ESSAYS

THE MAZE OF MEGA-COVERAGE LITIGATION

*Kenneth S. Abraham**

The rise of mass tort and environmental cleanup liability has spawned claims by policyholders for insurance coverage of these liabilities. Professor Abraham examines the origins of the issues that arise in litigation over these insurance claims and identifies the reasons that the litigation is prolonged, uncertain, and complex.

INTRODUCTION

Over the last two decades, the rise of mass tort liability and the enactment of CERCLA[1] have transformed both tort and insurance litigation. Class and multidistrict tort actions involving thousands of personal injury claimants, and disputes over environmental cleanup liability involving hundreds of millions of dollars, are now commonplace. With this new civil liability, however, has come a less noticed but also very significant development: massive insurance coverage litigation between the companies that are subject to the new civil liability and their liability insurers. Judge Jack Weinstein, whom this issue of the *Columbia Law Review* honors, has rendered important decisions in both fields.[2] The new civil liability has received much scholarly attention, including an entire book emphasizing Judge Weinstein's role in the *Agent Orange* case.[3] But the mega-insurance coverage disputes that typically accompany mass tort and CERCLA litigation have not been studied as extensively.

In this Essay, I step back from the doctrinal details of this liability insurance litigation in order to sketch its principal characteristics and generate some insights about the way it has worked in practice.[4] This

* Class of 1962 Professor of Law, University of Virginia School of Law.

1. Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 26 U.S.C., 33 U.S.C., 42 U.S.C., and 49 U.S.C.).

2. See, e.g., Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368 (E.D.N.Y. 1988) (resolving issues related to insurance coverage of liability for *Agent Orange* settlement); In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1267 (E.D.N.Y. 1985) (dismissing claims of opt-outs from *Agent Orange* class settlement on grounds of inability to prove causation), aff'd, 818 F.2d 187 (2d Cir. 1987); In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1396 (E.D.N.Y. 1985) (ordering distribution plan), aff'd in part, rev'd in part, 818 F.2d 179 (2d Cir. 1987); In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984) (finding settlement reasonable and fair), aff'd, 818 F.2d 145 (2d Cir. 1987).

3. See Peter H. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts (1986).

4. For a discussion of the doctrinal details, see, e.g., Kenneth S. Abraham, Environmental Liability Insurance Law: An Analysis of Toxic Tort and Hazardous Waste

Essay is not aimed at insurance law specialists, but at all lawyers who are interested in the manner in which new areas of law emerge, experience growing pains, and create their own new problems. Although insurance law may once have occupied a dark corner of the legal world, mega-coverage litigation has now developed into a field of major legal and economic importance. Hundreds of billions of dollars may ultimately be at stake in this litigation.[5] The story behind the development of mega-coverage litigation is therefore worth understanding, because it illustrates how the unintended side effects of legal innovations such as mass tort and CERCLA liability can come to be nearly as important as, and perhaps even more troublesome than, the innovations themselves.

I. Coverage Until the End of Time: The Trigger of Coverage and Its Consequences

A. *The CGL Trigger*

The story of mega-coverage litigation begins with a concept: the "trigger" of coverage. A trigger is the event that activates the right to coverage under an insurance policy. For over fifty years, American businesses have been purchasing their basic liability insurance under the CGL (first "Comprehensive General Liability" and more recently "Commercial General Liability") insurance policy. The trigger of coverage under a CGL policy has always been and continues to be the occurrence of bodily injury or property damage "during the policy period," which is usually one year from the date the policy is issued. CGL policies have never contained any limit, however, on the time when a claim for coverage may be made, so long as the claim involves bodily injury or property damage that occurred during the policy period. Thus, if the applicable statute of limitations governing tort actions permits it, a suit alleging liability for bodily injury that occurred in policy Year 1 may be brought against the policyholder during Year 30, yet be insured under the policy covering Year 1.[6] In short, because of their trigger of coverage, CGL policies potentially cover a policyholder's liability for long-latency bodily injury or property damage. Old CGL policies provide coverage against current liabilities arising out of past harm, beginning with the date they were issued and continuing, potentially, until the end of time.

Until the 1970s, exposure of insurers to claims for coverage of these "long-tail" liabilities was more a theoretical possibility than a real risk. Virtually all traditional bodily injury and property damage suits involved

Insurance Coverage Issues (1991); Barry R. Ostrager & Thomas R. Newman, Handbook on Insurance Coverage Disputes (8th ed. 1995).

5. See Abraham, supra note 4, at 1.

6. The CGL policy does require that the policyholder provide notice to the insurer of a suit against it, and of any occurrence that may give rise to a suit, but these requirements only come into play once harm becomes manifest. Most of the liabilities with which mega-coverage disputes are concerned, however, involve long-latent harm.

harm that was discovered soon after it occurred. In the infrequent cases in which harm had occurred earlier but remained latent for a number of years, the applicable statute of limitations often foreclosed suit because there was no statutory or judicially created exception for suits alleging liability for injury or damage that had only recently been discovered. The trigger of coverage was thus a shield for insurers, not a sword for policyholders. As a consequence, virtually all of the actual coverage exposure of CGL policies involved what have come to be called "short-tail" liabilities—suits brought during or soon after the expiration of the policy period in which the harm at issue was alleged to have occurred.

All this began to change in the 1960s and 1970s with the introduction of discovery exceptions to statutes of limitations governing tort actions, under which suit may be brought years after initially undiscovered injury or damage actually occurred.[7] But only with the advent of mass tort actions for long-latency diseases such as asbestosis did the problem become severe. Beginning in the 1970s, mass tort actions involving tens of thousands of claimants were instituted, alleging that claimants suffered decades-old injuries that had remained latent until recently. The scope of liability again dramatically expanded with the enactment of CERCLA in 1980, under which policyholders were exposed to liability for cleanup of environmental contamination that often had begun many years before.[8]

The rise of long-tail mass tort and environmental cleanup liabilities quickly led companies facing these liabilities to claim coverage under their CGL insurance policies. Given the trigger of coverage provided for by these policies, these coverage claims were made against every policy that was "on the risk" (i.e., provided coverage) during the period when the bodily injury or property damage at issue in the underlying liability action was occurring but remained latent. Thus, if an insulation worker began working with asbestos in 1940 and discovered in 1975 that he suffered from asbestosis, then the company or companies that he sued in tort would claim coverage under all the policies issued to them between 1940 and 1975. Similarly, a typical CERCLA liability might involve the cleanup of waste that was deposited at a site beginning in 1955 but that did not result in the discovery of chemical contamination of the water supply near the site until 1982. The company or companies facing this liability would claim coverage under all policies issued to them between 1955 and 1982.

In disputes over such claims, insurers have tended to argue that only one policy—the policy in effect when harm manifested itself—was triggered. In contrast, policyholders claiming coverage of these liabilities

7. See Developments in the Law—Toxic Waste Litigation, 99 Harv. L. Rev. 1458, 1605–06 (1986).

8. See Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, § 107, 94 Stat. 2767, 2781–85 (codified as amended at 42 U.S.C. § 9601 (1994)).

have asserted that there was bodily injury or property damage during each of the years from first exposure to manifestation, and have argued that each policy that was on the risk during these years was triggered. For the most part, policyholders have succeeded in obtaining the multiyear triggers for which they have argued, though the courts have given them different names: continuous trigger, actual trigger, exposure trigger, etc.[9] All these multiyear triggers are sufficiently similar for purposes of my analysis to refer to them simply as the "injury-in-fact" trigger.

The facts revealed in cases in which policyholders have conducted discovery regarding the drafting history of the CGL policy leave no doubt that those who drafted and sold CGL insurance policies in the 1950s and 1960s contemplated that there might be occasional cases in which harm could occur during more than one policy period and trigger more than one policy.[10] By this time there had been claims for coverage of such long-latency diseases as silicosis for decades.[11] But it is unlikely that the insurance industry anticipated the scope and magnitude of the liabilities that might be covered under policies issued during these earlier years, but not imposed on their policyholders until the 1980s.

The frequency and severity of subsequent claims for damages resulting from long-latency diseases that figure so prominently in mass toxic tort cases—asbestosis and cancer, for example—would have surprised the insurers of the 1950s and 1960s. In addition, the enactment of a federal statute (CERCLA) in 1980, directing cleanup of hazardous waste deposit sites and holding each party who generated any waste deposited at a site strictly, jointly and severally, and retroactively liable for the full cost of cleanup, surely could not have been predicted by even the most prescient of insurers before the mid-1970s.

B. *The Consequences of a Multiyear, Injury-in-Fact Trigger*

The result of this development of trigger-of-coverage rules was that, beginning in the 1980s, insurers that had issued CGL policies in earlier decades were struck with an avalanche of coverage claims that these insurers had not anticipated when they sold the policies. If surprise were a defense, the insurers would have faced no problem. But the fact that a form of liability was unanticipated, or even nonexistent at the time a policy was issued, is no defense to a claim of coverage under a CGL policy. CGL insurance policies provide "general" insurance against liability for all bodily injury or property damage that occurs during the policy period,

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9. See, e.g., Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1387–88 (E.D.N.Y. 1988) (Weinstein, J.).

10. See, e.g., Montrose Chem. Corp. v. Admiral Ins. Co., 5 Cal. Rptr. 2d 358, 369 (Cal. Ct. App. 1992) ("the drafters of the 'occurrence' [CGL] policy . . . contemplated coverage under successive policies for progressive continuing injuries and damage").

11. See, e.g., Urie v. Thompson, 337 U.S. 163, 168–69 (1949) (creating a discovery exception to the period of limitations under the Federal Employers Liability Act in a case involving silicosis).

whether or not the cause of action or theory of liability was in force at the time when the policy was issued. That is part of the attraction of this form of coverage, and part of what the policyholders of the 1950s and 1960s reasonably expected they were buying. By employing an injury-in-fact trigger of coverage, the insurers that issued these policies took the risk that, in the future, liability implicating their past policies would expand beyond what they had predicted.

The mega-coverage litigation that results from a disputed claim is prolonged, uncertain, and complex. Nevertheless, mass tort and CERCLA coverage claims are rarely paid without dispute. Too much money is at stake, too many other provisions in CGL policies potentially limit or eliminate coverage of mass tort and CERCLA liabilities, and insurers apparently collected so few premium dollars in anticipation of long-tail coverage liability that most policyholders with mega-coverage claims must bring a lawsuit in order to be paid. Because of the trigger of coverage under CGL policies, the courts must adjudicate these disputes over the scope of coverage under insurance policies that were issued decades, sometimes even half-a-century, ago.

Moreover, CGL policyholders typically were (and are today) covered by both primary and multiple "layers" of excess liability insurance each year. For this reason, virtually every mega-coverage case poses issues relating not only to coverage per se, but also to the allocation of coverage responsibility among primary and excess insurance policies covering different triggered years. Allocation among triggered years is difficult because much of the injury or damage that is at issue in the underlying liability actions against CGL policyholders is practically and theoretically indivisible by year. Exposure to asbestos over a period of years results in the multiyear development of a single disease; the commingling and multiyear migration of waste deposited at a site results in contamination of an underground water supply that cannot be segregated by policy periods.

When both primary and excess policies covering these time periods are triggered and are found to cover the liability at issue, allocation of coverage responsibility among these policies poses vexing problems. One of the leading approaches is to allocate equal coverage responsibility to each triggered year.[12] But many courts have rejected this approach. Some have in effect held all triggered policies jointly and severally liable. Under this rule the policyholder has access to the coverage issued in all triggered years.[13] Other courts have adopted different approaches, such as exhaustion by layers of coverage,[14] or allocation by year in proportion

12. See, e.g., Northern States Power Co. v. Fidelity and Cas. Co., 523 N.W.2d 657, 664 (Minn. 1994).

13. See, e.g., J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 508 (Pa. 1993).

14. See, e.g., Continental Cas. Co. v. Armstrong World Indus., Inc., 776 F. Supp. 1296, 1301 (N.D. Ill. 1991).

to the total amount of coverage purchased in each triggered year.[15] Secondary issues, such as whether to allocate "coverage" responsibility to triggered but uninsured years, must also be resolved.[16]

Uncertainty about the applicable method of allocating coverage responsibility among triggered policies means that policyholders often must sue virtually all the primary and excess insurers that sold them coverage over the entire potential trigger period, regardless of the amount of liability they face. In addition, settlements are more difficult to achieve because of this uncertainty, and even after settlement with some insurers occurs, disputes emerge over the appropriate way to account for these settlements in suits against nonsettling insurers.[17] Along with uncertainty over the basic coverage issues, therefore, disputes between policyholders and insurers and among insurers themselves over these allocation questions have combined to create a patchwork quilt of partially developed coverage law.[18]

In my view the courts have been correct in interpreting the trigger provisions of CGL insurance policies to provide for multipolicy coverage responsibility in cases involving multiyear bodily injury or property damage. To do otherwise would have been an incorrect reading of the policy language. At the very least, such a reading would have reversed the first rule of insurance law—requiring that ambiguous policy provisions be interpreted in favor of coverage—by ruling instead that inconclusive policy language should be interpreted against coverage.[19] But there is no denying that, directly or indirectly, the legal maze in which mega-coverage litigation takes place is heavily the result of the multiyear, injury-in-fact trigger of coverage under CGL insurance policies.

By 1986, the insurance industry had revised the CGL policy in an attempt to exclude coverage of most pollution-related liability. But given the trigger of coverage under pre-1986 policies, and the long latency of the injuries and property damage that give rise to mass tort and CERCLA liabilities, claims for coverage under the older policies can and will be made for years to come.

II. Doctrinal Immaturity and Horizontal Federalism

I turn next to a second factor that contributes to the creation of the legal maze of mega-coverage litigation. More than twenty years after this type of litigation arrived on the scene, the law on many significant cover-

15. See, e.g., Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 993 (N.J. 1994).

16. See, e.g., Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1047–49 (D.C. Cir. 1981); *Owens-Illinois*, 650 A.2d at 994.

17. See, e.g., Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1443 (3d Cir. 1996).

18. See, e.g., Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1391–94 (E.D.N.Y. 1988) (Weinstein, J.) (discussing different approaches to allocation of coverage responsibility).

19. See Kenneth S. Abraham, A Theory of Insurance Policy Interpretation, 95 Mich. L. Rev. 531, 557–58 (1996).

age issues in many states is still not definitive and is often nonexistent. Because important questions cannot be confidently answered, the parties' predictions of outcomes are likely to vary enough to impede settlement and thereby to produce the protracted and costly litigation that is so characteristic of this field.

A. *Slow Doctrinal Development*

The principal cause of this doctrinal uncertainty and immaturity is that insurance law is contract law. And of course contract law is state common law. Even the question whether a CGL policy covers federally created liability under CERCLA is a matter of state common law. In the typical common-law situation, a new form of civil liability emerges slowly, giving insurers the opportunity to fashion new policy provisions and the courts of different states time to develop a body of insurance law that deals adequately with the new liability. In contrast, mass toxic tort liability emerged over a very short time, and CERCLA liability came into being whole, on the day of the statute's enactment in 1980. Very quickly, policyholders and insurers needed a mature body of law to resolve their disputes. But that body of doctrine could not develop quickly enough and is still underdeveloped in most states today.

Even in a unitary legal system, doctrinal development would have been slow. One reason is that mega-coverage litigation is in many respects fact intensive. For example, there is no coverage of liability for harm that is "expected or intended" by the policyholder.[20] Extensive discovery on this issue, involving the policyholder's records, memories of numerous witnesses, and the scientific and technical state of the art at times past, almost inevitably takes several years to conduct. In most cases this discovery occurs before dispositive motions on "legal" coverage issues—i.e., those involving the interpretation of particular policy provisions and their proper application to different sets of facts. In this way, fact intensiveness delays adjudication and slows doctrinal development.

Another reason for the slow development of the law is that the typical case may raise a dozen or more interpretive issues. It is not surprising that obtaining authoritative appellate decisions on this many issues may take a decade or more. For example, nearly two decades after the enactment of CERCLA, less than one-third of all state supreme courts have addressed the meaning and scope of the "pollution exclusion" that was incorporated in CGL policies from about 1970 through 1985.[21] Yet, for reasons I shall indicate below, this exclusion is potentially one of the CGL

20. See Abraham, supra note 4, at 129–31.

21. See id. at 145. The 1986 revision of the CGL policy substituted an "absolute" exclusion for the "qualified" version. See id. at 160–61.

insurers' most powerful defenses.[22] In the meantime, the parties litigate rather than settle in the shadow of an uncertain legal regime.

B. *State-to-State Inconsistencies*

A second reason for the legal uncertainty that pervades mega-coverage litigation is that, even where there are authoritative decisions on an issue, the results reached are likely to vary radically across states. Thus, because we do not have a unitary legal system, the process of legal development and harmonization takes much longer than it would otherwise, and harmonization has not yet occurred. Mega-coverage law is made by fifty-one separate insurance law regimes under the control of the state courts, plus an overlay of federal diversity jurisdiction that requires federal courts to identify and apply the appropriate state's insurance law. With ample time, the common law of insurance can work itself pure, within any given state and across different states. If mega-coverage issues had emerged slowly, the backing and filling that are necessary to produce mature, consistent doctrine could have taken place over a period of decades. However, because mega-coverage litigation has burst on the scene virtually full-blown, the opportunity for doctrinal evolution and interstate harmonization has been lacking.

As a result, there is often a sharp division among the states on crucial issues. For example, the pollution exclusion referred to above contains an exception for liability for harm resulting from a "sudden and accidental" discharge of pollutants.[23] Thus, if a discharge is "sudden and accidental," then the exclusion is inapplicable. The roughly one dozen state courts of last resort that have addressed the issue, however, are almost evenly split on the meaning of the word "sudden" in the exclusion. In half of these states, sudden means "unexpected"; in the other half it means "abrupt."[24]

This is a crucial issue because most mass tort claims that involve pollutants, and almost all CERCLA liability, result from discharges that the policyholder contends were unexpected and gradual. For example, at the typical leaking hazardous waste disposal site, waste has migrated

22. See, e.g., Northville Indus. Corp. v. National Union Fire Ins. Co., 679 N.E.2d 1044, 1047–49 (N.Y. 1997) (affirming summary judgment for insurer on the basis of the pollution exclusion).

23. See Abraham, supra note 4, at 146.

24. Decisions favoring policyholders include Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204 (Ill. 1992); Dimmit Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700 (Fla. 1992); Joy Techs., Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W. Va. 1992); Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991); Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990); and Claussen v. Aetna Cas. & Sur. Co., 380 S.E.2d 686 (Ga. 1989). Decisions favoring insurers include Hybud Equip. Corp. v. Sphere Drake Ins. Co., 597 N.E.2d 1096 (Ohio 1992); Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392 (Mich. 1991); Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc., 555 N.E.2d 568 (Mass. 1990); and Waste Management, Inc. v. Peerless Ins. Co., 340 S.E.2d 374 (N.C. 1986).

slowly and underground, often without any awareness on the part of those ultimately held liable for cleanup or bodily injury resulting from this unexpected, gradual migration of waste. If coverage of liability for this harm is not excluded as long as a discharge was unexpected, there may be coverage; but if the discharge must have been abrupt as well as unexpected, there will be little coverage. For this reason, litigation over the meaning of the pollution exclusion has been widespread almost from the moment the issue first arose, and the courts of different states have not had the opportunity to observe the slow emergence of a trend in the case law. Instead, contradictory decisions quickly became prominent. As a consequence, each new court that was faced with the issue had to choose a side with which to align itself. The same phenomenon has occurred in connection with a number of other important coverage issues.

C. *The Choice-of-Law Morass*

The deep division among the states on crucial legal issues leads to a third feature of the legal maze facing mega-coverage litigants. In addition to both the extended development time and state-by-state doctrinal variation that characterize mega-coverage litigation, choice-of-law complications must be added. Because there is such variation among the states on coverage issues, conflicts of law abound and choice of law is critical in many cases. But like the law governing substantive coverage issues, state choice-of-law rules relating to mega-coverage disputes are also both immature and, where they have developed, often inconsistent. Varying and uncertain choice-of-law rules lead both policyholders and insurers to shop for a forum that will maximize the chance that a choice-of-law rule resulting in coverage law favorable to their side will be applied. Preemptive declaratory judgment actions by insurers are not uncommon, and policyholders who are sued preemptively sometimes file parallel actions in another state.

The starting point on this issue must be the recognition that the law of the state where an insurance coverage suit is brought will not necessarily be applied to the issues in that suit. Yet predicting which state's law will be applied is often difficult. Some states employ a Restatement (Second) of Conflict of Laws center-of-gravity test that takes into account the state or states where a policy was negotiated, issued, and received; the state where the principal insured risk was located; and the state where the loss occurred.[25] But none of these factors functions either reliably or predictably in mega-coverage cases. When multiple policies are involved, there is no single state of issuance; when multinational policyholders are involved, there is no state where the principal insured risk was located; when multiple losses are involved, there is no single state where the loss occurred; and even when these complications are absent, application of the center-of-gravity test requires the weighing of a series of factors—a

25. See Restatement (Second) of Conflict of Laws § 188 (1971).

quintessentially unpredictable enterprise. One finds lengthy discussions in the cases attempting to explain the balancing of factors that has led the court to its particular all-things-considered choice of applicable law. While the reasons the courts in such cases came to their conclusions may be understandable after the fact, the results are far from predictable ex ante.

On the other hand, some states reject the Restatement approach—or at least do not accept it categorically—and apply the law of the state where a hazardous waste site is located to claims for coverage of liability for the cost of cleanup at the site. In multisite cases brought in such states, the law of many states may apply to the same type of claim under the same policy provision. In states where this approach is firmly established, the choice of law outcome is predictable, but that outcome is both extraordinary and complex: in a single case, brought by one policyholder, the same language in the same insurance policy may have one meaning as applied to a site in one state, but a different meaning as applied to a site in a different state. Moreover, where the claim involves coverage of cleanup liability at dozens of sites, the law of dozens of different states may have to be identified or predicted, and then applied. This is a prescription for extended litigation.

In summary, three factors—doctrinal immaturity, state-to-state variability, and uncertain choice of law—render predicting the outcome of a mega-coverage claim an exercise in informed guesswork at best. Because of the factual complexity of the cases, until recently comparatively few had ripened to the point where they were ready for trial. Only in the last few years has some of the law, on some issues, in some states, finally become sufficiently clear to guide settlements, which were virtually nonexistent for the first decade of mega-coverage litigation. Over time, of course, as there are more trial verdicts and more authoritative appellate decisions on legal issues, results will become more predictable and settlements more frequent. But in the meantime, the legal maze of mega-coverage litigation persists.

III. Globalization and Disintermediation

I now shift from the internal dynamics of mega-coverage litigation to its external effects. Globalization of the economy and disintermediation in financial services are two of the most important economic developments of the past decade. The insurance industry has been significantly affected by both, and the advent of mega-coverage litigation has contributed to both. First, the London insurance market has been so heavily hit by mega-coverage claims that the last vestiges of its dominant position at the center of the insurance world have disappeared. Second, the insurance "crisis" of the mid-1980s that was brought on at least in part by the rise of mega-coverage litigation has accelerated the practice of greater self-insuring by American corporations, thus partially displacing conventional insurance companies from their role as conduits between policyholders and the capital markets for risk.

A. *The London Market Money-Drain*

Lloyds syndicates and London insurance companies wrote a substantial portion of the excess liability insurance purchased by American policyholders over the four decades immediately following World War II. As a result of mega-coverage litigation, however, London has now begun paying the price for its involvement in the American market. Hit hard by claims for coverage of asbestos and CERCLA liabilities, Lloyds has been forced to restructure in an attempt to assure payment of its syndicates' coverage responsibilities under existing CGL policies, while simultaneously making itself an attractive source for future coverage.[26] Many non-Lloyds, London-based limited-liability insurance companies, which sold excess policies in the postwar decades, are slowly slipping into insolvency. The principal cause of these insolvencies is the mounting mega-coverage claims of American policyholders, to whom these London companies sold high-layer excess policies for what, in light of liability expansions on this side of the Atlantic, have turned out to be bargain-basement premiums.

To make matters even worse for the British, this is a one-way street. All the capital flows westward across the Atlantic, into the pockets of American policyholders and mass tort plaintiffs, lawyers, and private cleanup contractors. British policyholders have no corresponding claims for catastrophic losses against American insurers. Indeed, in this sense there is limited method in the madness of mega-coverage litigation, at least from the American point of view: the U.S. economy has incurred high transactions costs merely to transfer responsibility for a portion of mass tort and CERCLA liability from its domestic policyholders to its domestic insurers, but then has obtained substantial net gains by imposing coverage responsibility for the remaining chunk of these liabilities on the London insurance market.

Lloyds of London probably has not been as powerful as its image suggests for a long time.[27] American and other foreign insurers had been growing in comparative importance in the world market before mega-coverage litigation further weakened London's position. But however powerful Lloyds and the rest of the London market once were, London's position is certainly greatly diminished today. As a conse-

26. See Robert M. Hall, Lloyds's of London: Reconstruction and Renewal, Credit for Reinsurance and Equitas, *in* Understanding Lloyd's and the London Insurance Market 125, 144–50 (PLI Commercial Law & Practice Course Handbook Series No. A-750, 1997).

27. For example, Justice Scalia's almost-certainly inaccurate statement that "[g]iven the sheer size of the Lloyds market," an allegation that four American insurers had coerced Lloyds into threatening a reinsurance boycott of American CGL policies "would be laughable," probably reflected this inflated image of Lloyds. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 809 (1993).

quence, the market for commercial liability insurance is now truly global, with powerful Japanese and European insurers and reinsurers playing a major role. The advent of mega-coverage litigation and its impact on the London insurers have undoubtedly contributed to this increasing globalization of the commercial insurance market.

B. *Increased Self-Insurance*

For many years, commercial liability insurance policies typically were subject to small deductibles, known as self-insured retentions or "SIRs." This practice kept small claims self-insured and handled in-house, thereby avoiding paying the insurer a premium that included the comparatively high cost of processing small claims. In recent years, however, policyholders have been purchasing CGL coverage subject to much larger SIRs. In addition, there has been an increase in the practices of insuring with a "captive" insurer owned by the policyholder and set up to insure the owner alone, and of purchasing coverage through small "risk-retention groups" that operate much like mutual insurers. The result of the increased use of these devices has been a decline in the percentage of the market for protection against legal risk that is controlled by conventional commercial liability insurers.

There are a number of causes of these developments. Computerization has facilitated the record keeping and data manipulation that are necessary for accurate and therefore safer self-insuring; corporate risk managers have become more sophisticated and therefore better able to handle self-insuring. But probably at least as influential is the fact that many corporate policyholders do not want their insurance programs to be so heavily dependent on the ebbs and flows of the commercial insurance market as they once were.[28] The starting point for this concern was the insurance "crisis" of the mid-1980s, brought on in significant measure by the mega-coverage litigation that began to escalate at that time. The steep premium increases and coverage unavailability of that period led to the use of larger SIRs, captives, and risk-retention groups to solve these temporary problems. But once these devices were in place, they came to be regarded as attractive methods of hedging against the risk of future shocks in the conventional commercial insurance market.[29]

28. Just as policyholders do not want to be subject to the ebbs and flows of the commercial insurance market, insurers seeking a competitive advantage in those markets sometimes attempt to wall off their mass tort and CERCLA coverage exposure under past CGL policies from their current and future business. One particularly noteworthy example of this effort is CIGNA's recent attempt to spin off certain of its past CGL liabilities into a new company with limited assets. This effort is currently under challenge by both past CIGNA policyholders and certain of CIGNA's competitors. See LaFarge Corp. v. Commonwealth, Ins. Dep't, 690 A.2d 826 (Pa. Commw. Ct. 1997).

29. See George L. Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521, 1570–72 (1987).

The effect of this development has been twofold. First, because of the increased size of the typical SIR, commercial insurers are providing insurance of fewer small claims against large policyholders. In times past, coverage of comparatively small claims was an important part of commercial insurers' bread and butter. In contrast, with respect to the first several hundred thousand or even several million dollars of a major policyholder's liability, today's commercial liability insurers less frequently serve as a port of entry into the global market for protection against legal risk. Rather, policyholders diversify this risk of loss themselves. Through this practice, the disintermediation that has occurred in many other areas of financial services is occurring in commercial insurance as well.

A second, related effect of this disintermediation is more subtle, but just as important. The comparatively small losses that are now covered by a policyholder's self-insured retention, captive, or risk-retention group are the losses that are most easily predicted, because they reflect the most frequent and least severe liabilities. Conversely, the larger liabilities that are still covered by commercial liability insurance policies occur less frequently, but are comparatively more severe when they do occur. It is only a slight exaggeration to say that commercial liability insurers are increasingly in the business of covering only catastrophic liabilities for major corporate policyholders. Yet these are the most risky of liabilities to insure, because they are less routine, less predictable, and more costly than the bread-and-butter small claims that were also once covered. To protect themselves, insurers covering these more volatile, large liabilities must engage in more extensive risk diversification, either through the purchase of reinsurance or through reliance on the law of large numbers, which can only come by increasing the size of the insurer's portfolio of insured risks.

The quickest way for an insurer to increase its portfolio of risks is to acquire another insurer's portfolio. It is no surprise, therefore, that the consolidation that has been occurring in the property-casualty insurance industry has been pushed along by the process of disintermediation. Although mega-coverage litigation is not by any means the sole cause of this consolidation of insurers, the forces set in motion by mega-coverage litigation certainly have contributed to it.

IV. The Stalemate on Solutions

Almost every attorney who has heard me describe the problems created by mega-coverage litigation—and especially the problems resulting from the radical state-to-state division on major coverage issues—immediately concludes that there must be a better way to resolve such coverage disputes. Thus far, however, no solution that is both workable and acceptable to the affected parties has emerged. In fact, several efforts at developing solutions have failed.

The first effort came in the early 1980s when the "Wellington Agreement" created a facility for processing asbestos claims that was to be funded by contributions from asbestos defendants and their insurers. The purpose of the facility was to avoid litigation over liability and coverage shares by apportioning shares in advance.[30] The facility was dissolved within a few years, however, largely because agreement on the size of the liability shares apportioned to each company or insurer could not be maintained. The disagreement turned as much on differences regarding insurers' coverage obligations as on any other issue. The Wellington Agreement has been succeeded by a Center for Claims Resolution, but the Center has much lower participation by the parties affected by asbestos litigation.[31]

The search for an alternative to CERCLA-coverage litigation has been even less successful. In the early 1990s, the American Insurance Group proposed tax-based financing of cleanups, with the tax to be based partially on insurance premiums, linked with the elimination of both CERCLA liability and accompanying coverage litigation.[32] That proposal, as well as an academic alternative that would have afforded policyholders percentage recoveries from their insurers based on the average outcomes of coverage litigation,[33] went nowhere.

In 1994, however, the Clinton administration cobbled together an amendment to CERCLA that seemed to combine elements of these earlier proposals. The administration's proposed legislation would have created an Environmental Insurance Resolution Fund (EIRF) that would pay CERCLA coverage claims and be financed by a tax on future premiums.[34] Policyholders would have been eligible for an EIRF payment of between twenty and sixty percent of their cleanup costs, depending on the strength of their claims (determined by assessing how pro- or anticoverage the law of the state was where their claims were lodged), in return for releasing their insurers from any further liability. Like so many other proposals for Superfund reform, however, this proposal also faltered when the parties whose interests would have been affected by this legislation—policyholders and insurers—reached a stalemate.

Thus, the same problem that has made mega-coverage litigation so complex and prolonged doomed the EIRF: there was insufficient agreement on what the outcome of any given policyholder's coverage claim was likely to be. In the absence of such agreement, it was impossible to fashion rights of recovery from the EIRF that were acceptable to policyholders, and impossible to devise a system of premium taxes sufficient to fund the program that was acceptable to insurers. The reason that no consensus could be reached on the terms of the EIRF replicated on a

30. See Lawrence Fitzpatrick, The Center for Claims Resolution, Law & Contemp. Probs., Autumn 1990, at 13.

31. See id. at 16.

32. See Sheila Kaplan, Ten Tough Nuts to Crack, Legal Times, Dec. 16, 1991, at 7.

33. See Kenneth S. Abraham, Cleaning Up the Environmental Liability Insurance Mess, 27 Val. U. L. Rev. 601, 610–12 (1993).

34. See Superfund Reform Act of 1994, H.R. 3800, 103d Cong. §§ 801–904.

large scale the reason there had been so many failures to settle individual mega-coverage claims: the parties' predictions of their expected recoveries and coverage liabilities were too different.

CONCLUSION

Since the failure of the EIRF legislation in 1994, no significant solutions to the problems of mega-coverage litigation have been proposed. Rather, the legal system moves this litigation slowly forward, filling gaps in the relevant coverage law one-by-one, state-by-state. Claims for coverage of mass tort and CERCLA liability are decreasing, though they continue to be filed. It will take many more years, however, just to resolve the claims that are currently being litigated. Over time the fabric of the body of law governing these claims will be woven more completely, and it will become a fully mature and more predictable legal regime. In the meantime, however, the maze of mega-coverage litigation confounds the efforts of policyholders, insurers, and the courts to achieve expeditious and sensible resolution of mass tort and CERCLA liability insurance coverage disputes. The side effect of the innovative effort of the legal system to deal with long-latency disease and environmental pollution through civil liability has been the rise of an entire mega-coverage litigation industry that is likely to be necessary even after the civil liabilities that gave rise to this litigation have long since been resolved.