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Anna M. Smith

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# ENVIRONMENTAL CLEANUP AND THE INTERPRETATION OF COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICIES: A LESSON FROM THE OREGON LEGISLATURE

*Anna M. Smith\**

## I. INTRODUCTION

When the 72nd Oregon Legislative Assembly convened in Salem in 2003, Senate Bill 297<sup>1</sup> was proposed to offer a new dimension for Oregon environmental policy. The bill introduced an all-sums<sup>2</sup> approach to environmental cleanup and the coverage entitled under comprehensive general liability insurance policies. An all-sums approach means that subject only to the limitations of the policy, the insurer remains responsible to pay the insured for all sums that result from a cleanup.<sup>3</sup> This rule enables the insured to choose the policy (if the insured held different policies over a period of years) from which to collect all of its cleanup costs. The insurance company chosen to pay the costs then pays the insured all sums due for the cleanup up to the policy's limit. The insurer then turns to other possibly liable insurance companies for indemnification.

Other states adopted the all-sums approach through case law, but the Oregon Legislature went a step further and mandated the all-sums approach through statute.<sup>4</sup> What the bill could do for small businesses, insurance companies, and environmental cleanup required consideration as the legislature met to discuss the bill's finer points. The ultimate passage of the bill and the language of its text suggests, however, much more than just these considerations. What the bill entails and what it accomplishes for environmental cleanup in Oregon reflects more of the growing environmental concern in the Pacific Northwest. Many people within this region seek more rigorous standards and tougher sanctions in order to protect the many rivers, lakes, ponds, and delicate ecosystems that help comprise the national ideal of Oregonian wilderness and the livelihood of those who exist on Oregon's landscape.

This Note examines the Oregon Legislature's approach to environmental cleanup and insurance policy coverage as it compares to case law in other states. Part II examines the different approaches used by some states, including the all-sums approach

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\* J.D. Candidate 2005, University of Notre Dame Law School. The author would like to thank Mark Nelson for the idea behind this Note, everyone on the Journal of Legislation for their editing suggestions, and her parents for their support and insight.

1. The bill revised OR. REV. STAT. § 465.475 and § 465.480 (2004).

2. See Christopher R. Hermann et al., *The Unanswered Question of Environmental Insurance Allocation in Oregon Law*, 39 WILLAMETTE L. REV. 1131, 1137-38 (2003).

3. *Id.*

4. See *supra* note 1.

adopted by Oregon, the time-on-the-risk approach,<sup>5</sup> and a mixture of the time-on-the-risk approach and the percentage of coverage approach. Part III proposes a view on the reasons the Oregon Legislature took the issue a step further and wrote the all-sums approach into statute, and it draws on ideas of what this bill could mean for future claims within the state. Finally, Part IV recommends Oregon as a model for undecided states to examine as they shape their own environmental insurance policies.

## II. CASE LAW ENVIRONMENTAL CLEANUP AND INSURANCE APPROACHES

Over the past few years, courts reached different conclusions on how defense and cleanup costs should gain apportionment among various insurance companies when a number of different policies insured the contaminated area over a period of years. Theoretically, an insured with one environmental spill where the damage spanned a twenty-year period could hold twenty different policies for each different year with twenty different insurance companies. Each company either could hold responsibility for all the damage or only part of the damage for the years where it acted as the insurer. Significant problems arise when the extent of damage for each individual year remains unknown, and most often, unknowable.<sup>6</sup> Different court decisions show strong differences in the interval of time for the cleanup and the amount of litigation that can ensue before a cleanup's conclusion.

### A. Interpreting Insurance Policies

In an examination of these policies, it is essential to know the basic rules of insurance policy interpretation. One basic feature of insurance policy interpretation, as most of these cases demonstrate, is that courts interpret ambiguous provisions according to the "insured's objectively reasonable expectations."<sup>7</sup> If this rule fails to correct the problem or resolve the issue, then courts construe the provision in question in a light most favorable to the insured.<sup>8</sup> This parallels the general contract theory that ambiguous terms in a contract are construed against the drafter. The drafter determines the provisions and defines the words included in a contract; therefore, she holds the greatest opportunity to clarify any terms that could lead to confusion. Public policy helps dictate that an insurer's failure to do this should not result in any hardship to the insured, as ample opportunity existed for the insurer to correct any potential problems during the drafting process.

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5. The time-on-the-risk approach:

allocates damages based on the relative period of time during which coverage was provided by each insurer's respective policies. Under this method, each triggered policy would bear a share of the total damages proportionate to the number of years it was on the risk relative to the total number of years of coverage triggered.

Sharon Steel Corp. v. Aetna Cas. & Sur. Co., 931 P.2d 127, 140 (Utah 1997).

6. See Hermann, *supra* note 2, at 1160.

7. Armstrong World Indus. v. Aetna Cas. & Sur. Co., 45 Cal. App. 4th 1, 11 (Cal. Ct. App. 1996).

8. See *id.* See also Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481, 492 (Del. 2001); St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co., 923 P.2d 1200, 1205 (Or. 1992); Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., 951 P.2d 250, 256 (Wash. 1998).

### B. Approaches from All-Sums States—Case Law

Prior to the proposed all-sums statute in Oregon, a number of states adopted the all-sums approach through case law.<sup>9</sup> In fact, states making the all-sums determination are currently in the majority. One illustrative example of this arises in *Aerojet-General Corp. v. Transport Indemnity Co.*,<sup>10</sup> wherein the California Supreme Court handed down a decision adopting this manner of indemnification. In this case, Aerojet, as a manufacturer of aerospace and defense products, discharged certain substances that caused damage to the ground and groundwater in an ongoing and continuous manner.<sup>11</sup>

In its adoption of the all-sums rule, the court stated, “[I]f specified harm is caused by an included occurrence and results, at least in part, within the policy period, it perdures to all points of time at which some such harm results thereafter.”<sup>12</sup> The court continued on to state that even if the triggering event<sup>13</sup> of insurance coverage remains subject to the policy’s coverage, this time period fails to limit the final amount paid by the insurer.<sup>14</sup> In sum, a triggering event can only occur during the policy period in order to necessitate the insurer’s duty to pay. Once an event triggers an insurance policy’s coverage, the amount that the insurer may need to pay in defense and indemnification costs remains unlimited. The duty to indemnify does not end once the policy expires if the triggering event occurs during the policy period. Under this analysis, the court reached the conclusion that each insurance carrier bears potential liability for the entire amount of costs.<sup>15</sup>

The court also makes an interesting examination of general contract principles in its explanation. The court states, “But the pertinent policies provide what they provide. Aerojet and the insurers were generally free to contract as they pleased.”<sup>16</sup> One concern

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9. See *Aerojet-Gen. Corp. v. Transp. Indem. Co.*, 948 P.2d 909, 919–20 (Cal. 1997); *Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 105 (Cal. Ct. App. 1996); *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 489 (Del. 2001); *Rubenstein v. Royal Ins. Co. of Am.*, 694 N.E.2d 381, 388 (Mass. App. Ct. 1998); *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835, 840 (Ohio 2002); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507–09 (Pa. 1993); *Am. Nat’l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 951 P.2d 250, 256 (Wash. 1998).

10. 948 P.2d 909, 919–20 (Cal. 1997).

11. *Id.* at 912.

12. *Id.* at 919. The court also discussed a hypothetical example in order to help clarify the matter, stating:

[I]nsurer has a duty to indemnify Insured for those sums that the Insured becomes legally obligated to pay as damages for property damage caused by its discharge of hazardous substances, up to a limit of \$1 million. Insured discharges such a substance. It thereby causes property damage to Neighbor’s land, in the amount of \$100,000 (determined by the cost of returning the soil to its original condition), within the policy period of year 1. It causes further damage of this sort as the substance spreads under the surface, in the amount of \$100,000 annually, in year two through year thirty. Insured must pay Neighbor \$3 million in damages under judgment. Insurer must pay Insured the limit of \$1 million for indemnification.

*Id.* at 920.

13. A triggering event is the occurrence of any event where, under the policy’s terms, the insurer becomes obligated to indemnify the insured for any damages that arise out of this event. *Id.* at 927.

14. *Id.* at 920–21. See also *Armstrong World Indus.*, 45 Cal. App. 4th at 105 (ruling that the time of the triggering event fails to define the extent of the policy’s coverage); *Am. Nat’l Fire Ins. Co.*, 951 P.2d at 253 (stating that after a policy is triggered, the “policy remains on the risk for continuing damage.”).

15. *Aerojet-General*, 948 P.2d at 933.

16. *Id.* at 932. See also *Allstate Ins. Co. v. Dana Corp.*, 737 N.E.2d 1177, 1192 (Ind. Ct. App. 2000), *aff’d in part*, 759 N.E.2d 1049, 1058 (Ind. 2001) (finding it necessary to write into its policies if it wanted to

with an all-sums approach emphasizes the inequity of a requirement that one insurance company—who perhaps acted as the insurance company for only one year—bears the costs of damages for twenty years of pollution. One guiding principle in contract law, though, as discussed above, showcases that parties remain free to contract for what they want. This principle enables a party to compose contract clauses so as to include anything they consider essential to the relationship. The court bears no duty to change the provisions of a contract when the provisions of that contract carry unintended results. It remains doubtful that an insurer who provided a policy for one year ever thought that it may need to indemnify an insured for twenty years of pollution damage. However, unintended results and significant payouts do not signify reasons to rewrite the terms of a contract. If the parties want to limit themselves in some way, then the contract should contain that limitation. As the court in this case stated:

As a general matter at least, we do not add to, take away from, or otherwise modify a contract for “public policy considerations.” We would certainly not do so here, where such considerations depend in large part on the amassing and analyzing of complex and extensive empirical data, which belong more appropriately to the executive and legislative branches than to the judicial. We shall therefore allow whatever “gains” and “losses” there may be to lie where they have fallen.<sup>17</sup>

The court thus implicitly shows that requiring an insurance company to pay all-sums that it may be required to pay under the issued policy simply adheres to basic contract principles.

Furthermore, it remains the insurer’s obligation to pay the full amount of the policy that it issued if a triggering event of coverage occurs within the policy period.<sup>18</sup> When the original contract comes into formation, the two parties agree on all the terms within it, irrespective of any other past or future policies. Thus, as between those two parties, when they form their contract, no other insurance policy exists. In a similar insurance situation regarding asbestos injuries, one California court stated in its opinion, “It is irrelevant that the damage took place across several policy periods and only a part of the damage occurred during any particular policy period. The plain language of the policies requires that each triggered policy respond in full.”<sup>19</sup> Essentially, continuous damage means no single isolated injury exists. Because the injury can extend over a period of many years, the injury holds the potential to trigger many policies. If the insurer wanted to contract for a provision that stated its obligation to pay for any continuous injury would extend only for a certain period, then they could draft this into future policies.<sup>20</sup> However, because the insurers failed to do so in the policies at issue in these

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release itself of the obligation to indemnify for any damage that might occur outside of the policy period).

17. *Aerojet-General*, 948 P.2d at 932 (citations omitted).

18. See, e.g., *Armstrong World Indus.*, 45 Cal. App. 4th at 106.

19. *Id.*

20. The Washington Supreme Court also used this analysis in its holding in *Am. Nat’l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 951 P.2d 250, 256 (Wash. 1998). The court stated, “If the insurer wished to limit its liability through a pro rata allocation of damages once a policy is triggered, the insurer could have included that language in the policy.” *Id.*

cases, then they should not be able to backtrack on what they wrote into the original policies.

In *American National Fire Insurance Co. v. B & L Trucking & Construction Co.*,<sup>21</sup> the Washington Supreme Court brought in another interesting argument in its analysis of the all-sums approach. This court ultimately held that at the time of the policy trigger, the insurer needed to pay all sums, up to the policy's limits.<sup>22</sup> In reaching its conclusion, the court, in part, applied a very strict interpretation of insurance contracts, and seemed almost to chastise the insurance companies in the case for attempting to suggest that something other than an all-sums approach remained equitable. The court stated:

[An] insurance obligation is interpreted in a fashion consistent with the undertaking described in the policy label. Insureds are not purchasing "almost comprehensive" coverage. CGL policies are marketed by insurers as comprehensive in their scope and should be strictly construed when the insurer attempts to subtract from the comprehensive scope of its undertaking.<sup>23</sup>

The Washington Supreme Court shows a very encompassing view of comprehensive general liability insurance policies. In the above language, the court seems to state that if a company purchases this type of insurance, it will gain indemnification for nearly everything.<sup>24</sup> The court simply states that comprehensive insurance entails exactly what it reads as—comprehensive.<sup>25</sup> Anything less than this would show that the policy contains language the parties never wrote into the contract.<sup>26</sup> To construe the language of a contract to include something that the parties never intended just to achieve a certain result would destroy the very purpose and meaning behind insurance policies as contracts. The Washington Supreme Court thus states that if the parties cannot devise ahead of time what they want to include, then the court will not construe the policy outside of its plain language.<sup>27</sup>

### C. Time-on-the-risk and Mixed Time-on-the-risk and Percentage of Coverage Approaches<sup>28</sup>

Two alternatives to the all-sums approach exist. These alternatives are known as time-on-the-risk and mixed time-on-the-risk and percentage of coverage. A few states follow each of these approaches because of recent case law decided in each state.<sup>29</sup>

21. *Id.*

22. *Id.* at 256.

23. *Id.* at 257.

24. This excludes coverage in the case of intentional or expected damage, a provision that most of these policies include.

25. *Am. Nat'l Fire Ins. Co.*, 951 P.2d at 257.

26. The court states, "Further, because insurance policies are considered contracts, the policy language, and not public policy, controls. We will not add language to the policy that the insurer did not include." *Id.*

27. *Id.*

28. Together, these are often cited as the "pro rata" rule.

29. In *Consol. Edison Co. of NY v. Allstate Ins. Co.*, the Court of Appeals of New York also adopted a pro rata approach, but it failed to determine which pro rata approach applied. 774 N.E.2d 687, 695 (N.Y. 2002).

## 1. Time-on-the-risk Approach

Currently, four states follow the time-on-the-risk approach.<sup>30</sup> The time-on-the-risk approach essentially states that where environmental damage to property occurs gradually and where it remains difficult to determine exactly how much damage occurs in any one year, then the total amount of liability gets divided by the number of years at issue. The court allocates liability for each policy year and distributes it to the insurer for that particular year.<sup>31</sup>

Colorado recently adopted the time-on-the-risk approach in 1999 with the Colorado Supreme Court's decision in *Public Service Company of Colorado v. Wallis & Cos.*<sup>32</sup> The Colorado Supreme Court reversed the ruling of the court of appeals, stating that it did so in part based on interpretation of case law, and it regarded the method of allocation used by the court of appeals as unreasonable.<sup>33</sup>

The Colorado Supreme Court reaches for what it regards as the most equitable result for all the parties, even at the expense of quicker environmental cleanup.<sup>34</sup> The court states, "[T]here is no logic to support the notion that one single insurance policy among 20 or 30 years worth of policies could be expected to be held liable for the entire time period."<sup>35</sup> The court thus implies that requiring one insurance company to indemnify the insured for the entire period when the environmental damage occurred would bring about an inequitable result. However, this reasoning disregards the further damage that could happen to the property as the insured must seek out each company under which it held a policy for the entire period of damage in order to get the full cleanup and defense costs.

This method also fails to address the problem that would inevitably arise with lost policies.<sup>36</sup> It remains quite possible that out of the thirty years when damage occurred, many of the insurance policies that the company rightfully paid for could be lost or without proper proof. The amount of time required to reconstruct lost policies could entail a considerable drain on the resources of the company. This would also increase

30. See *Pub. Serv. Co. of Colo. v. Wallis & Cos.*, 986 P.2d 924, 935 (Colo. 1999); *Sentinel Ins. Co. v. First Ins. Co. of Haw., Ltd.*, 875 P.2d 894, 919 (Haw. 1994); *Norfolk S. Corp. v. Cal. Union Ins.*, 859 So. 2d 167, 197-98 (La. App. 2003); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 732 (Minn. 1997).

31. See, e.g., *Pub. Serv. Co. of Colo.*, 986 P.2d at 940.

32. *Id.* at 935.

33. *Id.*

34. This case dealt with soil and ground water contamination at two different sites. See *id.* at 927-28.

35. *Id.* at 940.

36. This problem is not adequately addressed through adoption of an all sums approach by case law either. However, through the all sums approach, at least the cleanup could move forward during the time period the parties reconstructed the lost policies. This highlights another area where the Oregon Legislature successfully adopted a pro-policyholder stance. The revised statute allows for a cooperative investigation between the insured and the insurer to reconstruct or discover lost policies. The statute states:

If, based on the information discovered in an investigation of a lost policy, the insured can show by a preponderance of the evidence that a general liability insurance policy was issued to the insured by the insurer, then if: (a) the insured cannot produce evidence that tends to show the policy limits applicable to the policy, it shall be assumed that the minimum limits of coverage, including any exclusions to coverage, offered by the insurer during the period in question were purchased by the insured. (b) The insured can produce evidence that tends to show the policy limits applicable to the policy, then the insurer has the burden of proof to show that a different policy limit, including any exclusions to coverage, should apply.

the amount of litigation that could ensue if the insurer challenges the provisions of the lost policy. All of the time and money spent on seeking out each insurance company to indemnify the right share of the claim and the time spent on reconstructing lost policies signifies time better spent on cleaning up the area. Because the indemnification payments become stalled due to the requirement of the insured to seek payments for each policy held, the cleanup at the site slows.

## 2. Mixed Time-on-the-Risk and Percentage of Coverage Approach

Under the mixed time-on-the-risk and percentage of coverage approach, the amount due in indemnification is divided among the insurance companies according to the time period in which they acted as an insurer and the percentage of coverage they offered.<sup>37</sup> The Utah Supreme Court adopted this approach in a 1997 decision.<sup>38</sup> In that decision, the question of insurance allocation arose in the area of defense costs.<sup>39</sup> From 1984 to 1986, the Environmental Protection Agency determined that property owned by Sharon Steel Corporation, acquired from UV Industries, posed a threat to public health.<sup>40</sup> It then brought an action against Sharon Steel, UV Industries, and the Liquidating Trust for liability under the Comprehensive Environmental Response, Compensation and Liability Act<sup>41</sup> and the Resource Conservation and Recovery Act<sup>42</sup> for site cleanup costs at the property.<sup>43</sup> During most of the time that UV Industries conducted business, it held comprehensive general liability insurance policies from three companies, Aetna Casualty and Surety Company, Hartford Accident and Indemnity Company, and American Motorists Insurance Company (AMICO).<sup>44</sup>

After the Liquidating Trust provided notice to the insurance companies of the proceedings, Hartford and Aetna began to pay defense costs, although Hartford restricted its coverage to a pro rata formula of its coverage years, and AMICO never paid anything.<sup>45</sup> After different rulings by the trial court, settlements, and cross-claims,<sup>46</sup> the Utah Supreme Court determined that when two or more co-insurers exist, each holds a duty to contribute defense costs when one of them paid more than its share.<sup>47</sup> The court made this determination in part on notions of equitability. It seemed to believe that holding differently would somehow reward those who failed to pay, and

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37. Sharon Steel Corp. v. Aetna Cas. & Sur. Co., 931 P.2d 127, 140 (Utah 1997).

38. *Id.* at 127.

39. *Id.* at 130.

40. *Id.*

41. 42 U.S.C. §§ 9601–9675 (2000).

42. *Id.* §§ 6901–6992.

43. Sharon Steel Corp., 931 P.2d at 130.

44. *Id.*

45. *Id.* at 130–31.

46. *Id.* at 131. The trial court determined that “all three insurance companies had a duty to defend.” Aetna then continued to pay defense costs, as required by its policies, and ultimately paid out about ninety-five percent of the total amount of costs. Hartford contributed about five percent, and AMICO contributed nothing. In order to release themselves from future obligations, AMICO and Hartford later reached a settlement agreement with Sharon Steel and the Liquidating Trust. Aetna then filed a cross-claim against the other two insurance companies for indemnification for the defense costs that it paid out for the Liquidating Trust. The trial judge ruled that Hartford and AMICO’s settlement agreement extinguished Aetna’s right for indemnification. This ruling brought the appeal to the Utah Supreme Court. *Id.*

47. *Id.* at 138.



it would conflict with the court's general policy of "encouraging prompt payment to the insured. . . ."<sup>48</sup>

Furthermore, and most important for this analysis, the court also stated that the best approach to determine indemnification is a method that looks at the time-on-the-risk of each insurer and the policy limits.<sup>49</sup> The court viewed this as the most equitable result to the insurers.<sup>50</sup> The court also ruled that when it could determine what defense costs were needed for actions that took place outside the policies, these defense costs were to be born by the insurer.<sup>51</sup>

The New Jersey Supreme Court also adopted this approach, but it did so for somewhat different reasons. The court approached the question in *Owens-Illinois, Inc. v. United Insurance Co.*,<sup>52</sup> a case involving asbestos and coverage under liability insurance policies. In its attempt to determine a manner of insurance liability allocation under a continuous trigger theory, the court stated:

Among the factors that we should consider is the extent to which our decision will make the most efficient use of the resources available to cope with environmental disease or damage. One of the principles of such decision-making is to provide incentives that parties should engage in responsible conduct that will increase, not decrease, available resources.<sup>53</sup>

The court pointed to a general theory in insurance that insurance companies exist to transfer risks.<sup>54</sup> The insurance company accepts risks through liability and can then spread them out through reinsurance.<sup>55</sup> Because they can do this, the law should not discourage parties from acquiring insurance in order to cover all of their risks.<sup>56</sup> In relying on these two factors and what it regarded as "simple justice,"<sup>57</sup> the court determined that the best method of allocation for spreading the risk was a mixture of time-on-the-risk and the degree of risk assumed.<sup>58</sup>

Adopting this approach shows a concern for the equity of insurance allocation to each insurer, but fails to consider the ramifications for the cleanup. If each insurer only needs to pay its time-on-the-risk computed with the limitations of its policy, then it could take a significant amount of time to calculate these costs. Courts would need to

48. *Sharon Steel Corp.*, 931 P.2d at 138.

49. *Id.* at 140.

50. *Id.*

51. *Id.* at 141.

52. 650 A.2d 974 (N.J. 1994).

53. *Id.* at 992.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 992. *But see, e.g.,* *Sentinel Ins. Co. v. First Ins. Co. of Haw., Ltd.*, 875 P.2d 894, 919 (Haw. 1994) (stating its own theory of simple justice in asserting that equity requires allocation among all insurers relative to the time periods in which they provided coverage, thereby adopting the time-on-the-risk approach).

58. *Owens-Illinois, Inc.*, 650 A.2d at 995. The court revisited the issue in *Carter-Wallace Inc. v. Admiral Ins. Co.*, 712 A.2d 1116 (N.J. 1998). The issue in this case pertained to how to apply the holding of *Owens-Illinois* to excess insurers in continuous trigger liability cases. The court determined again that the best method of allocation between primary and excess insurers would be a mixed time-on-the-risk and degree of risk assumed approach. *Id.* at 1124.

sift through a myriad of information presented by both the insurer and the insured. Fortunately, in the case above, Aetna already paid most of the defense costs and only sought indemnification from the other two insurance companies. This presumably meant that no delay in cleanup occurred. However, in other cases, this decision could result in long delays as the insurers attempt to work with the insured to determine each one's exact liability for defense costs that, in turn, would result in longer delays for the cleanup efforts.

### III. OREGON GOES FURTHER

The Oregon Legislature needed to choose among these three options in order to settle the question of insurance allocation in the state. I propose that the real reason the Oregon Legislature chose to pass Senate Bill 297 rests in part on the general composition of the state's industry and its citizens. The relevant portion of the statute reads:

An insurer with a duty to pay defense or indemnity costs, or both, to an insured for an environmental claim under a general liability insurance policy that provides that the insurer has a duty to pay all sums arising out of a risk covered by the policy, *must pay all defense or indemnity costs*, or both, proximately arising out of the risk pursuant to the applicable terms of its policy, including its limit of liability, *independent and unaffected by other insurance that may provide coverage for the same claim.*<sup>59</sup>

Environmental protection in the Pacific Northwest is one of the primary concerns for many of its citizens. With large wilderness areas, a significant forestry and fishing base, and dozens of lakes, a clean environment in Oregon stands as one of the most pressing issues facing Oregon citizens. It remains possible to surmise that a clean environment can mean much more than a thriving natural resource-based industry; it can also result in greater tourism. People flock to the Oregon wilderness to engage in what they view as typical Oregon activities: fly fishing, mountain climbing, snow skiing, water skiing, kayaking, and hiking. Without a clean environment and idyllic setting, these activities lose some of the luster that can attract out-of-state and foreign tourists. Prior to the passage of the new statute, the lack of a clear rule of allocation threatened the well-being of many Oregonians.<sup>60</sup> According to the Oregon Department of Environmental Quality, approximately 550 sites throughout the state are already designated as contaminated enough to warrant investigation and cleanups.<sup>61</sup> Because judges and juries, along with constituents and legislators, harbor these concerns, recent Oregon case law seems to adhere to the general pro-policyholder and pro-environment policy set out in the new statute. These cases serve as a precursor to the statute and its policy implications.

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59. OR. REV. STAT. § 465.480(3)(a) (2003) (emphasis added).

60. See, e.g., Christopher R. Hermann et al., *The Unanswered Question of Environmental Insurance Allocation in Oregon Law*, 39 WILLAMETTE L. REV. 1131, 1136 (2003).

61. *Id.* at 1131.

### A. The Adoption of a Pro-Environment Policy Through Oregon Case Law

One of the first cases to adopt a real pro-environment approach came in *Lane Electric Cooperative Inc. v. Federated Rural Electric Insurance Corp.*<sup>62</sup> In this case, the Oregon Court of Appeals determined, among other things, that cleanup costs due to groundwater contamination constituted covered property damage in insurance policies.<sup>63</sup> Here, a gasoline tank leaked fuel into the groundwater.<sup>64</sup> The plaintiff cleaned the area and sought coverage from its insurance company.<sup>65</sup> The insurance company asserted that contamination of the groundwater constituted physical injury to the property not “within the meaning of the policy.”<sup>66</sup> The court then examined basic rules of insurance policy interpretation to reach its conclusion. The court specifically applied the rule that language of a policy enjoys interpretation according to its plain and ordinary meaning, and a policy is to be construed according to its purpose and the implication that the policyholder would assume it to embrace.<sup>67</sup> The court then simply stated, “Ground water is tangible property. When it is contaminated, its quality is injured physically and is ‘damaged.’”<sup>68</sup> With this holding, the Oregon Court of Appeals seemed to set the course for the generally pro-environment policy followed later by the Oregon Supreme Court and embraced by the legislature in the passage of Senate Bill 297.

Subsequently, in 1994, the Oregon Court of Appeals made another decision to accompany the general pro-environment stance that the court made in 1992. In *St. Paul Fire & Marine Insurance Co., Inc. v. McCormick & Baxter Creosoting Co.*,<sup>69</sup> the Oregon Court of Appeals determined that demands from a regulatory agency and a suit brought in court triggered the duty to defend.<sup>70</sup> The facts show that McCormick & Baxter operated wood treatment plants in Portland and used certain chemicals which later leaked into the soil and groundwater, contaminating these areas and surface water.<sup>71</sup> The contamination occurred because of surface impoundments where McCormick & Baxter stored wastewater from the wood treatment process.<sup>72</sup> Later on, McCormick & Baxter learned that some of the contaminants leaked through the surface impoundments into the groundwater and soil.<sup>73</sup> They then notified the Oregon

62. 834 P.2d 502 (Or. Ct. App. 1992).

63. *Id.* at 505.

64. *Id.* at 503.

65. *Id.*

66. *Id.* at 505.

67. *Id.*

68. *Lane Electric*, 834 P.2d at 505.

69. 870 P.2d 260 (Or. Ct. App. 1994), *aff'd in part and rev'd in part*, 923 P.2d 1200, 1218 (Or. 1996).

70. *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 870 P.2d 260, 266 (Or. Ct. App. 1994).

71. *Id.* at 263.

72. These were standard for the industry. *Id.*

73. *Id.* Evidence also showed that during a labor dispute in 1949 or 1950, around 50,000 gallons of creosote spilled into the soil when someone opened a storage tank's flange bolt. Additional damage also occurred “by overflow from storage tanks, by equipment failures, and by stormwater runoff from treated products and equipment, which were coated with preservatives. Preservatives also dripped and spilled onto unprotected soil.” *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200, 1204 (Or. 1996).

Department of Environmental Quality about the contamination and entered into a consent decree for cleanup of the contaminated area.<sup>74</sup> After over \$2 million in cleanup costs, McCormick & Baxter went to its insurers for indemnification.<sup>75</sup> Three of the insurance companies argued that their duty to defend only arose when there was an actual suit for recovery of cleanup costs in a court of law and not in an agency proceeding.<sup>76</sup> McCormick & Baxter asserted a duty to defend in administrative proceedings as well as in court cases. The court agreed with McCormick & Baxter and concluded “suit” as broad enough to cover administrative proceedings.<sup>77</sup>

In its holding, the court relied on the fact that due to the type of administrative proceedings that governed the environmental cleanup, McCormick & Baxter needed to pay. The court stated, “The fact that it chose to try to gain a more favorable resolution by cooperation instead of litigation does not mean that the agency was not making a claim that [McCormick & Baxter] was responsible for damages.”<sup>78</sup> By choosing to begin cleanup right away and cooperate with the agencies, McCormick & Baxter began its cleanup efforts earlier than would usually occur through litigation. Ultimately, no matter what route it went, environmental proceedings required that McCormick & Baxter do some type of cleanup. Therefore, because McCormick & Baxter chose to cooperate with the agencies rather than litigate the matter, the court appeared unwilling to punish them for taking this pro-environment stance.<sup>79</sup> McCormick & Baxter harbored responsibility for the damage, no matter which way the damage occurred. Because of this, the court determined that the administrative proceedings remained the same as an actual court case, thus triggering the insurance companies’ duty to defend.<sup>80</sup>

Again in 1996, the Oregon Supreme Court rendered one of its most important decisions on environmental policy, determining the meaning behind “accident” in these policies.<sup>81</sup> This case came up on appeal before the Oregon Supreme Court from the case just discussed. The court divided the pertinent policies into three categories: “caused-by-accident” policies, “occurrence-based” policies, and policies with pollution exclusions.<sup>82</sup> For purposes of analysis here, I will only address the “caused by accident” policies.

The “caused by accident” policies essentially stated that the insurance policies issued with that stipulation could only cover third-party property damage caused by accident.<sup>83</sup> The insurers wanted the court to attach a temporal limit on the term “accident,” suggesting that it meant something more sudden that could be restricted in a

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74. *St. Paul Fire & Marine Ins. Co.*, 870 P.2d at 263. McCormick & Baxter held responsibility for cleanup at a site in California. McCormick & Baxter worked with the California Department of Health Services which determined that McCormick & Baxter violated the California Hazardous Waste Control Act, and the agency told McCormick & Baxter of the penalties that it would face should it not cleanup the area. *Id.*

75. *St. Paul Fire & Marine Ins. Co.*, 923 P.2d at 1203–04.

76. *St. Paul Fire & Marine Ins. Co.*, 870 P.2d at 266.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 266.

81. *St. Paul Fire & Marine Co.*, 923 P.2d at 1213.

82. *Id.* at 1209.

83. *Id.* at 1211.

definite time period.<sup>84</sup> McCormick & Baxter alternatively sought a determination that would show “accident” meant simply “any event that results in unexpected, or unforeseen, consequences.”<sup>85</sup> The word “accident” remained undefined in all of the policies, therefore leaving it to the court to determine.

The court looked to the common meaning of the word “accident” and prior case law to determine that the contamination-causing events described by McCormick & Baxter all remained accidents.<sup>86</sup> It stated, “Based on our precedents, an ‘accident’ is an ‘incident or occurrence that happened by chance, without design and contrary to intention and expectation.’”<sup>87</sup> Because the evidence presented by McCormick & Baxter showed that all the spills and leaks were unintentional, so was the environmental harm that resulted.<sup>88</sup> McCormick & Baxter remained unaware that the contaminants would leak into the soil and groundwater, and because of this the action remained unintentional.<sup>89</sup> It therefore amounted to an accident, as required by the policy.<sup>90</sup>

The significance of this decision shows that the term “accident” can mean any unintended event, not a temporally-defined event. Because of this definition, events that occur in the regular course of business can constitute accidents if they remained unintentional. This holding makes significant contributions to sound environmental policy because it helps establish that unknown events that cause contamination can still be accidental, even if the act itself was deliberate. The *act* can be deliberate, as it is done in the regular course of business (as McCormick & Baxter used the surface impoundments deliberately). If the act delivers unintentional *results* that cause contamination, the insured is covered. If the act delivers expected and intended results that the insured knows could cause contamination, then he is not covered. This decision illustrates that a company can engage in its normal business activities without hindrance from insurance policies that put a temporal qualifier on the word “accident.”<sup>91</sup>

Finally, in 1999, the Oregon Environmental Cleanup Assistance Act<sup>92</sup> took another step to establish a pro-environment policy for the state. This Act in part established that any written direction, request, or agreement by the Department of Environmental Quality (DEQ) or the Environmental Protection Agency (EPA) would be the equivalent of a lawsuit as the term is used in general liability insurance policies.<sup>93</sup> Through the adoption of this position, the Oregon Legislature made it considerably easier for those with a claim for indemnification to receive funds from their insurance companies. The companies would no longer need to wait for the commencement of an actual lawsuit to receive defense costs; rather, they could receive funding as soon as the DEQ or EPA

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84. *Id.*

85. *Id.*

86. *Id.* at 1212–13.

87. *St. Paul Fire & Marine Ins. Co.*, 923 P.2d at 1213 (quoting *Finley v. Prudential Ins. Co.*, 388 P.2d 21, 26 (Or. 1963)).

88. *Id.* at 1214.

89. *Id.*

90. *Id.*

91. *See also* *Pub. Serv. Co. of Colo. v. Wallis & Cos.*, 986 P.2d 924, 931 (Colo. 1999) (stating that the term “sudden” in a “sudden, unintended and unexpected” exception clause contained enough ambiguity so as to be construed against the insurer, and therefore did not contain a temporal implication).

92. OR. REV. STAT. § 465.480 (2001).

93. *Id.*

issued a direction, request, or agreement. This thus allows the cleanup to begin sooner as the company does not need to wait in the long court queue to receive its funds.

These past few cases and the Oregon Environmental Cleanup Assistance Act thus helped establish the pro-policyholder and pro-environment landscape in the state. These instances would then help ease the way for the introduction and eventual passage of Senate Bill 297 in 2003.

### *B. All-Sums Approach through Statute as Opposed to Case Law*

Adoption of an all-sums approach evidently means that a significant amount of time will be saved between the discovery of the contaminated area and the time of the cleanup. Rather than a requirement that each business or individual seek payments from each different insurance company, as with time-on-the-risk, the business or individual holds the power to seek these funds from just one company. The company can begin the cleanup without the necessary wait time required by extensive litigation with each insurance company. The way the statute works shows that the business obtains all the funds up to the policy's limit from one insurer, and then that insurer can seek indemnification from any other insurer who may also hold liability for part of the cost. This emanates no unfairness to the insurers, as they are not required to distribute any more money than the original limit of the policy. The insurers wrote the contract, and thus harbor responsibility for all the limits that these contracts entail. In its adoption of the statute, the Oregon Legislature put no new liabilities on these insurance companies, but merely clarified the interpretation of already existing contracts.

However, the Oregon Legislature went further than this. In its adoption of the statute, the legislature showed that it harbored a desire to rid the state of environmental contamination as quickly as possible. Furthermore, the passage of a statute, rather than a judicial decision, seems to show that the effort reflects a statewide consensus, rather than one held just by the judiciary. Although both methods—the all-sums approach decided through case law and the all-sums approach adopted through a statute—generate much of the same results, they remain fundamentally different. One emanates from judges deciding an issue immediately before them, and the other originates with representatives elected by the people attempting to alleviate present and future problems.

### *C. What the Bill Could Mean for Future Claims and the Future of the State*

The real significance of this bill will undoubtedly unfold within the next few years as companies and individuals around the state move forward to take advantage of it. This will mean faster cleanup of contaminated sites thus generating greater health throughout the state. Furthermore, companies will hold the ability to move on the claim right away, fix the site according to plans laid out by DEQ, and see the remedy through to the end of the cleanup. To illustrate the amount of time that it can take before a company could achieve resolution of its claims before the statute, one example arises in the case of McCormick & Baxter.<sup>94</sup> In 1988, McCormick & Baxter paid out over \$2

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94. See *supra* Part III.A.

million in cleanup costs and then filed for bankruptcy.<sup>95</sup> A year earlier, McCormick & Baxter looked to its insurance companies for indemnification with regard to its cleanup costs.<sup>96</sup> The entire case finally ended in 1996.<sup>97</sup>

If companies like McCormick & Baxter held the ability to collect right away under the provisions of the new statute, all this litigation might remain unnecessary. The statute allows them to get the money immediately and perhaps save them from bankruptcy. Companies in Oregon, like McCormick & Baxter, paid into these insurance policies for years, expecting indemnification for cleanup should the need arise. This new law will now allow them to receive the benefits of these insurance policies they once held, and it will allow them to effectuate a more efficient cleanup of contaminated areas to the betterment of the entire state.

As companies move to take advantage of this new statute, smaller companies and private individuals who also hold these policies could face consequences. Unable to afford suit expenses and without the time to endure lengthy litigation, some individuals may decide to handle the situation themselves once their insurance companies refuse to indemnify them under the policies. This could even entail a declaration of bankruptcy. Now with the all-sums approach written into statute, individuals with smaller claims can move forward right away in exercising their rights. Again, the statute will allow for faster cleanup as even those with smaller claims can take advantage of its remedial effects.

However, the repercussions of the bill do not end with the individuals and companies who harbor claims against their insurance companies. The bill's consequences extend much farther than this as each of these cleanups near completion. With each cleanup and containment of environmental degradation, the state obtains a healthier environmental standard. Cleaner lakes, rivers, forests, and any area in general means a chance for other industries to thrive as well. These cleanup efforts impact the entire state.

#### IV. OREGON AS A MODEL FOR UNDECIDED STATES

The passage of Senate Bill 297 in Oregon allows the state to stand as a model for other states yet to determine the allocation issue under comprehensive general liability insurance policies. Leaving the matter undecided creates a potential for calamitous consequences as sites remain damaged and environmental destruction continues.<sup>98</sup>

95. *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 870 P.2d 260, 263 (Or. Ct. App. 1994).

96. *See St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200 (Or. 1996).

97. *See id.*

98. *See Frona M. Powell, Insuring Environmental Cleanup: Triggering Coverage for Environmental Property Damage under the Terms of a Comprehensive General Liability Insurance Policy*, 71 NEB. L. REV. 1194, 1195 (1992). This article states:

The mammoth price tag for cleaning up the nation's worst hazardous waste sites encourages parties to litigate because the costs of litigating are often less than the costs of remedying hazardous waste contamination. But litigation does not further the goal of a clean environment. Rather, it consumes resources that could be spent on cleanup while postponing an ultimate solution to the problem of hazardous waste contamination.

When companies remain tied up in litigation in their attempt to determine who needs to pay for the cleanup, further degradation occurs across the landscape. It remains crucial to the well-being of affected sites that undecided states determine this matter as soon as possible. The faster that a cleanup can occur, the better it comes for the general well-being of the state. Allowing these sites to remain untouched as companies battle it out in litigation creates the potential for dire environmental degradation.

Furthermore, those states that remain undecided should look to Oregon's Senate Bill 297, as it creates a remedy most conducive to quicker cleanups. Adopting the all-sums approach through case law illustrates a step in the right direction, but states should affirmatively follow the Oregon approach and adopt the all-sums rule with a statute. A statute makes things more concrete than case law. Even though *stare decisis* standards provide binding precedent, this precedent can always be overturned later. It takes a greater effort to overturn a statute. In addition, the adoption of an approach through case law takes a lot of time and an incredible amount of money. The court process is slow, and parties find it necessary to front large sums of money in order to get things underway. Meanwhile, as the issues get laid out in the court, the damaged sites remain uncleaned.

Finally, following Oregon's approach establishes a very strong pro-environment policy. A statute passed by representatives of the people shows the concern of the state as a whole. When the Oregon senators and representatives met in Salem to decide this issue and hammer it out on the table, they accomplished much more than just a method for allocation. They established a pro-environment policy, they adopted an approach for the betterment of the state, and they established Oregon as a model for the rest of the country to look to when trying to determine their own set of environmental standards and guidelines.

## V. CONCLUSION

Environmental cleanup will continue to symbolize one of the major concerns for each state as the effects of pollution and past harmful practices come to realization. Most of the time, damage caused from past practices can take years before it actually surfaces. Because of this delay, the harmful effects of some practices can cause considerable damage to a state's natural environment. Rules like the one adopted by the Oregon Legislature in Senate Bill 297 stand as attempts to help correct the devastating results of years of environmental degradation. Because the Oregon Legislature adopted an approach equitable both to the insurance companies that drafted the policies and the policyholders who paid premiums on these policies, all states yet to reach a conclusion on this matter should adopt Oregon's approach. The Oregon approach remains the best for all those involved, and it creates the optimum inroad into a cleaner, healthier environment.



