to pay as *damages* because of . . . property damage. . . ."[245] The court concluded, however, that the cost of compliance with a mandatory injunction cannot be regarded as a sum payable "as damages":

> The cost of compliance with the mandatory injunction is not reasonably to be regarded as a sum payable 'as damages.' Damages are recompensed for injuries sustained. They are remedial rather than preventative, and in the usual sense are pecuniary in nature. The expense of restoring the plaintiff's property to its former state will not remedy the injury previously done, nor will it be paid to the injured parties.[246]

However, some courts do allow coverage of costs incurred by the

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243. *See* cases cited *infra* notes 244-45.

244. 73 Ill. App. 3d 43, 391 N.E.2d 568 (1979) (declaratory judgment action to determine coverage of suit seeking mandatory injunction against the insured to remove debris that had slid from a slag heap on the insured's property onto the property of the claimant).

245. 73 Ill. App. 3d at 44, 391 N.E.2d at 570 (emphasis added). The court defined "damages" as " [a] pecuniary compensation . . . which may be recovered in the courts by any person who has suffered loss, detriment or injury, whether to his person, property, or right, through the unlawful act or omission or negligence of another." 73 Ill. App. 3d at 47, 391 N.E.2d at 571 (quoting Aetna Casualty & Surety Co. v. Hanna, 224 F.2d 499, 521 (5th Cir. 1955), (citing *Black's Law Dictionary* 499 (3d ed.))).

246. 73 Ill. App. 3d at 47, 391 N.E.2d at 572 (citations omitted) (quoting Desrochers v. New York Casualty Co., 99 N.H. 129, 131-32, 106 A.2d 196, 198 (1954)). *See also* Garden Sanctuary, Inc. v. Insurance Co. of North America, 292 So. 2d 75 (Fla. Dist. Ct. App. 1974); Rosenbaum, *Insurance, Hazardous Waste, and the Courts: Unforeseen Injuries, Unforeseen Law*, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10204 (1983).

An insurer not only has no duty to indemnify an insured for the costs of complying with an injunction, but also it has no duty to defend an action seeking only equitable relief. *See* Aetna Casualty & Surety Co. v. Hanna, 224 F.2d 499 (5th Cir. 1955); Ladd, 73 Ill. App. 3d 43, 391 N.E.2d 568; Board of Education v. County Mutual Ins. Co., 121 Ill. App. 3d 124, 76 Ill. Dec. 628, 459 N.E.2d 273 (1984). Courts may, however, require an insurer to defend an entire action which seeks damages in addition to the equitable remedy if the allegations of the complaint fall partially within the scope of coverage. *See, e.g.*, Township of Jackson v. American Home Assurance Co., No. A-170-81T3, slip op. at 15-16 (N.J. Super. Ct. Div. Mar. 24, 1982); Garden Sanctuary, 292 So. 2d 75; Desrochers v. New York Casualty Co., 99 N.H. 129, 106 A.2d 196 (1954); Doyle v. Allstate Ins. Co., 1 N.Y.2d 439, 443, 136 N.E.2d 484, 486, 154 N.Y.S.2d 10, 13 (1956).

insured to prevent further damage,[247] perhaps because such costs are sometimes awarded as compensatory damages.

Just as the costs of compliance with the mandatory injunction are not covered damages under a CGL policy, a restitutionary award which, like an injunction seeks restoration of the status quo, should not be covered. By definition, restitution does not compensate the plaintiff for injury previously done. Indeed, courts have analyzed coverage of restitutionary awards in the same manner as coverage of injunctions.[248] Two reasons support the analysis. First, examination of a liability policy in its entirety suggests that it was designed to insure against traditional tort damages brought by private individuals. A suit brought by the state seeking restitution is for the purpose of protecting the public, not compensating private individuals. Therefore any remedy, even one payable as a money judgment, is not "damages" within the meaning of a liability insurance policy.[249] Indeed, one court has held that a general business insurer has no duty to defend an insured in a Superfund action seeking restitutionary response costs.[250]

Second, an award of restitution is available only against one who

247. *See, e.g.*, Slay Warehousing Co., Inc. v. Reliance Ins. Co., 471 F.2d 1364 (8th Cir. 1973); Meadows & Walker Drilling Co. v. Pacific Employers Indemnity Co., 324 F Supp. 282, 285 (S.D. Tex. 1971) (Aetna Casualty & Surety Co. v. Hanna, 224 F.2d 499 (5th Cir. 1955) and Desrochers v. New York Casualty Co., 99 N.H. 129, 106 A.2d 196 (1954) were distinguished from the case in which the insurer was required to pay for expenses incurred by insured to take reasonable means to prevent further damage arising from an accident or in restoring property after accident caused by negligence); Leebov v. United States Fidelity & Guar. Co., 401 Pa. 477, 165 A.2d 82 (1960) (insurer liable for expenses incurred to arrest threatened landslide). Such expenses, when incurred by the claimant, are recoverable compensatory damages in some jurisdictions. *See supra* notes 141-43 and accompanying text. *But see* McNeilab, Inc. v. North River Ins. Co., 645 F. Supp. 525 (D.N.J. 1986) (criticizing cases allowing coverage of mitigation expenses).

248. Haines v. St. Paul Fire and Marine Ins. Co., 428 F. Supp. 435 (D. Md. 1977) (no coverage of action brought by Securities & Exchange Commission against attorneys for registrants in a debenture offering seeking injunctive relief and such other and further relief as is just and equitable; only remedies of restitution or disgorgement were potentially available); O'Neill Investigations, Inc. v. Illinois Employers Ins. of Wausau, 636 P.2d 1170 (Alaska 1981) (no coverage of action brought by state attorney general alleging violations of Consumer Protection Act and seeking injunctive relief, civil penalties and an order for restoration to individuals of monies acquired by insured through conduct complained of); Seaboard Sur. Co. v. Ralph Williams' Northwest Chrysler Plymouth, Inc., 81 Wash. 2d 740, 504 P.2d 1139 (1973) (no coverage of an action brought by a state attorney general to enjoin unfair competition pursuant to statute authorizing restitution as an incident to granting of the injunction).

249. *O'Neill Investigations*, 636 P.2d at 1176. *See also Seaboard Sur. Co.*, 504 P.2d at 1141.

250. Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. 430 (D. Md. 1986).

has been enriched. If the insured is permitted to retain the unjust gain and force its insurer to pay the restitutionary award, the insured enjoys a windfall—even though it may have violated a statute, a result surely not contemplated by the relevant statutes. This conclusion is even more compelling when the party seeking recovery against the insured is a governmental entity acting not in any proprietary capacity but rather to enforce a regulatory statute or to further the public interest.[251]

As discussed in Part I,[252] Superfund affords essentially equitable relief in the nature of restitution, and not the compensatory damages normally available at common law. Thus Superfund remedies should not be covered under the standard form CGL policy. If Congress intended to impose Superfund liability for the effects of past disposal practices "as a means to spread the costs of the cleanup on those who created and profited from the waste disposal,"[253] it is contrary to public policy to allow a responsible party to pass on the costs of cleanup, as well as other costs recoverable under Superfund, to its insurance carrier, and thereby retain the benefit of having another perform its public duty without ever having paid for it.

Unfortunately, courts have failed to recognize this public policy concern and have granted coverage in Superfund cases as well as in state actions to recover cleanup costs pursuant to statutes which appear to have liability schemes analogous to that under Superfund.[254] These cases seem to assume that since the sovereign has an interest in the preservation of public resources and the environment and is enabled to maintain an action to prevent injury

251. *See, e.g., Haines*, 428 F. Supp. at 441; *O'Neill Investigations, Inc.*, 636 P.2d at 1176, n.10; *Seaboard Sur. Co.* 504 P.2d at 1143, n.10. *Cf.* Solo Cup Co. v. Federal Ins. Co., 619 F.2d 1178 (7th Cir. 1980) (insurer had duty to defend action brought by EEOC against insured seeking both compensatory and injunctive relief where EEOC sought to confer benefit on individual discriminatees rather than on the public at large), *cert. denied* 449 U.S. 1033 (1980). Courts seem to ignore these public policy concerns in pollution cases. *See, e.g.*, Bankers Trust Co. v. Hartford Accident & Indemnity Co., 518 F. Supp. 371 (S.D.N.Y. 1981) (insurer had duty to indemnify insured for cleanup costs incurred by insured when pipe beneath warehouse on insured's property caused oil to spill into river and city-owned park), *vacated on other grounds*, 621 F. Supp. 685 (S.D.N.Y. 1981) and cases cited *infra* notes 254-55.

252. *See supra* notes 168-82, 198-201 and accompanying text.

253. United States v. Northeastern Pharmaceutical & Chemical Co., 579 F. Supp. 823, 841 (W.D. Mo. 1984). *See also* cases cited *supra* note 51.

254. *See, e.g.*, United States v. Conservation Chemical Co., 653 F. Supp. 152, 187-94 (W. D. Mo. 1986); Lansco, Inc. v. Dept. of Environmental Protection, 138 N.J. Super. 275, 310 A.2d 520 (Chancery Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976).

thereto, any recoverable remedy is covered damages.[255] This analysis ignores the fact that although a governmental entity is certainly entitled to maintain an action to preserve public resources and the environment, such an action is not based on a property interest. Therefore, the government cannot recover compensation for harm to a property interest, or "damages" within the meaning of a CGL policy.[256]

It is understandable why insurers would want to limit coverage to compensatory damages. In the case of property damage, the upper limit of the insured's liability is the pre-tort market value of the property harmed. Equitable remedies have no similar limit and are awarded as circumstances dictate. With no upper limit of liability, it becomes difficult for insurers to predict the magnitude of a loss which an insured may suffer and to underwrite such losses sensibly.[257] Moreover, the restitutionary remedies provided in Superfund are innovative and have not widely been used in common law actions. It is difficult for commercial insurers to underwrite policies without the experience to set rates that bear a relationship to the magnitude of the risk assumed.[258]

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255. The court in *Lansco* addressed the insurer's argument that cleanup costs were not covered damages within the meaning of the insured's CGL policy as follows:

> [The insurer] urges, however, that coverage under the policy does not include damages recoverable by the State from Lansco in the State's sovereign capacity or under the public trust doctrine; in other words, the term "property damage" must be read as meaning measurable damages to identifiable physical property. The argument is without merit. It has long been established that the sovereign's interest in the preservation of public resources and the environment enables it to maintain an action to prevent injury thereto.

138 N.J. Super. at 282 (citations omitted). *See also* Port of Portland v. Water Quality Ins. Syndicate, 796 F.2d 1188, 1193-95 (9th Cir. 1986); United States v. Conservation Chemical Co., 653 F. Supp. at 187-94, and cases cited therein; Township of Jackson v. American Home Ins. Co., A-170-81T3, slip op. at 15 (N.J. Super. App. Div. Mar. 24, 1982). This line of cases was criticized in Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. 430, 433-34 (D. Md. 1986).

256. *See* Mraz v. American Universal Ins. Co., 804 F.2d 1326, 1328-29 (4th Cir. 1986), *rev'g* 616 F. Supp. 1173 (D. Md. 1985). The cause of the erroneous reasoning might be that *Lansco*, 138 N.J. Super. 275 (1975), the leading case in the group of cases cited *supra* note 255, was decided before the Supreme Court's decision in Hughes v. Oklahoma, 441 U.S. 323 (1979), *see supra* notes 131-33, and relies on cases construing the remedies for environmental harm decided in the pre-*Hughes* era.

257. *See* FINAL TREASURY REPORT, *supra* note 6, at 76-81, discussing difficulty of underwriting CERCLA liabilities because losses are unlimited.

258. *See, e.g., Hearings, supra* note 6, at 145, 148, (statement of Richard A. Schmalz), discussing the difficulty of setting premiums without the experience to forecast the timing and amount of a covered loss. Similarly, problems of unlimited losses and lack of experience with hazardous waste liability have made insurers reluctant to enter the market for RCRA insurance. In a notice of proposed rulemaking and request for comment regarding revision of the RCRA financial responsibility requirements,

(3) Other Public Policies Implicated in CGL Coverage of CERCLA Liabilities

There are two other public policy reasons why insurance policies sold in the past should not be held to cover Superfund liabilities. First, under section 106 of Superfund the EPA can compel a responsible party to abate the danger caused by an actual or threatened release.[259] Private parties may seek similar relief under the citizens suit provision.[260] However, courts have fairly uniformly held that costs incurred in complying with a mandatory injunction are not covered damages.[261] To allow responsible parties to pass on to their insurers the obligation to pay section 107 liabilities, but not costs of complying with a decree obtained under section 106 or under the citizens suit provision, would create no incentive for responsible parties to comply with such decrees.[262]

Second, many Superfund cases involve liability for harm caused

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promulgated under 42 U.S.C. § 6925 (1982), the EPA summarized insurers' contentions that RCRA insurance is a high risk proposition:

> First, there is a lack of actuarial data to establish realistic premiums that adequately reflect risk. Second, there is a lack of acceptable and universally applied risk analysis methods. Third, there is a social perception that hazardous waste has not been and cannot be adequately managed. The insurance industry contends that this perception will ultimately lead to several costly effects: third party claims for virtually all policies that they underwrite; a subsequent duty to defend against these claims; resultant high litigation costs; and policy losses due to court rulings in favor of the insured for coverage that the insurer did not intend to provide.

50 Fed. Reg. 33,902, 33,904 (1985).

259. 42 U.S.C. § 9606 (1982).

260. *See supra* notes 59-60 and accompanying text.

261. *See supra* notes 243-46 and accompanying text.

262. *But see* United States Aviex Co. v. Travelers Insurance Co., 125 Mich. App. 579 (1983), which concerned coverage of the insured's cost to correct a groundwater contamination problem as ordered by the state department of natural resources. Although the court recognized that the costs of complying with an injunctive decree is generally not covered, the court required the insurer to cover the state's suit "to recover the full value of the injuries done to natural resources of the state." 125 Mich. App. at 589. The court reasoned that:

> If the state were to sue in court to recover in traditional "damages," including the state's costs incurred in cleaning up the contamination, for the injury to the groundwater, defendant's obligation to defend against the lawsuit and to pay damages would be clear. It is merely fortuitous from the standpoint of either plaintiff or defendant that the state has chosen to have plaintiff remedy the contamination problem, rather than choosing to incur the costs of clean-up itself and then suing plaintiff to recover those costs. The damage to the natural resources is simply measured in the cost to restore the water to its original state.

Id. at 589-90. The court recognizes correctly that it may be absurd to allow coverage of costs incurred by the state and recovered in a lawsuit but not costs incurred by the insured. The court fails, however, to understand that the state's recovery may not be covered "damages" and to consider whether the state's environmental scheme was better served by holding that neither cleanup by the insured nor by the state was covered.

by longstanding improper disposal practices, as opposed to sudden and accidental releases,[263] but a growing body of case law suggests that liability resulting from such longstanding practices should not be covered by liability insurance. These cases base their decisions on both general public policy concerns as well as explicit CGL policy language. In general, one of two principles often apply to except certain losses from coverage, even in the absence of an explicit exclusion:

> First, insurance contracts do not ordinarily cover economic detriment of a type occurring so regularly in relation to an insured enterprise or activity that it is commonly regarded as a cost rather than a risk of that activity or enterprise. Second, insurance contracts do not cover economic detriment that is not fortuitous from the point of view of the person (usually the insured) whose detriment is asserted as the basis of the insurer's liability. For example, a loss is not fortuitous in this sense if caused intentionally by that person.[264]

The public policy against coverage of nonfortuitous events stems from "a fear that an individual might be encouraged to inflict injury intentionally if he was assured [sic] against the dollar consequences."[265] In many cases, the two principles work hand-in-hand, and the fact that detriment occurs so regularly in relation to an insured enterprise or activity indicates the nonfortuitous nature of the detriment.[266]

By the time the ISO developed its standard form occurrence-based CGL policy, these principles were embodied in an express exception incorporated in the definition of an occurrence as "an accident, including injurious exposure to conditions, which results, during the policy period, in . . . property damage *neither expected nor intended from the standpoint of the insured.*"[267] In construing the application of this exclusion to coverage of a pollution incident in which liability is sought under a common law theory, most courts have held that coverage is excluded only if the resulting *dam-*

263. *See supra* notes 15, 48-51, 94 and accompanying text.

264. R. KEETON, INSURANCE LAW § 5.3(a), at 278-79 (1971). These principles apply to all types of insurance including liability insurance.

265. Burd v. Sussex Mutual Ins. Co., 56 N.J. 383, 398, 276 A.2d 7, 15 (1970). *See also* LoRocco v. N.J. Manufacturers Indemnity Co., 82 N.J. Super. 323, 332, 197 A.2d 591, 596 (App. Div. 1964).

266. *See infra* notes 274-79 and accompanying text.

267. *Sample Forms, supra* note 228, Form GL00-00-01-73 (emphasis added). "The exclusion here probably has no more effect than that which the law would imply in its absence." Lyons v. Hartford Ins. Group, 125 N.J. Super. 239, 245, 310 A.2d 485, 488 (App. Div. 1973), *citing* Smith v. Moran, 61 Ill. App. 2d 157, 209 N.E.2d 18 (App. Ct. 1965).

age is expected or intended, and the insured's intent with regard to the act resulting in the damage is irrelevant.[268]

A more difficult issue is how one decides whether the insured intended or expected the resulting damage. Although a few cases exclude coverage only when the insured subjectively intended the results, a more objective approach is gaining wide acceptance.[269] The court in *City of Carter Lake v. Aetna Casualty and Surety Co.*[270] describes this approach:

> An interpretation of the word "accident" . . . which is consistent with the results reached in most of the cases confronting the issue. . . is to look at the question of whether a result is "expected" as a matter of probability. . . . An insured need not know to a virtual certainty that a result will follow its acts or omissions for the result to be expected. . . . Rather, each case must be determined by examination of

268. *See, e.g.*, City of Carter Lake v. Aetna Casualty & Surety Co., 604 F.2d 1052 (8th Cir. 1979) and cases cited therein; Yakima Cement Products Co. v. Great American Ins. Co., 93 Wash. 2d 210, 608 P.2d 254 (1980); McGroarty v. Great American Ins. Co., 43 A.D.2d 368, 351 N.Y.S.2d 428 (1974), *aff'd*, 36 N.Y.2d 358, 329 N.E.2d 172, 368 N.Y.S.2d 485 (1975); White v. Smith, 440 S.W.2d 497 (Mo. Ct. App. 1969). *But see* Idaho v. Bunker Hill Co., 647 F. Supp. 1064, 1072 (D. Idaho 1986) (court held that the event, not the resulting harm must be unexpected and unintended to be covered).

A minority of jurisdictions hold that if the damage is the foreseeable result of a voluntary and intentional act, coverage is excluded because the insured was aware of the risk of damage prior to the act which caused the damage, and thus there was no "accident." *See, e.g.*, Millard Warehouse, Inc. v. Hartford Fire Ins. Co., 204 Neb. 518, 283 N.W.2d 56 (1979), and cases cited therein; Ladner & Co., Inc. v. Southern Guaranty Ins. Co., 347 So. 2d 100 (Ala. 1977); Thomason v. United States Fidelity & Guaranty Co., 248 F.2d 417 (5th Cir. 1957). One court criticized this line of cases:

> . . . if the damage was foreseeable then the insured is liable, but there is no coverage, and if the damage is not foreseeable there is coverage, but the insured is not liable. This is not the law. The function of an insurance company is more than that of premium receiver.

City of Carter Lake v. Aetna Casualty and Surety Co., 604 F.2d 1052, 1058 (8th Cir. 1979).

269. *See, e.g.*, United States v. Conservation Chemical Co., 653 F. Supp. 152, 198 (W.D. Mo. 1986); Honeycomb Systems, Inc. v. Admiral Insurance Co., 567 F. Supp. 1400, 1404 (D. Me. 1983), and cases cited therein. There are a number of cases which seem to construe the exclusion using a subjective standard. *See, e.g.*, Steyer v. Westvaco Corp., 450 F. Supp. 384 (D. Md. 1978), and cases cited therein; Ladner & Co., Inc. v. Southern Guaranty Ins. Co., 347 So. 2d 100 (Ala. 1977), and cases cited therein. It is unclear what weight ought to be given this group of cases. The courts were construing the duty to defend which generally covers circumstances somewhat more broadly than does the duty to indemnify. *See supra* note 246. Also, the exclusion on its face excepts from coverage damages *expected* or intended, while the foregoing cases seem to concern themselves only with whether the insured intended the resulting damage.

270. 604 F.2d 1052 (8th Cir. 1979). *Carter Lake* concerned coverage in connection with claims arising from several incidents of sewage back-up caused by the failure of the insured's sewage pump. The court held that the first incident was covered, but the subsequent incidents were expected or intended and not covered.

> the totality of the circumstances. . . . If the insured knew or should have known that there was a substantial probability that certain results would follow his acts or omissions then there has been been an occurrence. . . . The results cease to be expected and coverage is present as the probability that the consequences will follow decreases and becomes less than a substantial probability.[271]

The court notes that the difference between "reasonably foreseeable" and "substantial probability" is the degree of expectability.[272] Thus, when an insured takes a calculated risk that an injury causing event will occur, it cannot look to its insurer to indemnify it for liability resulting from its failure to prevent the event.[273]

Many courts deciding whether CGL policies cover an insured's liability for a pollution incident have followed the objective approach of *Carter Lake* in interpreting both the exclusion of expected or intended damages and the pollution exclusion introduced into standard form CGL policies in the early 1970's.[274] These cases interpret the pollution exclusion coextensively with the definition of occurrence. As stated by the court in *American States Ins. Co. v. Maryland Casualty Co.*:[275]

> [The pollution exclusion] is new. It eliminates coverage for damages arising out of pollution or contamination, where such damages appear to be expected or intended on the part of the insured and hence are

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271. *Id.* at 1058-59, *citing* R. KEETON, BASIC TEXT ON INSURANCE LAW § 5.4(c) at 298-300 (1971). *See also* Professor (now Massachusetts Federal District Judge) Keeton's distinction "between highly expectable losses [not covered] and those less expectable [covered]." *Id.*

272. Carter Lake, 604 F.2d at 1059, n.4.

273. *Id.* at 1059. Other cases reach consistent results using language compatible with *Carter Lake* and the Keeton view. *See, e.g.*, Ashland Oil, Inc. v. Miller Oil Purchasing Co., 678 F.2d 1293 (5th Cir. 1982) (insured, an expert in the handling of dangerous chemical waste, mixed it with crude oil which eventually damaged claimant's refinery; court held that manifestation of the dangerous character of the hazardous waste was a possibility insured expected; the insured intended that the waste be discharged into a pipeline system and damage to refinery was expected); Continental Ins. Co. v. Hodges, 259 Ark. 541, 534 S.W.2d 764 (1976) (complaint alleged that insured drained water into ditch crossing claimant's land resulting in damage to claimant's crops; damages could not have taken place without foresight or expectation). *But cf.* Gruol Construction Co. v. Insurance Co. of North America, 11 Wash. App. 632, 524 P.2d 427 (1975) (although dry rot is the expected result of defective backfilling, insured was not aware of the defective backfilling and the damage resulting from the unknown condition was unexpected); City of Kimball v. St. Paul Fire & Marine Ins. Co., 190 Neb. 152, 206 N.W.2d 632 (1973) (where site of construction of a sewage lagoon had been inspected but seismograph holes were undiscovered, resulting seepage into neighboring groundwater was "unforeseen, unexpected, extraordinary, an unlooked for mishap and so an accident.").

274. *See supra* note 232 and accompanying text, and cases cited *infra* note 277.

275. 587 F. Supp. 1549 (E.D. Mich. 1984).

> excluded by definition of 'occurrence'. Coverage is afforded for damages caused by pollution or contamination if the discharge, dispersal, release or escape is sudden and accidental.[276]

The court added the observation that "the pollution exclusion was not intended to exclude coverage previously provided, but was intended to eliminate any doubt that may have existed concerning coverage for damages caused by the emission of pollutants as a regular or continuous part of the insured's business."[277] Thus, the court held that damages caused by the insured's dumping of toxic waste continuously over several years could not be viewed as unintended or unexpected, was not a covered occurrence, and was excluded from coverage by the pollution exclusion.

Cases such as *Carter Lake* and *American States* advance both principles that underlie the implied exceptions from coverage,[278] and are consistent with the public policy rationale for avoiding coverage for restitutionary remedies.[279] Just as restitutionary awards should not be awarded so as to avoid giving a windfall to the insured, costs of doing business that could have been anticipated should not be foisted upon the insurer of an enterprise that lacks the foresight to internalize those costs. Certainly there are unanticipated risks attendant to any enterprise, and these risks are appropri-

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276. *Id.* at 1553, *quoting* Niagara County v. Utica Mutual Ins. Co., 439 N.Y.S.2d 538, 80 A.D.2d 415 (1981), *relying on* 3 R. LONG, THE LAW OF LIABILITY INSURANCE, App. 58 (1980).

277. American States, 587 F. Supp. at 1553. *See also* Great Lakes Container Corp. v. National Union Fire Ins. Co. of Pittsburgh, 727 F.2d 30 (1st Cir. 1984); American Mutual Liability Ins. Co. v. Neville Chemical Co., 650 F. Supp. 929, 932 (W.D. Pa. 1987); Techalloy, Inc. v. Reliance Ins. Co., 338 Pa. Super. 1, 12-15, 487 A.2d 820, 826-28 (1984); City of Milwaukee v. Allied Smelting Corp., 117 Wis. 2d 377, 344 N.W.2d 523 (Wis. Ct. App. 1983). *Cf.* National Grange Mutual Ins. Co. v. Continental Casualty Ins. Co., 650 F. Supp. 1404 (S.D.N.Y. 1986), and Lansco, Inc. v. Dept. of Envtl. Protection, 138 N.J. Super. 275, 310 A.2d 520 (Chancery Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), wherein the courts interpreted the pollution exclusion coextensively with the definition of "occurrence" and found in favor of coverage.

The equating of the definition of occurrence with the pollution exclusion fails to give effect to the word "sudden" in the exception from the exclusion. For example, an insured may be totally unaware of a leak in an underground storage tank which it has taken due care to maintain properly, and hazardous materials might escape and damage neighboring property. The resulting damage would be fortuitous and accidental, that is, neither expected nor intended, from the standpoint of the insured. But such an incident, occurring over a long period of time, could hardly be regarded as sudden, and thus ought not be expected from the exclusion. *See* Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374 (1986), and cases cited therein.

278. *See supra* notes 264-66 and accompanying text.

279. *See supra* notes 248-53 and accompanying text.

ately shifted to an insurance carrier. However, an insurer ought not to be expected to carry all the losses of its insureds.

It should be noted that the issues concerning whether CGL coverage may apply to Superfund liabilities are not cleared up by a newer version of the CGL policy introduced on January 4, 1985.[280] Although the policy employs somewhat simpler language than the old CGL, and provides coverage on a claims-made basis, that is, coverage is provided when a claim against the insured is made during the policy period rather than when property damage occurs within the policy period,[281] the provisions that preclude coverage of Superfund liabilities remain basically unchanged.[282]

Also, in the late 1970's and early 1980's, a few insurance organizations developed new policies to insure liabilities arising from environmental harm and to fill the gap left by the incorporation of pollution exclusions into standard form CGL policies.[283] As a practical matter, very few of these policies have been written because of the reinsurance market's withdrawal from pollution coverage.[284] Moreover, there are no court interpretations of these policies.

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280. Insurance News from Insurance Information Institute for Insurance Services Office (January 4, 1985) (discussing ISO unveiling of new commercial general liability policy in two versions: claims-made and occurrence). The new occurrence form bears the number GL-00-01-11-85, and the new claims-made form bears the number GL-00-02-11-85 [hereinafter New CGL].

281. The use of claims-made policies would eliminate the debate over whether an occurrence-based policy covers liability arising from events which span more than one policy period. *See supra* notes 236-42 and accompanying text. However, insurers are experiencing difficulty in gaining approval of the new claims-made policy in many states. *See, e.g., Opinion and Decision of New York State Insurance Department on Issues Raised by Insurance Services Office on Commercial General Liability Claims-made Form*, 4 J. INS. REG. 39 (1986).

282. Both the claims-made and occurrence versions provide that the insurer will pay "those sums that the insured becomes liable to pay *as damages* because of . . . 'property damage' to which this insurance applies." (Emphasis added.) *See* New CGL, *supra* note 281, Form GL-00-01-11-85 at 1, and Form GL-00-02-11-85 at 1. Thus, both forms, like the old CGL, are intended to cover compensatory damages only, and not equitable awards.

Also, like the old CGL, both new forms exclude from coverage " 'property damage' expected or intended from the standpoint of the insured," Form GL-00-01-11-85, § I, Coverage A, 2, a; Form GL-00-02-11-85, § I, Coverage A, 2, a, and contain a pollution exclusion, Form GL-00-01-11-85, § I, Coverage A, 2, f, Form GL-00-02-11-85, § I, Coverage A, 2, f.

283. There are basically two types of pollution insurance. First are environmental impairment liability ("EIL") policies, marketed by a number of different insurance organizations. *See* FINAL TREASURY REPORT, *supra* note 6, at 52-53; INTERIM TREASURY REPORT, *supra* note 6, at 70-72; Smith, *Environmental Damage Liability Insurance—A Primer*, 39 BUS. LAW. 333, 336-37, n.13 (1983). The second type of policy is the pollution liability insurance ("PLI") policy introduced by the ISO.

284. *See* Morrow, *Environmental Impairment Policies Availability and Scope* in ALI,

Therefore, further discussion of these pollution insurance policies is beyond the scope of this article.

C. CONCLUSION

In summary, the CGL policy generally does not cover the restitutionary remedies awarded under Superfund; indeed coverage of such remedies is contrary to public policy. Courts have, however, interpreted the CGL policy to cover some costs of repair and restoration of property, probably because those costs can be awarded as compensatory damages, despite their somewhat equitable ring. Damages incurred as a regular part of the insured's business activity, however, would be "expected or intended from the standpoint of the insured" and should not be covered because of the public policy against coverage of intentional damage. This exclusion alone precludes coverage of most retroactive liabilities imposed under Superfund. Thus, liability insurance as currently understood is unavailable to cover responsible parties for liabilities imposed upon them under Superfund.

PART III—CAN INSURANCE BE MADE AVAILABLE TO COVER SUPERFUND LIABILITIES?

A. INTRODUCTION

As demonstrated above, Superfund created new liabilities and remedies to address the harms associated with hazardous waste releases, but most of those liabilities are not covered under standard form insurance policy language. Courts have, of course, stretched the language of standard form liability policies to cover not only Superfund liabilities,[285] but also other liabilities related to pollution incidents, in order to create funds for those seeking compensation for injuries caused by hazardous waste releases as well as to make money readily available for noncompensatory cleanup.[286]

HAZARDOUS WASTES, SUPERFUND, AND TOXIC SUBSTANCES, 465, 467 (1984). *See also infra* note 290 and accompanying text.

285. At least one court has construed CGL policies to provide coverage for Superfund liabilities. *See* Buckeye Union Ins. Co. v. Liberty Solvent & Chem. Co., Inc., 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984). Several trial court rulings in favor of coverage have been reversed. *See* cases cited *supra* note 234.

286. For example, New Jersey courts have in the past clearly articulated the public policy reasons for excluding intentional injuries from coverage, *see* cases cited *supra* notes 265-67, but in Jackson Township Municipal Utilities Auth. v. Hartford Accident and Indemn. Co., 186 N.J. Super. 156, 451 A.2d 990 (1982), the court disregarded these concerns and held that an insurer had a duty to defend an action alleging, *inter alia*, that the insured deposited waste with same regularity into a landfill and that pollutants

One can certainly sympathize with judges' desire to expand coverage beyond that provided in insurance policies, given the lack of other funding sources. In many cases, parties responsible by statute for hazardous waste releases have sought protection from liability under the bankruptcy laws, leaving the taxpayers to pay for cleanup.[287] Moreover, the funds originally authorized under CERCLA were depleted because the task of cleaning up hazardous waste sites turned out to be enormous. Furthermore, the EPA has not been altogether successful in replenishing the Fund through section 107 actions, nor has it spent Fund money altogether wisely.[288] Although SARA addresses many of these problems,[289] one can expect a continuing need for money to complete the tasks authorized by Superfund.

Despite this need for money, blithe judicial assertion of coverage for never before insured liabilities defeats other public policy concerns, and, in the long term, makes insurers reluctant to underwrite risks exposed to liability for environmental harms.[290] Thus, those potentially subject to Superfund liabilities are unable to obtain af-

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seeped into an acquifer that served as a source of public water supply. Similarly in nonpollution cases, courts are brushing aside public policy concerns in order to make available money to pay claimants' damages. *See, e.g.*, Ambassador Ins. Co. v. Montes, 76 N.J. 477, 388 A.2d 603 (1978); Garden State Fire & Casualty Co. v. Keefe, 172 N.J. Super. 53, 410 A.2d 718 (1980), *cert. denied*, 84 N.J. 389, 420 A.2d 317 (1980).

287. *See, e.g.*, Ohio v. Kovacs, 469 U.S. 274 (1985) and *In re* Thomas Solvent Co., 44 B.R. (West) 83 (Bankr. W.D. Mich. 1984) where orders to clean up sites were deemed a debt dischargeable in bankruptcy. *But see* Midlantic Nat'l Bank v. N.J. Dept. of Envtl. Protection,—U.S.—, 54 U.S.L.W. 4138 (1986), *aff'g In re* Quanta Resources Corp., 739 F.2d 912 (3d Cir. 1984), and *In re* T.P. Long Chemical Inc., 45 B.R. (West) 278 (Bankr. N.D. Ohio 1985), in which the courts refused to permit trustees in bankruptcy to abandon hazardous waste sites, and Penn Terra Ltd. v. Dept. of Envtl. Resources, 733 F.2d 267 (3d Cir. 1984), in which an action to enjoin debtor to pay fines for debtor's violation of state environmental protection laws to prevent future harm and to restore the environment was not barred by automatic stay provisions of Bankruptcy Code.

288. *See supra* note 21.

289. *See supra* notes 23-24, 69-73 and accompanying text.

290. The optimistic predictions made about a growing market for pollution liability insurance in the FINAL TREASURY REPORT, *supra* note 6, at 59-61, have not been fulfilled. As a result, the Senate Committee on Environment and Public Works held hearings in April, 1985, to determine whether the insurance industry will offer pollution liability insurance to those involved in Superfund cleanup and to those who store, treat, dispose or handle hazardous substances, and if not, what, if anything can or should be done. *Hearings*, supra note 6. All who testified agreed that insurance against Superfund liabilities was currently unavailable, and expansive judicial interpretations of policies was repeatedly cited as one of the reasons insurers were reluctant to cover pollution risks. *See, e.g., id.* at 37, 39, 75, 140, 142-44, 152-55, 275. Indeed, Congress recognized the problem of unavailability of insurance in mandating the insurability study by the Comptroller General. *See supra* note 224 and accompanying text

fordable insurance and may not be able to meet their financial responsibilities. It is therefore desirable that some means of insuring Superfund liabilities be found.

The remainder of this article is devoted to recommendations for making insurance coverage of Superfund liabilities possible.

B. DISTINGUISHING INSURABLE FROM NON-INSURABLE SUPERFUND LIABILITIES

The liability provisions of Superfund do not distinguish between liability for releases that occurred in the past and those that may occur in the future, nor do they distinguish between releases that occur gradually and those that occur suddenly and accidentally.[291] A responsible party is liable for the restitutionary remedies provided under section 107(a) regardless of the character of the release giving rise to the liability.

Differentiation among the various circumstances giving rise to liability may not be necessary to meet the policy objectives of Superfund,[292] but the nature of the circumstances giving rise to liability and of the accompanying remedy are important in determining the insurability of particular losses. Thus, if Congress regards insurance as a means of paying Superfund liabilities, it may be necessary to compromise the far reaching liability and remedial provisions of Superfund. However, this compromise may be achieved without seriously hampering the desired effect of the statute.

When a responsible party's liability stems from longstanding improper hazardous waste disposal practices, characterization of the recoverable remedy as restitutionary is appropriate and insurance covering such liability and remedy is inappropriate. If courts would interpret CGL policies sold in past years to such parties to preclude coverage of such losses, insurers might be willing to reenter the

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291. *See supra* notes 53-93 and accompanying text. Superfund clearly imposes liability not only for cleanup of abandoned waste sites, but also for cleanup of spills and leaks into the environment. *See* 126 CONG. REC. S14962 at S14964-66 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph), *reprinted in* 1 LEGISLATIVE HISTORY OF CERCLA, *supra* note 10, at 686 (compares S.1480, the comprehensive Senate bill ultimately enacted to two measures pending in the House, H.R. 7020, dealing only with abandoned sites, and H.R. 85, dealing only with spills into navigable waters). One hopes that with the mechanisms of RCRA and Superfund in place, the practice of deliberately disposing of hazardous waste into environmental media will cease. *See, e.g.*, 132 CONG. REC. S14902 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford) ("The primary purpose of Superfund is to minimize releases of toxic chemicals.").

292. *See supra* notes 11-51 and accompanying text.

market for pollution liability insurance.[293] The amendment of section 108 permits guarantors in actions brought against them by claimants to assert "all rights and defenses which would have been available to the guarantor if an action had been brought against the guarantor by [an insured liable under section 107]."[294] This provision allows courts to interpret insurance contracts in the manner intended by the parties to the contract.

However, with the RCRA and Superfund schemes in place, future releases resulting from longstanding improper hazardous waste disposal should become infrequent.[295] It is more likely that future releases will involve responsible parties that have endeavored to dispose properly of hazardous substances, but a release nonetheless accidentally occurs. While the standard of liability imposed upon the responsible party might be the same as that imposed for longstanding improper disposal, characterizing the remedy as restitutionary may be inappropriate. The responsible party profiting from the activity involving hazardous waste disposal *has* paid the costs of the activity, but an accident nonetheless occurred. Response costs, natural resource damages and health-related costs are incurred to avoid the type of property damage and personal injury liability that give rise to a compensatory damages award. The award of those costs, therefore, resembles compensatory damages more than restitution, particularly when the remedy is for a money judgment, rather than an order to abate the hazard.[296] Indeed, courts sometimes award compensatory damages measured by the reasonable costs to restore or repair damages, so long as such costs do not exceed the total pre-tort value of the property.[297] Courts have required insurers to cover such compensatory damage awards.[298] Thus, since the insured does not receive a windfall from an insurer's payment of the remedy and coverage is limited to the value of af-

293. *See, e.g., Hearings, supra* note 6, at 36 (statement of Wheeler Hess); *id.* at 38 (testimony of T. Lawrence Jones); *id.* at 38-39 (testimony of George K. Bernstein)

294. SARA § 108(c) (to be codified at 42 U.S.C. § 9608(c)(2)). The only policy defense that the original section 108(c) allowed the guarantor to assert was that "the incident caused by the willful misconduct of the owner or operator." CERCLA § 108(c), 42 U.S.C. § 9608 (1982).

295. *See supra* note 14 and accompanying text.

296. A money judgement in restitution resembles a compensatory damages judgment in that the coercive element is no longer present. *See supra* note 158 and accompanying text. Thus it is easier to collect such a judgment from an insurer than to have the insurer comply with an injunction.

297. *See supra* notes 141-43 and accompanying text.

298. *See supra* note 247 and accompanying text.

fected property prior to the damage, both the public policy and practical difficulties of insuring such a remedy are eliminated.

From a public policy perspective, therefore, courts, regulators and Congress should recognize that there may be circumstances where Superfund liabilities and remedies could be characterized as compensatory, rather than equitable restitution, and could be covered by private insurance. Those circumstances, however, are limited to fortuitous hazardous substance releases and must exclude highly expectable risks. The longstanding public policy against insuring highly expectable losses cannot be swept aside merely because the problems of improper hazardous waste disposal are currently overwhelming. Indeed, insurers have shown a willingness to accept "sudden" pollution risks, which are less likely to be expected or intended,[299] and may be willing to do so again if this legitimate limitation on coverage were respected.

Certainly, if only limited insurance is provided, and insurance is regarded as a primary source of paying Superfund liabilities and remedies, it is imperative that costs recoverable under section 107 be incurred in a cost-effective manner. Congress has already recognized this need in providing cleanup standards,[300] so the requirements for greater insurability are consistent with the intent of the statute.

Thus, if courts in interpreting insurance policy language and Superfund's statutory provisions, Congress in considering future amendments to Superfund, the EPA in developing levels of financial responsibility for facilities and the Comptroller General in undertaking its insurance study recognize the difference between insurable and uninsurable Superfund liabilities and remedies, limited insurance may be made available by the private insurance industry to shoulder some of the financial responsibility for responding to hazardous substance releases.

C. THE NEED FOR A RISK RETENTION ACT

Even if the foregoing recommendations are implemented, many Superfund liabilities will remain uninsured. Regular commercial insurance cannot be expected to pay for cleanup of releases that were a regular part of the responsible party's business, nor can they be expected to cover costs in excess of the pre-release value of the property. Therefore, it is necessary to establish a mechanism to as-

299. *See supra* notes 274-79 and accompanying text.
300. *See supra* notes 23-24 and accompanying text.

sure that remaining liabilities will be paid. The pollution liability insurance provisions of SARA may provide such a mechanism.

Section 210 of SARA adds a new Title IV to Superfund.[301] Under this provision, risk retention groups, defined as ". . . corporation[s] . . . (A) whose primary activity consists of assuming and spreading all, or any portion, of the pollution liability of its members; [and] (B) which [are] organized for the primary purpose of conducting the activity described under subparagraph (A),"[302] are exempt from state laws prohibiting the formation of such groups or otherwise inhibiting their operation.[303] The statute defines pollution liability as "liability for injuries arising from the release of hazardous substances or pollutants or contaminants."[304] In general the new provision allows persons subject to pollution liability to form groups to spread such liability among group members or to purchase insurance against pollution liability. Even without section 210 of SARA, parties subject to Superfund liabilities could form risk retention groups under the Risk Retention Amendments of 1986,[305] which allows businesses exposed to similar liabilities to form risk retention groups.[306]

Formation of risk retention groups may facilitate the establishment of a funding source to pay the Superfund remedies for highly expectable losses without violating the public policy concerns triggered when private insurers cover those same costs. The concept of risk retention is that enterprises subject to related liabilities self-insure, transferring the risk of loss among themselves. The responsible parties, therefore, are not forcing an outside party to pay for activities from which they profited. Rather, parties subject to Superfund liability place their profits directly in the risk retention

301. SARA § 210 (to be codified at 42 U.S.C. § 9671 *et seq.*).

302. *Id.* (to be codified at 42 U.S.C. § 9671).

303. *Id.* (to be codified at 42 U.S.C. § 9673). The reason that legislation is needed is that under the McCarran-Ferguson Act, 15 U.S.C. § 1012 (1945), specific federal legislation is needed to preempt state laws regulating the business of insurance.

304. SARA § 210 (to be codified at 42 U.S.C. 9671).

305. Pub. L. No. 99-563,—Stat.—(1986) [hereinafter RRA]. This statute amends the Product Liability Act of 1981, 15 U.S.C. §§ 3901-3904, which permitted manufacturers to form risk retention groups to assume the product liability exposure of its group members.

306. RRA § 4(a)(4) (to be codified at 15 U.S.C. § 3901(a)(4)) allows risk retention groups to include members who are "engaged in businesses or activities similar to related with respect to the liability to which such members are exposed by virtue of any related, similar or common business, trade, product, services, premises, or operations." Section 210 of SARA and the RRA were not intended to be mutually exclusive. *See* RRA § 11(c); 131 CONG. REC. H9588 (daily ed. Oct. 8, 1986) (statement of Rep. Florio).

group's reserves, along with profits of similar enterprises. Thus, the risk of loss is spread only among parties subject to similar liability rather than being transferred to parties with no connection to the pollution liability risk.[307]

There are additional advantages to forming risk retention groups to cover Superfund liabilities and remedies. Since premiums will directly relate to the group's loss experience, there will be a built-in incentive for group members to avoid losses in order to keep premiums low. Moreover, the formation of risk retention groups may facilitate the development of appropriate financial responsibility requirements.[308] Risk retention groups operate like private insurers, which are permitted to share rating information.[309] Thus, the groups will need to develop information on the group's loss experience to determine appropriate ratings, and the EPA can use this information in developing financial responsibility requirements for facilities.

There is another advantage to permitting the formation of risk retention groups. Although the statute restricts the nature of the risks that a group may assume to pollution liability, it places no restriction on who may be a member of a particular group. Thus, parties subject to Superfund liability may find it useful to form groups whose members share the use of a common disposal site. Permitting the formation of such a group might reduce some of the protracted litigation over proportionate shares that has plagued Superfund recovery,[310] because each group member's premium could be based on its use of the site relative to the others. In the event of a release, all users of the site would be jointly and severally liable under Superfund, but the groups could promptly pay the

307. One might argue that this scenario describes loss spreading by traditional insurers that charge similar premiums to insureds in the same risk classification. However, this argument ignores the fact that when an insurer pays a large loss of one of its insureds, not only are future ratings of similarly classified insureds likely to be affected, but corporate profits and shareholders' dividends are likely to be reduced.

308. *See supra* notes 204-09 and accompanying text.

309. *See, e.g.*, North Little Rock Transp. Co. v. Casualty Reciprocal Exchange, 85 F. Supp. 961 (E.D. Ark. 1949), *aff'd* 181 F.2d 174 (8th Cir.), *cert. denied*, 340 U.S. 823 (1950).

310. Some of this litigation will be avoided because SARA clearly authorizes a responsible party to seek contribution from another. SARA § 113(b) (to be codified at 42 U.S.C. § 9613(f)). However, the statute merely allows the court to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." *Id.* Parties will certainly litigate about how the court should exercise this discretion. *See generally* Brennan, *Joint and Several Liability for Generators under Superfund: A Federal Formula for Cost Recovery*, 5 UCLA J. ENVTL. L. & POL'Y 101 (1986).

costs without the need for extended litigation since proportionate shares already would have been established.

One aspect of SARA's risk retention provisions should, however, be clarified. Pollution liability is defined to mean "liability for injuries arising from the release of hazardous substances or pollutants or contaminants."[311] The use of the word "injuries" may be interpreted to mean the type of harms that traditional liability insurers cover, rather than the restitutionary remedies of Superfund.[312] The definition of pollution liability should be amended to clearly apply to *all* liabilities arising from the release of hazardous substances, pollutants or contaminants, particularly those that are uninsurable by traditional insurers.

Thus, SARA's risk retention provisions suggest an insurance scheme that would eliminate the public policy concerns invoked over private insurance coverage of many Superfund liabilities, while creating funds to cover those liabilities. Group members would have built-in incentives to avoid losses resulting in claims, groups could develop information to facilitate the development of financial responsibility requirements, and litigation among group members might be averted. Given the nature of Superfund liabilities and remedies, risk retention groups provide the clearest hope that responsible parties, instead of taxpayers, will pay for these liabilities and remedies, thereby accomplishing a major goal of the statute.[313]

CONCLUSION

Superfund allows the harm caused by hazardous waste releases to be addressed in a manner not contemplated by the common law. Private insurance does not cover the losses for which responsible parties may be held liable under Superfund. As a result, sufficient funds are not currently available to meet the statute's objective of affirmatively addressing hazardous waste releases. A twofold approach may, however, facilitate available insurance coverage of

311. SARA § 210 (to be codified at 42 U.S.C. § 9671).

312. The types of liabilities that risk retention groups can assume under the RRA are similarly limited. Under the RRA, risk retention groups are limited to providing "liability insurance for assuming and spreading all or any portion of the similar or related liability exposure of its group members." RRA § 4 (a)(4) (to be codified at 15 U.S.C. § 3901 (a)(4)). "Liability" is defined to mean "*legal* liability for damages because of injuries to other persons, damage to their property, or other damage or loss to such other persons . . . ." RRA § 3(a) (to be codified at 15 U.S.C. § 3901(a)(2)) (emphasis added). The definition of liability does not permit risk retention groups to assume Superhand's equitable remedies.

313. *See supra* notes 48-51 and accompanying text.

Superfund liabilities. First, the courts, the Congress, the Comptroller General and the EPA must recognize the public policy reasons for the limits of private insurance and respect those limits. Once this step is taken, private insurers may be willing to underwrite Superfund liabilities on a restricted basis. Second, risk retention groups can cover Superfund liabilities that are uninsurable by private companies without offending public policy concerns. Thus, formation of risk retention groups should be encouraged. If this twofold approach successfully creates funds needed to pay for the affirmative provisions of Superfund, it may provide a useful model for other types of environmental cleanup programs both at the federal and state level.