

# Sudden Exposure: Accessing Historic Insurance Policies for the Environmental Liabilities Associated with Newly Acquired Properties or Operations

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## INTRODUCTION

The paradigmatic environmental coverage case is by now a familiar component of insurance law.<sup>1</sup> A corporate policy-

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1. Many insurance treatises now treat environmental coverage issues in chapters devoted exclusively to that subject. See, e.g., 2 ROWLAND H. LONG, *Pollution and Environ-*

holder, who typically has transported or generated waste or is the owner of property onto which someone else has deposited the waste,<sup>2</sup> seeks liability insurance coverage for a suit against it alleging environmental harm arising out of the policyholder's past operations. What distinguishes an environmental case from other liability coverage cases is the nature of the harm underlying the insured's liability. In environmental cases, the harm (property damage or bodily injury) usually occurs gradually and often spans many years of the insured's prior operations. Because harm that occurs during the policy period is what triggers the standard commercial general liability (CGL) policy,<sup>3</sup> a multiple-year loss ordinarily triggers multiple policies.<sup>4</sup> Thus, in the usual environmental coverage case, the policyholder seeks coverage from numerous past carriers: all those that issued policies during the time that the harm was gradually occurring.

Courts are increasingly encountering a new wrinkle in this typical case: a policyholder who faces liability for gradual environmental harm associated with *newly acquired* property or operations. In this emerging context, the policyholder's liability arises not from the policyholder's past operations, but from the operations of another entity altogether, the prior owner. When both the prior owner and the subsequent owner have purchased liability insurance over the years, one might at first feel doubly assured that some insurance will cover environmental liability arising from the site, since there are *two* premium-paying insureds (the prior owner and the current owner).<sup>5</sup> Some re-

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*mental Risk Insurance*, in THE LAW OF LIABILITY INSURANCE §§ 10A.01-100 (1997); BARRY R. OSTRAGER & THOMAS R. NEWMAN, *Insurance Coverage Issues Arising Out of Hazardous Waste/Environmental Clean-Up Litigation*, in HANDBOOK ON INSURANCE COVERAGE DISPUTES §§ 10.01-.05 (8th ed. 1995).

2. These categories mirror "potentially responsible parties" (PRP) under the Comprehensive Environmental Response and Cleanup Liability Act (CERCLA). See 42 U.S.C. § 9607(a) (1994) (the primary regime of environmental liability prevailing in the United States).

3. See *infra* Part I.A.1.

4. See, e.g., *Millipore Corp. v. Travelers Indem. Co.*, 115 F.3d 21, 27 (1st Cir. 1997) ("Where, as here, CERCLA liability arises out of a PRP's operations over the course of many years, it often implicates general liability policies issued by several different insurers.").

5. This Article assumes that CGL insurance covers environmental liability generally, focusing instead on the impact of an ownership change on that assumed environmental coverage. Some insurers have, of course, disputed the extent of CGL coverage applicable to such liabilities. See *Id.* at 23 ("The substantial costs of remediating environmental damage . . . have pitted businesses against their insurers in fierce disputes over who will bear these costs."). Nevertheless, the assumption that CGL policies afford coverage for environmental liabilities is consistent with policyholders' general success in this area. See, e.g., *Pittston Co. Ultramar Am. Ltd. v. Allianz Ins. Co.*, 124 F.3d 508, 519 (3d Cir. 1997) (finding possibility of coverage under CGL policies for environmental remediation costs); *B.S.B. Diversified Co. v. American Motorists Ins. Co.*, 947 F. Supp. 1476, 1479 (W.D. Wash. 1996) ("Washington law recognizes that comprehensive general liability ('CGL') insurance encompasses environmental damages.")

cent cases, however, suggest that a company acquiring pollution-suspect operations or properties faces an enormous risk of "sudden exposure": unexpectedly uninsured environmental liability.

A company that acquires pollution-laden properties or operations (successor) of a prior owner (predecessor) might rely on two sources of coverage to remedy this gap. Part I of this Article analyzes policies issued to the successor that expired prior to its acquisition of new property (pre-acquisition policies). Part II analyzes policies issued to the predecessor prior to the successor's company's acquisition of that property (predecessor policies).

Part I, regarding pre-acquisition policies, analyzes both the applicable provisions in standard CGL policies and the concept of "insurable interest" to conclude that pre-acquisition policies should be available to cover a successor company's environmental liabilities. When an insured is subject to liability for environmental harm, harm occurring during the policy period triggers an insurer's obligations under a CGL policy. There seems to be no reason for also requiring that an insured own the property associated with its liability during the policy period, or that the insured's liability be premised on the insured's fault.

Critics of pre-acquisition coverage cite "fairness" to the insurer. They typically overstate such concerns, however. Also, it seems inappropriate to give concerns about fairness to the insurer much weight in light of the traditional rationale for considering extra-contractual matters. Such extra-contractual considerations are intended to compensate insureds for the limited choices they face in the insurance-policy negotiation. The use of pro-insured considerations to rescue an insurer from the insurer's own policy language is a perversion of the very rationale underlying those considerations.

Part II, regarding predecessor policies, concludes that policy rights may transfer from a predecessor company to a successor company whether or not the insurer consents to that transfer. The only qualification is that the transfer must occur after the environmental damage has already happened. In such circumstances, there is no harm to the insurer; the risk it insured did not change by virtue of the post-damage transaction between the successor company and predecessor company. That the successor company has paid no premiums is irrelevant. Under general contract law, an assignee of contractual claims can enforce that contract against the promisor whether or not the assignee paid anything for the contract benefit. The question under predecessor policies, then, is not whether the transfer should be enforced, but whether it has occurred. The mode of transfer in a given case may be by contract (*e.g.*, one company acquires all the assets of another) or by operation of law (*e.g.*, one company inherits the

liabilities of another). Moreover, fairness concerns (arguably more relevant to this class of policies) reinforce the conclusion that coverage ought be available to the successor company under predecessor policies.

## I.

### PRE-ACQUISITION POLICIES

Pre-acquisition policies are policies that were issued to the successor company and expired prior to the moment that the successor company acquired the operations or property giving rise to its liability. A recent California case presents a sample fact pattern:

Defendant [insurance company] issued a comprehensive general liability (CGL) insurance policy to plaintiffs which was in effect from May 1981 to May 1982. Plaintiffs purchased a parcel of real property in 1984, and a cleanup and abatement action was brought against them in 1987 for groundwater contamination on that real property which had begun in 1967.<sup>6</sup>

In this case, the 1981 insurance policy, having expired prior to the insureds' purchase of the property, is a pre-acquisition policy. The question addressed in this section is whether such a policy covers an insured who is subject to liability for environmental harm occurring during the period that the pre-acquisition policy was in effect. In analyzing that question, this section discusses standard CGL policy language, the doctrine of insurable interest, and fairness concerns.

#### A. *Trigger of Coverage under the Standard CGL Policy*

When an insured faces liability for environmental harm that occurred over many years, it must first identify past CGL policies that may afford coverage. Courts, policyholders, and insurers have labeled this inquiry the "trigger" question.<sup>7</sup> Courts have found, pursuant to standard CGL language, that the timing of the harm underlying an insured's liability triggers coverage. CGL policies generally contain no language requiring courts to alter this traditional trigger analysis when an insured acquires pollution-prone property after a policy's expiration.

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6. *A.C. Label Co. v. Transamerica Ins. Co.*, 56 Cal. Rptr. 2d 207, 208 (Ct. App. 1996), review denied, 1996 Cal. LEXIS 5943 (Oct. 16, 1996).

7. *See, e.g., Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 880 n.2 (Cal. 1995) (in bank) (noting that "trigger of coverage" is "a term of convenience used to describe that which, under the specific terms of an insurance policy, must happen in the policy period in order for the potential of coverage to arise"). Even when its policy is triggered, an insurer typically argues that standard insurer defenses and various provisions (e.g., pollution exclusion) preclude coverage. *See id.* ("Whether coverage is ultimately established in any given case may depend on the consideration of many additional factors . . .").

### 1. *Traditional Trigger Analysis under "Occurrence"-Based Policies*

In most coverage claims, the CGL policy that applies is obvious: all the events underlying the insured's coverage claim likely took place during the period of just one policy. For example, consider a "slip and fall" by a visitor to an insured's premises. The visitor's injury, say a broken limb, probably happens as the immediate result of the fall. At that point, the insured becomes subject to liability; the visitor demands compensation shortly thereafter. In these types of circumstances, all the events underlying the insured's coverage claim—accident, resulting injury, insured's potential liability, and lawsuit against the insured—take place during the period of just one policy.

Sometimes, however, certain of these events occur before or after the policy period. For example, an insured negligently disposes of waste in 1960, property damage results in 1970, CERCLA creates the insured's potential liability in 1980, and the owner of the damaged property sues in 1990. Which of these events need to have happened during the policy period in order to trigger coverage? The language of the standard CGL policy<sup>8</sup> answers the trigger question. Policies generally promise to pay an insured "all sums" for which the insured "shall become legally obligated to pay" because of "property damage" or "bodily injury" that is "caused by an occurrence."<sup>9</sup> Policies typically define "occurrence" as an "event[,] including injurious exposure to conditions, which results *during the policy period* in bodily injury or property damage neither expected nor intended from the standpoint of the Insured."<sup>10</sup> In addition, policies define both "bodily injury" and "property damage" as requiring the injury or damage to occur "*during the policy period.*"<sup>11</sup>

Thus, "it is the time of the actual injury within the effective dates of the policy which triggers the policy."<sup>12</sup> For example, if an insured is liable for an accident causing property damage in 1975, its 1975 policy affords coverage even if the accident victim does not bring the lawsuit until after the policy's expiration. So long as harm occurs during

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8. General liability coverage "is relatively standardized within the insurance industry." 2 LONG, *supra* note 1, § 10.03(1).

9. NL Indus., Inc. v. Commercial Union Ins. Co., 926 F. Supp. 446, 452 (D.N.J. 1996) (quoting policy). In addition to this promise to indemnify, standard CGL policies also promise "to defend" any "suit" against the insured seeking "damages" on account of such "bodily injury" or "property damage." *Id.*

10. *Id.* (quoting policy) (emphasis added).

11. *Id.* (quoting policy) (emphasis added).

12. Diocese of Winona v. Interstate Fire & Cas. Co., 89 F.3d 1386, 1390 n.5 (8th Cir. 1996); see also, e.g., Middle Dep't Inspection Agency v. Home Ins. Co., 380 A.2d 1165, 1167 (N.J. Super. Ct. 1977) ("[I]n order for an occurrence to qualify for coverage under this policy the damage must occur within the policy period.").

the policy period, the timing of other events—the act that caused the harm, the attachment of liability, the claim against the insured—is irrelevant.

Consider each of these other events in order. First, when the act causing harm and the harm itself do not occur during the same policy period, courts have uniformly held that the timing of the harm controls the trigger question. For example, one court held that “[f]rom a literal reading of the policy, it appears that the policy only provides coverage for property damage which occurs during the policy period. However, there is no requirement in the policy that the accident which caused the property damage occur during the policy period. . . .”<sup>13</sup>

Second, timing of the harm also controls if the harm and the attachment of liability occur during different policy periods. For example, in *Lumbermens Mutual Casualty Co. v. S-W Industries, Inc.*,<sup>14</sup> an employee of the insured sued for bodily injuries resulting from continuous workplace exposure to toxic fumes. The insured-employer then sought coverage for its liabilities in its employee’s intentional tort suit. Although the employee was harmed continuously since the employee’s first exposure to the fumes in 1968, the insured employer was not subject to common law liability for those injuries until 1982. That year, the state’s supreme court ruled, for the first time, that an employee may seek recovery under common law for injuries resulting from an employer’s intentional torts (notwithstanding a statute purportedly limiting remedies to workers compensation). Thus, liability for such injuries did not attach until 1982, after the pre-1982 policies had already expired.

The Sixth Circuit then held that pre-1982 policies potentially afforded coverage even though the insured was not yet liable during those policy periods:

In essence, [the insurers] urge this court to imply an exception to the broadly worded grant of coverage to the effect that no liability is covered unless it could have been imposed as of the date the policy was issued . . . .

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13. *Friendship Homes, Inc. v. American States Ins. Cos.*, 450 N.W.2d 778, 780 (N.D. 1990) (citations omitted); *see also, e.g.*, *State v. Glens Falls Ins. Co.*, 609 P.2d 598, 600 (Ariz. Ct. App. 1980) (“[T]he controlling inquiry with respect to whether an ‘occurrence’ . . . falls within the coverage of the policies is the time of the actual damage to the complaining party and not the time of the wrongful act.”); *Middle Dep’t Inspection Agency v. Home Ins. Co.*, 380 A.2d 1165, 1167 (N.J. Super. Ct. 1977) (holding that no coverage existed for negligence during policy period where resulting damage occurred only after the policy had expired); *Van Wyck Assocs. v. St. Paul Fire & Marine Ins. Co.*, 454 N.Y.S.2d 266, 269 (N.Y. Sup. Ct. 1982) (mem.) (“[C]overage is not [triggered] upon the act or conditions during the period of existence of the policy which might give rise to ultimate liability, but rather upon the ‘result’ thereof taking place during said policy period of existence.”), *aff’d without op.*, 464 N.Y.S.2d 617 (N.Y. App. Div. 1983).

14. 39 F.3d 1324 (6th Cir. 1994).

....

We reject the [insurers'] argument because it runs contrary to the settled law of insurance . . . .

....

Here, the broad coverage provisions in [the policyholder's] insurance contracts, though issued prior to the [1982 supreme court] decision, may fairly be read to cover this type of liability and the insurers have not established a contrary intent. . . .

....

Therefore, we hold that these insurers may not avoid coverage, where the plain language of their policies clearly provides it, on the basis that a suit such as [the employee's] probably . . . would not have been successful at the time the policies were issued.<sup>15</sup>

This holding is consistent with the standard policy's focus on timing of *harm*, not timing of the creation or imposition of the insured's liability.

Finally, injured parties may delay considerably in filing lawsuits against the insured. Practitioners label this delay as the "tail period." The CGL policy affords coverage no matter how long this tail period lasts.<sup>16</sup> Thus, the tail period—often decades long in environmental coverage cases—renders the occurrence policy "open-ended." This means that such policies remain available for coverage even though the policy has long since expired: "The coverage is essentially open-ended so long as the injury or damage occurs during the policy period."<sup>17</sup> The end of the policy period, then, does not signify an "expiration" of coverage. Rather, it signifies that coverage will not be extended to harm occurring after the end of the policy period. Again,

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15. *Id.* at 1329-30 (citation omitted).

16. *See Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciente*, 125 F.3d 9, 11 n.1 (1st Cir. 1997) ("An occurrence policy, which provides coverage for occurrences within the policy period regardless of when the claim is made, is distinguished from a claims-made policy, which only covers the insured for claims that are actually made during the policy period.").

17. *A.C. Label Co. v. Transamerica Ins. Co.*, 56 Cal. Rptr. 2d 207, 211 (Ct. App. 1996) (Premo, J., dissenting), *review denied*, 1996 Cal. LEXIS 5943 (Oct. 16, 1996); *see also LaForge v. American Cas. Co.*, 37 F.3d 580, 583 (10th Cir. 1994) (noting occurrence policies' lack of "predictability" from standpoint of insurer); *American Cas. Co. v. FDIC*, 821 F. Supp. 655, 663 (W.D. Okla. 1993) (noting that occurrence policies leave an insurer's liability exposure "open-ended"); *Wolf Bros. Oil Co. v. International Surplus Lines Ins. Co.*, 718 F. Supp. 839, 844 n.3 (W.D. Wash. 1989) (noting that occurrence policies are characterized by the "uncertainty of the open-ended 'tail' period"); *Brown-Spaulding & Assocs. v. International Surplus Lines Ins. Co.*, 254 Cal. Rptr. 192, 194 (Ct. App. 1988) ("An underwriter of an occurrence type policy is faced with the possibility of a 'tail' that extends beyond the policy period . . . ."); *Safeco Title Ins. Co. v. Gannon*, 774 P.2d 30, 34 (Wash. Ct. App. 1989) (noting that issuer of occurrence policy "contracts to cover risk that is by its very nature open-ended").

this interpretation of the "tail period" is consistent with the standard CGL policy's focus on timing of harm.<sup>18</sup>

In summary, a policy is "triggered" if the harm underlying an insured's liability took place during the policy period. The timing of other events associated with that liability—the cause, the attachment of liability, or the suit against the insured—are irrelevant. When there is a timing "mismatch" between any of these events and the harm underlying the liability, timing of the harm controls. This is the key insight required to analyze "occurrence"-based coverage. If a harm occurs during the policy period, the insurer is potentially liable to the insured without regard to the timing of other events.

## 2. *Environmental Trigger Analysis*

There are four primary trigger theories in the environmental context (or any context involving gradual multiple-year loss):<sup>19</sup>

- *Exposure* Under this theory, exposure to the injury-causing condition during the policy period triggers the policy.<sup>20</sup>
- *Manifestation* Under this theory, manifestation or discovery of harm during the policy period triggers the policy.<sup>21</sup>
- *Injury-in-fact* Under this theory, damage shown to have actually occurred during the policy period triggers the policy.<sup>22</sup>
- *Continuous* Under this theory, the occurrence of any of the above (exposure, manifestation, injury) during the policy period triggers the policy.<sup>23</sup>

The common denominator in these theories is that all purport to identify the timing of the harm underlying an insured's liability; they simply apply "different definitions" of harm.<sup>24</sup> Consistent with tradi-

18. In accord, many CGL policies contain a provision stating that "[t]his policy applies only to occurrences happening . . . during the policy period." *First State Underwriters Agency of New Eng. Reins. Corp. v. Travelers Ins. Co.*, 803 F.2d 1308, 1314 n.4 (3d Cir. 1986).

19. See generally, e.g., *Inland Waters Pollution Control, Inc. v. National Union Fire Ins. Co.*, 997 F.2d 172, 183 (6th Cir. 1993) ("Four principal theories regarding trigger of coverage have been recognized."); *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1387 (E.D.N.Y. 1988) (enumerating four principal trigger theories); *Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co.*, 486 S.E.2d 89, 90-91 (S.C. 1997) (reviewing four principal trigger theories).

20. See, e.g., *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1217, 1223 (6th Cir. 1980).

21. See, e.g., *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 523 F. Supp. 110, 118 (D. Mass. 1981). Incidentally, "[a]n overwhelming majority of jurisdictions" have rejected this theory. *Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co.*, 486 S.E.2d 89, 90 (S.C. 1997).

22. See, e.g., *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 764-65 (2nd Cir. 1984).

23. See, e.g., *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1047 (D.C. Cir. 1981).

24. *Gelman Sciences, Inc. v. Fidelity & Cas. Co.*, 572 N.W.2d 617, 626 (Mich. 1998).

tional trigger analysis, none of these theories purports to identify the timing of the other events associated with an insured's liability. For example, courts have enforced coverage even though nobody knew during the policy period that property damage was occurring.<sup>25</sup> Courts have also enforced coverage even though the plaintiffs in the underlying lawsuit against the insured did not own the contaminated property during the policy period.<sup>26</sup> Likewise, courts have not inquired into the timing of the moment that the insured's liability first existed. In fact, in virtually every instance of federal environmental liability, the underlying property damage took place long before that liability ever existed. This is because Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—the primary statutory regime creating retroactive environmental liability in the United States—in 1980, decades after a great deal of environmental harm had occurred.<sup>27</sup> Even so, courts have routinely found CGL coverage for CERCLA liability under pre-CERCLA insurance policies.<sup>28</sup> This is consistent with the traditional trigger focus on timing of harm, not the time that the liability first existed.

### 3. *Territory Defined by the Policy*

Standard CGL policies do not require that the property damage occur only on properties adjacent to operations or sites owned by the insured during the policy period. To the contrary, they typically afford coverage for property damage occurring “anywhere in the world.”<sup>29</sup>

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25. See *id.* at 624 (“[N]othing in the policy language indicates that property damage does not exist unless someone knows about it.”).

26. See, e.g., *Trustees of Tufts Univ. v. Commercial Union Ins. Co.*, 616 N.E.2d 68, 72 (Mass. 1993) (“The policy language does not require that [the claimant against the insured in the underlying suit] have a property interest in the contaminated property during the policy period, but only that the property damage itself occur during that time.”).

27. See *Millipore Corp. v. Travelers Indem. Co.*, 115 F.3d 21, 24 (1st Cir. 1997) (noting that under CERCLA a PRP “may be held responsible for actions taken before CERCLA was enacted and before the PRP was aware that its actions might lead to environmental liability”).

28. In each of the following cases, the court found coverage (or a possibility of coverage) under pre-1980 insurance policies for CERCLA liability arising from pre-1980 property damage or bodily injury, with no mention from any party (including insurers) that coverage might possibly be precluded by the fact that the insured's CERCLA liability did not yet exist at the time the property damage was occurring: *Millipore Corp. v. Travelers Indem. Co.*, 115 F.3d 21 (1st Cir. 1997); *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 89 F.3d 976 (3rd Cir. 1996); *Bituminous Cas. Corp. v. Vacuum Tanks, Inc.*, 75 F.3d 1048 (5th Cir. 1996); *Anderson Dev. Co. v. Travelers Indem. Co.*, 49 F.3d 1128 (6th Cir. 1995); *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551 (9th Cir. 1991).

29. See, e.g., *Snydergeneral Corp. v. Century Indem. Co.*, 113 F.3d 536, 538 (5th Cir. 1997) (quoting insuring agreement that covered liability for property damage “caused by or arising out of an occurrence occurring anywhere in the world”); *First State Underwriters Agency of New Eng. Reins. Corp. v. Travelers Ins. Co.*, 803 F.2d 1308, 1314 n.4 (3d Cir.

In accord with these broad provisions, some courts have declined to limit environmental liability coverage to harm emanating from only operations or properties of which the insurer was aware. "CGL insurance does not cover only liabilities that occur at a specific site listed in the insurance declarations or endorsements. . . . *An entity can conceivably become liable for occurrences which are not on the sites or premises listed.*"<sup>30</sup>

A policy should thus provide coverage for damage on property adjacent to sites not yet owned by the insured during the policy period. Such sites would not have been listed in the insured's pre-acquisition policy. But because the damaged property is situated "anywhere in the world," damage to it that subsequently gives rise to liability is covered by the policy so long as such damage took place during the policy period. As stated by one court:

Travelers' policies are comprehensive general liability insurance policies. Nowhere in the policies is the property damage described in [the insuring agreement] limited by the phrase "arising out of or in connection with the premises listed in the Declarations Schedule." If property damage was so restricted the policies would not be comprehensive general liability policies.<sup>31</sup>

These broad territory provisions, coupled with the absence of any language purporting to restrict covered environmental harm to only particular properties, is consistent with the focus of traditional trigger analysis on the *timing* of such harm. Absent a more restrictive "policy territory" provision, the *site* of such harm is beside the point.

#### 4. *Trigger Analysis under Pre-Acquisition Policies*

The earlier example, which included a pre-acquisition policy that expired in 1982, property that was purchased in 1984, and environmental liability that attached in 1987, was taken from *A.C. Label Co. v. Transamerica Insurance Co.*<sup>32</sup> There, the court acknowledged that

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1986) (quoting "policy territory" provision stating that "[t]his policy applies only to occurrences happening anywhere in the world during the policy period"). Cases that have excluded coverage for property damage at a particular site involved policies without this language. *See, e.g.,* *Keystone Automated Equip. Co. v. Reliance Ins. Co.*, 535 A.2d 648, 649, 655 (Pa. Super. Ct. 1988) (holding that no liability coverage existed for property damage occurring in Africa because "policy territory" was defined as only "the United States of America").

30. *Commercial Union Ins. Co. v. Cannelton Indus., Inc.*, No. 2:92-CV-111, 1996 U.S. Dist. LEXIS 15646, at \*17 (W.D. Mich. Sept. 27, 1996) (emphasis added).

31. *Stone & Webster Management Consultants, Inc. v. Travelers Indem. Co.*, No. 94 Civ. 6619, 1996 U.S. Dist. LEXIS 4852, at \*24 (S.D.N.Y. Apr. 16, 1996).

32. *See supra* note 6 and accompanying text.

damage had allegedly occurred during the policy period.<sup>33</sup> However, the court concluded that the damage did not trigger the policy:

The facts in existence at the time that the . . . groundwater contamination occurred . . . did not trigger coverage under plaintiffs' CGL policy because, although the damage allegedly occurred during the policy period, . . . the insureds[ ] were not, and had not been, associated with the property or the groundwater contamination in any way at the time this damage occurred, and therefore plaintiffs were not liable for and could not have been held liable for this damage at the time that this damage occurred. Plaintiffs became connected to the damage only through their 1984 acquisition of the property.<sup>34</sup>

The court apparently reasoned not only that the property damage must occur during the policy period, but also that the insured's liability must attach during the policy period. Only then could the insured "have been held liable" for the property damage "at the time that this damage occurred." This conclusion constitutes a departure from the traditional focus on timing of harm.

That departure seems contrary to both the CGL insuring agreement and the open-ended nature of occurrence policies. As already described, courts have interpreted CGL agreements to trigger coverage for occurrences in which harm occurs during the policy period. Timing of other events associated with the insured's liability is irrelevant. In *A.C. Label*, the court cited no policy language requiring that attachment of the insured's liability take place during the policy period. Indeed, courts have routinely found coverage under CGL policies for CERCLA liabilities that did not exist until long after such policies had expired.<sup>35</sup> That holding is consistent with courts' general recognition that occurrence policies afford coverage no matter when the insured is subject to liability.<sup>36</sup> Open-ended coverage is the exact reason that some insurers have switched to a policy form that triggers an insurer's duties only when a person makes a claim against the insured during the policy period. "[C]laims made policies allow the insurer to 'close its books' on a policy at its expiration and therefore attain a level of predictability *unattainable under standard occurrence*

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33. See 56 Cal. Rptr. 2d 207, 209 (Ct. App. 1996), *review denied*, 1996 Cal. LEXIS 5943 (Oct. 16, 1996).

34. *Id.*

35. See *supra* note 28.

36. See *Lumbermens Mut. Cas. Co. v. S-W Indus., Inc.*, 39 F.3d 1324, 1329 (6th Cir. 1994) (rejecting insurers' invitation to "imply an exception to the broadly worded grants of coverage to the effect that no liability is covered unless it could have been imposed as of the date the policy was issued"); *St. Paul Fire & Marine Ins. Co. v. American Home Assurance Co.*, 514 N.W.2d 113, 117 n.19 (Mich. 1994) ("Both insured and insurer anticipate that the claim would probably not be made until after the policy period . . .").

*policies*.”<sup>37</sup> Because traditional trigger analysis focuses only on the timing of harm, *A. C. Label*’s reliance on the timing of a different event (namely attachment of potential liability) is best viewed as a deviation from the usual trigger analysis.

### 5. Summary

In summary, property damage or bodily injury that takes place during the policy period triggers coverage under the standard CGL policy. These policies do not require that other events associated with environmental liability (e.g., negligence, passage of CERCLA, acquisition of polluted property, lawsuit against the insured) also happen during that same period. As stated by the Sixth Circuit, “insurers may not avoid coverage, where the plain language of their policies clearly provides it, on the basis that [the underlying suit against the insured] probably . . . would not have been successful at the time the policies were issued.”<sup>38</sup> In addition, the policy affords coverage for damage to property “anywhere in the world,” and contains no contrary language requiring that the damage occur on property adjacent to sites owned by the insured during the policy period.

Therefore, environmental trigger theories focus exclusively on when the harm happened, not when liability attached. Courts routinely find coverage for environmental liabilities under CGL policies that were in effect while the underlying property damage was taking place, even though such policies expired long before CERCLA created those liabilities in 1980. The very nature of occurrence policies is to afford open-ended coverage for liability arising from occurrences during the policy period, no matter when the insured is subject to liability for such occurrences. Thus, so long as the harm underlying an insured’s potential liability occurred during the period of a pre-acquisition policy, that policy ought be available for coverage.

### B. Considerations Outside the Policy Language

As an initial matter, courts do not ordinarily manufacture exclusions contrary to the express language of the policy, nor should they. If an insurer desires to exclude liability for certain environmental harm, it should do so explicitly.<sup>39</sup> The usual rationale for this rule is

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37. *Resolution Trust Corp. v. Ayo*, 31 F.3d 285, 289 (5th Cir. 1994) (internal quotation marks omitted) (emphasis added); *see also Stine v. Continental Cas. Co.*, 349 N.W.2d 127, 131 (Mich. 1984) (“‘Claims made,’ or ‘discovery’ policies . . . were developed primarily to deal with situations in which the error, omission, or negligent act is difficult to pinpoint and may have occurred over an extended period of time.”).

38. *Lumbermens Mut. Cas. Co.*, 39 F.3d at 1330.

39. *See, e.g., KDT Indus., Inc. v. Home Ins. Co.*, 603 F. Supp. 861, 867 (D. Mass. 1985) (“[I]nsurers are required to express exclusions clearly, specifically, and unequivocally.”); *West Bend Mut. Ins. Co. v. Iowa Iron Works*, 503 N.W.2d 596, 598 (Iowa 1993) (“[A]n

that "the insurer drafted the policy and could have made clear its intention to exclude coverage" if it had so desired.<sup>40</sup> Thus, courts have held that a CGL agreement "must be read broadly to include all bodily injury or property damage that occurs during the policy period, except to the extent that such coverage is specifically limited by the express exclusions found elsewhere within the policy."<sup>41</sup>

That said, courts have on occasion cited "public policy" as justification for implying particular exclusions. Also, courts that reject coverage under pre-acquisition policies have cited general "fairness" concerns. However, neither public policy nor fairness warrant an implied exclusion for environmental harm that would otherwise be covered under a pre-acquisition policy. Public policy has never required that an insured have an ownership interest in the property associated with its liability, or that such liability be premised on the insured's own conduct. Even assuming that a court should consider fairness, such concerns do not warrant implied exclusions for environmental liability arising from newly acquired operations or properties.

### 1. *Public Policy*

Some insurers have resisted pre-acquisition coverage by arguing that the doctrine of "insurable interest" requires an insured to have a property interest, during the policy period, in the property associated with its liability.<sup>42</sup> There is admittedly some precedent for requiring some ownership interest in the property that is the subject of *property* insurance. Historically, courts required an insured to have an ownership interest in the subject of property insurance because otherwise, an insured would have an incentive to destroy the property and collect the insurance:

The basis for the public policy against issuance of property insurance to one who has no interest in the property is obvious. Such an insured would have nothing to lose and everything to gain from the loss of the

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insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations or exclusionary clauses in clear and explicit terms.") (quoting *Benzer v. Iowa Mut. Tornado Ins. Ass'n*, 216 N.W.2d 385, 388 (Iowa 1974)); *Gelman Sciences, Inc. v. Fidelity & Cas. Co.*, 572 N.W.2d 617, 620 (Mich. 1998) (holding that CGL coverage "is broad, extending generally to any business liability not expressly excluded").

40. *Manriquez v. Mid-Century Ins. Co.*, 779 S.W.2d 482, 484 (Tex. Ct. App. 1989, writ denied).

41. *Devich v. Commercial Union Ins. Co.*, 867 F. Supp. 1230, 1233 (W.D. Pa. 1994).

42. *See, e.g., Maryland Cas. Co. v. W.R. Grace & Co.*, 794 F. Supp. 1206, 1231 (S.D.N.Y. 1991) (noting insurer's argument that coverage was precluded because the insured "had no insurable interest," during the policy period, in the operations underlying its environmental liabilities); *Certain Underwriters at Lloyd's v. Superior Ct.*, 65 Cal. Rptr. 2d 821, 822 (Ct. App. 1997) (noting insurer's argument that "there was no possibility of coverage under the policies" because the insured "had no insurable interest in the properties that are the subject of the underlying action" during the policy period).

property. The resultant moral hazard is not to be invited or supported.<sup>43</sup>

Essentially, then, the insurable interest doctrine, when applied to property insurance, promotes a public policy against contractual incentives to commit bad acts (*i.e.*, the willful destruction of property).

The rationale for that requirement, however, does not apply in the context of *liability* insurance. A policyholder should be able to insure its environmental liability without regard to the ownership of property or operations associated with that liability during the policy period. In the context of liability policies, that rationale translates into a prohibition against insuring liabilities for intentional wrongful conduct. "Public policy does on occasion demand that a wrongdoer be forbidden to shift the cost of liability to another through insurance . . . but that is in cases of deliberate wrongdoing."<sup>44</sup> Both insurance of unowned property and insurance of liability for intentional wrongful acts give the insured an incentive to commit a bad act—a "moral hazard" in insurance theory parlance.

This rationale simply does not apply to insurance against liability for unintentional damage. As stated by the Fifth Circuit:

There is no . . . perverse incentive in insuring against liability for injury to another on any location, whether one has an ownership interest or not; such insurance merely indemnifies the insured if and to the extent the insured is held liable for the injury. As a result it is generally recognized that public policy does not require that such an insured have an interest in the property itself. Typically, only legal accountability for accidents or losses thereon is required. It is apparent that liability insurance may issue in any instance in which the insured might be held liable.<sup>45</sup>

Virginia's Supreme Court has likewise rejected the notion that public policy requires an insured to own the property associated with its liability. Instead, coverage turns on "*whether he may be charged at law*

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43. *United Fire & Cas. Co. v. Reeder*, 9 F.3d 15, 17 (5th Cir. 1993); *see also, e.g.*, *Brewton v. Alabama Farm Bureau Mut. Cas. Ins. Co.*, 474 So. 2d 1120, 1122 (Ala. 1985) ("[I]f the insured has no insurable interest in the property insured, the insured is wagering that a loss or damage to the property will occur . . . thereby supplying the insured with an incentive to injure or destroy the insured property, which is against public policy.") (quoting *National Sec. Fire & Cas. Ins. Co. v. Brannon*, 253 So. 2d 777, 781 (Ala. Civ. App. 1971)).

44. *Harley-Davidson, Inc. v. Minstar, Inc.*, 41 F.3d 341, 343 (7th Cir. 1994); *see also, e.g.*, *St. Paul Ins. Cos. v. Talladega Nursing Home, Inc.*, 606 F.2d 631, 633 (5th Cir. 1979) ("[A]ll contracts insuring against loss from intentional wrongs are void in Alabama as against public policy."); *Dixon Distrib. Co. v. Hanover Ins. Co.*, 641 N.E.2d 395, 401 (Ill. 1994) ("[I]t is generally held that a contract of insurance to indemnify a person for damages resulting from his own intentional misconduct is void as against public policy . . .").

45. *United Fire & Cas. Co. v. Reeder*, 9 F.3d 15, 17 (5th Cir. 1993) (footnotes omitted) (holding that liability coverage is available under homeowner's policy for injuries taking place in home even though insured did not own home).

*or in equity* with the liability against which insurance is taken out.”<sup>46</sup> Under this view, the “dispositive question” in the context of environmental liability coverage under pre-acquisition policies is whether the insured is subject to liability for environmental harm that occurs during the policy period. Thus, public policy does not require that the insured have had, while the environmental harm was taking place, an ownership interest in the property associated with that harm. All public policy requires is that the insured be potentially liable at law for damages.

This general principle makes sense. An insured may be held liable for harm whether or not he or she had any ownership interest in the associated property at the time that harm occurred, as is true under CERCLA of persons who purchased property later found to be contaminated. The motivation for purchasing insurance—risk aversion—exists whether or not the insured owned the property associated with its liability when the harm occurred.

This liability principle is also consistent with the analogous rule that liability policies afford coverage whether or not the insured’s own negligence contributed to that liability.<sup>47</sup> Thus, there is no public pol-

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46. *Scottsdale Ins. Co. v. Glick*, 397 S.E.2d 105, 107 (Va. 1990) (emphasis in original) (holding that a tenant’s liability insurance covered injuries which occurred in a portion of the building that was not part of the leased premises); *see also, e.g.*, *Industrial Indem. Co. v. Goettl*, 674 P.2d 869, 876 (Ariz. Ct. App. 1983) (“[A]lmost any hazard which may expose a person to pecuniary loss may constitute a valid insurance interest.”); *Hinkle v. Perry*, 752 S.W.2d 267, 269 (Ark. 1988) (“[A]n insurable interest is not dependent on ownership.”); *Pennsylvania Nat’l Mut. Cas. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 605 S.W.2d 125, 127 (Mo. 1980) (“[O]wnership . . . may be irrelevant to the validity of an insurance policy that covers only liability for bodily injuries and property damages.”); *Gulf Ins. Co. v. Winn*, 545 S.W.2d 526, 528 (Tex. Civ. App. 1976, writ ref’d n.r.e.) (“The authorities and encyclopedias of law are in apparent agreement that the only interest necessary to the validity of an automobile liability insurance policy is that the insured may incur liability . . .”).

47. *See e.g.*, *Stonewall Ins. Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178, 1200 (2d Cir. 1995) (“The policies may reasonably be interpreted to provide coverage for any bodily injury during the policy period for which the policy-holder is held liable, even if the policy-holder is later shown not to have caused that bodily injury.”); *Boeing Co. v. Aetna Cas. & Sur. Co.*, 6 Litig. Repts.: Ins. (Mealey’s) No. 1, at A-1, A-3 (W.D. Wash. Oct. 16, 1991) (An insuring agreement “is not limited by any requirement that the insured’s act be a proximate cause of the damages it is ‘legally obligated to pay’.”); *United States Fidelity & Guar. Co. v. Morrison Grain Co.*, 734 F. Supp. 437, 449 (D. Kan. 1990) (“Obviously, public policy does not bar insurance coverage on a partner’s vicarious liability . . . .”); *Hartford Accident & Indem. Co. v. Continental Cas. Co.*, 273 F. Supp. 851, 852 (W.D. Mich. 1966) (holding, pursuant to a standard general liability insuring agreement, that insured had coverage for its vicarious liability); *Trus Joist Corp. v. Safeco Ins. Co.*, 735 P.2d 125, 129-30 (Ariz. Ct. App. 1986) (affirming lower court’s holding that insured had coverage even if its liability was based entirely on negligence of another); *Lisa M. v. Henry Mayo Newhall Mem’l Hosp.*, 907 P.2d 358, 366 n.9 (Cal. 1995) (noting that “the hospital . . . may be covered for its vicarious liability under a commercial general liability policy”); *DiGerolamo v. Liberty Mut. Ins. Co.*, 364 So. 2d 939, 942-43 (La. 1978) (holding that coverage was available to father for vicarious liability for son’s torts); *Leon Lowe & Sons, Inc. v. Great Am. Surplus Lines Ins. Co.*, 572 So. 2d 206, 210 (La. Ct. App. 1990) (holding

icy reason to prohibit insurance simply because an insured did not own the property associated with its liability or was not involved in the operations associated with its liability. Coverage under pre-acquisition policies creates no incentives for an insured to intentionally destroy property or intentionally commit a wrongful act.

Instead of creating an exception for damage associated with property when such property was not owned by the insured during the policy period, courts should enforce policy language as it is written. As stated by a New Jersey trial court:

[T]he plain meaning of [the insuring agreement] . . . is that the given insurer agreed to defend and indemnify [the insured] . . . for all sums . . . which the insured shall be obligated to pay . . . imposed upon it by law for property damage . . . arising out of an event, *whether [the insured] caused that event or not* . . . . [I]t's not appropriate for a court to write a better contract for the carrier than it could have written for itself.<sup>48</sup>

## 2. "Fairness" Concerns

It is unusual for courts to rescue an insurance company from provisions in its own policies.<sup>49</sup> Even so, some courts have noted that affording coverage under pre-acquisition policies would be "unfair" to the insurance company.<sup>50</sup> This is the "lemonade stand" problem. An insurance company issues a liability policy to a five-cent lemonade stand. After the policy's expiration, the lemonade stand purchases an industrial operation laden with onerous environmental liabilities.

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that employer was covered for suit premised on employer's vicarious liability); *Lansco, Inc. v. Department of Env'tl. Protection*, 350 A.2d 520, 526 (N.J. Ch. Div. 1975) ("[The insured] was legally liable for the costs of removal of the oil spill regardless of whether it was caused by [the insured] or by some third party, and [the insurer] is obligated to indemnify its insured."), *aff'd*, 368 A.2d 363 (App. Div. 1976); *Northbrook Ins. Co. v. American States Ins. Co.*, 495 N.W.2d 450, 453 (Minn. Ct. App. 1993) (noting common policy provision that is primarily intended to "protect" the insured "from vicarious liability").

48. *Morton Int'l, Inc. v. Aetna Cas. & Sur.*, No. L-1033093, slip op. at 24-25 (N.J. Super. Ct. Ch. Div. Nov. 29, 1993) (order denying various insurer motions to dismiss); *accord Stonewall*, 73 F.3d at 1200-01 ("Had the Insurers wished to limit indemnification to occurrences caused by the insured, . . . they could have expressly provided for this limitation in their policies, just as they required a showing of injury during the policy period."); *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 8 Litig. Repts.: Ins. (Mealey's) No. 23, at K-1, K-1 (Wash. Super. Ct. Mar. 18, 1994) (relying on *Morton* to deny insurer's summary-judgment argument that a policy issued prior to the policyholder's involvement at a site provided no coverage).

49. See *Lower Paxton Township v. United States Fidelity & Guar. Co.*, 557 A.2d 393, 397 (Pa. Super. Ct. 1989) ("[This court's] role is merely to interpret the language of the insurance contract.") (quoting *Broadwell Realty Services, Inc. v. Fidelity & Cas. Co.*, 528 A.2d 76, 80 (N.J. Super. Ct. App. Div. 1987)).

50. See *Total Waste Management Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 147 (D.N.H. 1994) (noting a prior unreported Wisconsin decision, which held that "[a]llowing [the policyholder] to recover under its insurance policies for the acts of [an entity acquired after expiration of the policies] would be unfair"); *infra* note 51.

Promptly thereafter, the lemonade stand is liable for substantial clean-up operations attributable to the acquired operation's past conduct. In this situation, the insurer thought its insured was a simple, small lemonade stand without exposure to environmental liability. The insurer had no idea that its insured might one day acquire a mega-polluter. Affording coverage under these circumstances is "unfair."<sup>51</sup>

However, critics of pre-acquisition coverage typically overstate this "fairness" concern. Lemonade stands do not normally acquire industrial operations. Rather, industrial operations acquire industrial operations. Corporate mergers and acquisitions should not come as a surprise to an insurance company, as constant change in the composition of companies has been taking place for decades.<sup>52</sup> When an insurance company sells liability insurance to a large sophisticated corporation with multi-state operations, it should know that the insured has attained its position by consolidation, merger, acquisition of business assets, reorganization of various corporations, and various other methods of growth and expansion. Such an insured is unlikely to cease such activities upon the purchase of insurance. Further, liabilities will likely accompany newly acquired assets, as successor liability is by no means an emerging theory of liability.<sup>53</sup> Thus, a pollution-laden acquisition may truly surprise an insurer much less frequently than is at first supposed.

Second, there is a more fundamental response to the "fairness" question. The insurance industry drafts policies that often "are, to put it charitably, convoluted."<sup>54</sup> This, plus the limited choices facing an insured in the policy "negotiation," have led to various common law doctrines to protect insureds from over-reaching by insurers. These doctrines may apply even when protecting the insured is contrary to the policy language.<sup>55</sup> As discussed in Professor Keeton's seminal ar-

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51. *Maryland Cas. Co. v. W.R. Grace & Co.*, 794 F. Supp. 1206 (S.D.N.Y. 1991), contains a subtle example of this argument. In that case, the court held that coverage did not exist under pre-acquisition policies for an insured's asbestos-related liabilities because the insured had "had no involvement with asbestos" while those policies were in effect. *Id.* at 1231; see also *Independent Petrochem. Corp. v. Aetna Cas. & Sur. Co.*, 654 F. Supp. 1334, 1348 (D.D.C. 1986) ("It would be absurd to suggest that . . . [an insurer] elected to insure a company that suddenly acquired \$71 million worth [sic] of oil and gas subsidiaries.").

52. See *City of Charlottesville v. FERC*, 774 F.2d 1205, 1216 (D.C. Cir. 1985) (describing this "era" as one in which "enterprises are frequently the objects of acquisition or merger").

53. See, e.g., *City of Lampasas v. Bell*, 180 U.S. 276, 276 (1901) ("The main controversy on the merits depends upon whether the plaintiff [corporation] . . . is . . . [a] successor in liability.").

54. *Prisco Serena Sturm Architects, Ltd. v. Liberty Mut. Ins. Co.*, 126 F.3d 886, 887 (7th Cir. 1997).

55. See, e.g., *Bensalem Township v. International Surplus Lines Ins. Co.*, 38 F.3d 1303, 1311 (3d Cir. 1994) (holding that, despite an unambiguous exclusion, Pennsylvania law would honor an insured's reasonable expectation of coverage); *Seidenberg v. Mutual Life*

ticle on the subject, the judiciary designed these common law departures from the insurance contract to compensate *insureds* for their weak position in the insurer-insured relationship. Thus, when discussing "rights at variance" with the policy, Professor Keeton speaks of "rights against *insurers*."<sup>56</sup> He details the various reasons that courts developed these pro-policyholder doctrines, including: the disparity in the bargaining positions of the insurer and insured,<sup>57</sup> especially given that the insurer typically drafts the proposed terms of agreement;<sup>58</sup> weak regulations;<sup>59</sup> and the fact that ordinarily policyholders do not read their policies.<sup>60</sup>

There is no hint that courts developed the various doctrines justifying departure from the policy in order to aid *insurers*. It would be perverse to invoke those doctrines to rescue an insurer from the insurer's own language. A doctrine justifying a departure from the insurance policy—whether termed "reasonable expectations," "unconscionability," or just "fairness"—should protect only policyholders. Under this view, it is fundamentally inappropriate to cite "fairness" to relieve an insurer from its obligations under a pre-acquisition policy.

## II.

### PREDECESSOR POLICIES

Predecessor policies are policies issued to the predecessor company that expired prior to the moment that the successor company acquired the operations or the property giving rise to its liability. A recent California case involving an asbestos company presents an example fact pattern. Formed in the early 1900's, the Western Asbestos Company (predecessor) became a distributor of asbestos products in 1930. By 1965, it was suffering financial setbacks and was in urgent need of operating capital. Shortly thereafter, Western MacArthur (successor) took over Western Asbestos. Thirty years later, a California state court found Western MacArthur liable for the torts of Western Asbestos as a successor corporation under state law.<sup>61</sup> Policies

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Ins. Co., 949 F. Supp. 269, 275-76 (D.N.J. 1996) ("Under the doctrine of reasonable expectations, even an unambiguous contract may be interpreted contrary to its plain meaning."). See generally Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970).

56. *E.g.*, Keeton, *supra* note 55, at 963 (emphasis added).

57. *Id.*

58. *Id.*

59. *Id.* at 967.

60. *Id.* at 968. Failure to read policies is often due, in part, to the fact that the policy forms are long and complicated and cannot be fully understood without detailed study. *Id.*

61. See *General Accident Ins. Co. of Am. v. Superior Ct.*, 64 Cal. Rptr. 2d 781, 782-83 (Ct. App. 1997) *review denied*, 1997 Cal. LEXIS 6025 (Sept. 24, 1997).

issued to Western Asbestos before 1965 were predecessor policies representing a potential source of insurance for liabilities arising out of Western MacArthur's take-over of Western Asbestos.

Insurers' concerns regarding coverage under pre-acquisition policies do not apply in cases such as this. With predecessor policies, the insured—Western Asbestos here—*did* own the property or operations while the damage was occurring, and *was* therefore somehow “involved” in that damage. Assuming that CGL policies cover environmental liability generally,<sup>62</sup> an insurer would owe coverage obligations to its insured. The new “catch,” however, is that the insured no longer owns the property. Instead, a successor company has acquired the property or operations and, by doing so, has also inherited the predecessor's environmental liability. The question addressed in this Part is whether the *predecessor's* policy ought be available to afford coverage for the *successor's* liability. In analyzing that question, this Part discusses the law regarding an insurer's consent to the transfer of coverage rights and the mode of transfer and fairness concerns regarding coverage for environmental liabilities under predecessor policies.

#### A. *Insurer Consent to Transfer of Coverage Rights*

CGL policies ordinarily prohibit assignment of the insurance policy without the express consent of the insurance company.<sup>63</sup> “No-assignment” clauses protect insurers against an increase in the risks originally assumed.<sup>64</sup> For example, suppose an insurer issued a liability policy to “Good Company,” whom the authorities, the media, and industry peers recognized as the very model of environmental responsibility. In all likelihood, the insurer charged a lower premium relative to the insured's peers, in recognition of the insured's low level of anticipated environmental loss. Some time later, the insured sold its coverage rights to “Bad Company,” which had a dismal record of en-

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62. See *supra* note 5.

63. See, e.g., *Independent Petrochem. Corp. v. Aetna Cas. & Sur. Co.*, 654 F. Supp. 1334, 1348 (D.D.C. 1986) (quoting CGL policy stating that “assignment of this policy shall not be valid except by written consent of [the insurer]”).

64. See *National Am. Ins. Co. v. Jamison Agency, Inc.*, 501 F.2d 1125, 1128 (8th Cir. 1974) (“The object of policy provisions and legal rules which require consent of the insurer to any assignment of a fire insurance policy is ‘to prevent an increase of risk and hazard of loss by change of ownership without the knowledge of the insurer.’”) (quoting 16 GEORGE J. COUCH ET AL., *COUCH ON INSURANCE* 2d § 63:31 (1966)); *Federal Ins. Co. v. Purex Indus., Inc.*, 972 F. Supp. 872, 889 (D.N.J. 1997) (“The rationale for consent to assignment clauses is to protect insurers from unforeseen risks.”); *Total Waste Management Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 152 (D.N.H. 1994) (“The rationale for consent to assignment clauses is to protect insurers from unforeseen risks.”); *Elat, Inc. v. Aetna Cas. & Sur. Co.*, 654 A.2d 503, 505 (N.J. Super. Ct. App. Div. 1995) (holding that rationale of no-assignment clause is “to protect the insurer from insuring a different risk than intended”).

vironmental damage. If the insurer must afford liability coverage to Bad Company, it takes on an increased risk with no commensurate increase in premiums.

However, the rationale for no-assignment clauses does not apply once a covered loss has occurred. For example, suppose that in spite of Good Company's environmentally responsible behavior, its operations resulted in an unintended contamination leading to bodily injury during the period of a particular policy. *After* such injury occurred, Good Company sold its operations to Bad Company. As a successor corporation, Bad Company is now liable for the effects of the bodily injury that Good Company's operations caused.<sup>65</sup> Under these circumstances, the rationale for the no-assignment clause does not apply. Since the injury took place prior to the transfer of assets to Bad Company, the risk assumed by the insurer has not changed. The event underlying Bad Company's liability—contamination related to Good Company's operations—was contemplated by the insurer at the time it originally assessed the risks and charged Good Company the premium. The sale effected only a change in the identity of the company seeking the policy's liability coverage.

Thus, courts have generally held that a *post-loss* transfer of coverage rights does not violate a no-assignment clause, even if the insurer never consented to such a transfer. "[I]nsurers' risks have not increased when their duty to indemnify and defend relates to events occurring prior to transfer. Coverage will depend on the terms of each policy, but the damage to the property is the same regardless."<sup>66</sup> Applying that principle to environmental damage, coverage ought be

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65. Such successor liability may always be assumed in any discussion regarding the availability of coverage under predecessor policies because there is no reason to seek liability coverage for contamination related to the property or operations *unless* a given successor is liable for such contamination.

66. *B.S.B. Diversified Co. v. American Motorists Ins. Co.*, 947 F. Supp. 1476, 1481 (W.D. Wash. 1996); *see also* *Imperial Enters., Inc. v. Fireman's Fund Ins. Co.*, 535 F.2d 287, 293 (5th Cir. 1976) ("[T]he no-assignment clause should not be applied ritualistically and mechanically to forfeit coverage" because the merger "caused no increase in the risks or hazards incurred by [the insurer]."); *Total Waste Management Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 152 (D.N.H. 1994) ("An insurer's risk does not increase where the loss or liability arose prior to the transfer."); *Brunswick Corp. v. St. Paul Fire & Marine Ins. Co.*, 509 F. Supp. 750, 753 (E.D. Pa. 1981) ("[T]he insurer can claim no prejudice from [refusing to apply a 'no-assignment' clause], for [it] will be liable only on those claims against [the successor] arising out of covered acts of [the predecessor] which occurred during the period of [the insurer's] coverage."); *Southwestern Bell Telephone Co. v. Ocean Accident & Guar. Corp.*, 22 F. Supp. 686, 688 (W.D. Mo. 1938) ("[I]t is entirely proper for an insurer to select its assureds, but it does not seem logical or reasonable that it could invoke the personal element as to co-operation after a loss has been sustained."); *St. Paul Fire & Marine Ins. Co. v. Allstate Ins. Co.*, 543 P.2d 147, 149 (Ariz. Ct. App. 1975) ("After a loss has occurred and the rights under the policy have accrued, an assignment may be made without the consent of the insurer."); *Public Util. Dist. No. 1 v. International Ins. Co.*, 881 P.2d 1020, 1027 (Wash. 1994) (en banc) ("After the events giving rise to the in-

available under predecessor policies as long as the harm underlying the successor's liability happened prior to the predecessor's sale of its operations to the successor.<sup>67</sup>

In reaching a contrary result, the court in *General Accident Insurance Co. of America v. Superior Court* rejected a claim that a predecessor policy can afford coverage to "an 'insured' that has never paid a premium or been subject to an underwriting analysis."<sup>68</sup> The court ignored the fact, pointed out above, that when a successor corporation seeks coverage for liabilities arising from the predecessor's pre-transfer activities, it does not matter to the insurer that the successor was never "subject to an underwriting analysis." In those circumstances, the successor is not seeking coverage for its own activities. Rather, it is seeking coverage for the predecessor's pre-transfer activities, which activities the insurer knew and presumably analyzed in calculating the premium.

It likewise should not matter that the successor "never paid a premium" for the predecessor policy, because the concept of consideration is irrelevant to the analysis. Under the *General Accident* approach, an assignee of any contract would never be able to enforce the assigned rights because consideration did not flow from the assignee to the promisor.<sup>69</sup> Oddly, this position harks back to the old English rule against third-party beneficiaries; but, American courts have long held that "an assignee can sue in his own name, although no consideration for [the] promise moves directly from [the assignee] to the promisor."<sup>70</sup>

Thus, it does not matter whether the insurer collected a premium from the successor company. It does not even matter whether the successor company paid anything to the predecessor company for the predecessor policies (although that is usually the case). Under settled contract principles, courts do not excuse an obligor (e.g., an insurer of a predecessor company) from performance simply because the as-

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surer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity.").

67. See *Jones Truck Lines v. Transport Ins. Co.*, No. 88-5723, 1989 U.S. Dist. LEXIS 5092, at \*33 (E.D. Pa. May 10, 1989) ("Because the . . . assignment . . . occurred . . . well after the contamination and also after the cleanup of the site, . . . the [no-assignment] clause does not preclude [the assignee] from recovering on the policies . . .").

68. *General Accident Ins. Co. of Am. v. Superior Ct.*, 64 Cal. Rptr. 2d 781, 788 (Ct. App. 1997).

69. See *id.* (The law cannot "impose a contractual insurance relationship between an insurer and a stranger to the insurance contract").

70. *Crompton v. Lumbermens Mut. Cas. Co.*, 129 N.E.2d 139, 141-42 (Mass. 1955) (internal quotation marks omitted).

signee (e.g., a successor company) paid no consideration to the obligor for that performance.<sup>71</sup>

In sum, when a predecessor company transfers its coverage rights to a successor, the insurer has no cause to complain so long as the successor seeks coverage for environmental contamination that occurred before the transfer. In those circumstances, the successor simply seeks to collect insurance for the exact risk underwritten by the insurer. That risk does not change upon the transfer, as the harm for which the predecessor bought liability coverage had already occurred. What the assignee paid for the policy is irrelevant.

### B. Mode of Transfer

Because an insurer suffers no harm in a post-loss transfer of coverage rights, the question ought not be whether courts should enforce the policy after the transfer, but whether the transfer has in fact occurred. The most straightforward manner in which a transfer of coverage rights occurs is via an express contract, as when a contract specifically mentions that insurance rights or "all assets" are being transferred.<sup>72</sup> Courts have also held, however, that coverage rights can transfer by "operation of law," whether or not the transaction documents specifically mention insurance coverage rights.

Transfer by operation of law is typically held to occur when one company merges into or acquires the assets of another.<sup>73</sup> The surviving company succeeds to the merged company's rights under an insur-

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71. See ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 909 (1951) ("[T]he cases holding a gift assignment to be effective are legion—it is no defense to an obligor that the assignee gave no consideration."); *accord* Union Life Ins. Co. v. Priest, 694 F.2d 1252, 1255 (10th Cir. 1982); *Barker v. Danner*, 903 S.W.2d 950, 955 (Mo. Ct. App. 1995) ("[A] non-party to the assignment may not claim lack of consideration."); *American Banana Co. v. Venezolana Internacional de Aviacion S.A.*, 411 N.Y.S.2d 889, 896 (App. Div. 1979) ("If the assignee has title to the chose in action, the debtor or obligor cannot object to a lack of consideration."); *Kennard v. McCray*, 648 S.W.2d 743, 746 (Tex. Ct. App. 1983, writ dismissed w.o.j.) ("[L]ack of consideration is purely a matter between the assignor and assignee; it is immaterial so far as the duty of the obligor . . . is concerned . . .").

72. See *B.S.B. Diversified Co. v. American Motorists Ins. Co.*, 947 F. Supp. 1476, 1480 (W.D. Wash. 1996) (holding that bill of sale between partnership and partner effectively assigned the business's assets and liabilities, including insurance coverage, to the partner); *Elat, Inc. v. Aetna Cas. & Sur. Co.*, 654 A.2d 503, 504 (N.J. Super. Ct. App. Div. 1995) (involving assignment of coverage rights to injured party as part of settlement with insured).

73. See *Imperial Enters., Inc. v. Fireman's Fund Ins. Co.*, 535 F.2d 287, 292 (5th Cir. 1976) ("[T]he transfer of the policy to [the surviving corporation in a merger] occurred by operation of law . . ."); *Total Waste Management Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 152 (D.N.H. 1994) (holding that coverage transfers by operation of law to corporate successor of insured); *Brunswick Corp. v. St. Paul Fire & Marine Ins. Co.*, 509 F. Supp. 750, 752-53 (E.D. Pa. 1981) ("Upon merger, [rights under a CGL policy] automatically vested in the surviving corporation by operation of the merger statute.").

ance policy notwithstanding any no-assignment clause.<sup>74</sup> Courts have also recognized transfer by operation of law when a successor company inherits the liabilities of a predecessor company, whether or not it acquired the entire predecessor.<sup>75</sup> Under these cases, one can say that the coverage follows the liability. For example, in *Northern Insurance Co. v. Allied Mutual Insurance Co.*,<sup>76</sup> one company purchased another via an asset purchase agreement that did not mention the predecessor's insurance policies. The court held that product liability for the predecessor's activities "transferred irrespective of any clauses to the contrary in the asset purchase agreement," such that coverage rights transferred by "operation of law."<sup>77</sup>

A subsequent court extended "the holding in *Northern Insurance* to a successor responsible for environmental cleanup where the events creating liability occurred prior to transfer of liability."<sup>78</sup> In that case, a successor to a partnership's liabilities and assets brought a coverage action pursuant to the predecessor's policies for liabilities arising from acquired property. The court reasoned that the "insurers' risks have not increased when their duty to indemnify and defend relates to events occurring prior to transfer."<sup>79</sup> This holding is consistent with the rationale underlying no-assignment clauses.

### C. "Fairness" Concerns

Fairness considerations may be more appropriate in the context of predecessor policies than in the context of pre-acquisition policies. Determining whether coverage exists under predecessor policies requires more than an interpretation of the insurance policy. The court

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74. See *National Am. Ins. Co. v. Jamison Agency, Inc.*, 501 F.2d 1125, 1129-30 (8th Cir. 1974) (citing cases holding that an exception to no-assignment provisions exists "when the property and policy have been transferred by operation of law"); *Federal Ins. Co. v. Purex Indus., Inc.*, 972 F. Supp. 872, 889 (D.N.J. 1997) ("Courts have refused to apply no assignment clauses to transfers occurring by operation of law because 'such transfers do not entail any increase in the risk or hazard assumed by the insurer.'"); *Total Waste Management Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 152 (D.N.H. 1994); *Southwestern Bell Telephone Co. v. Ocean Accident & Guar. Corp.*, 22 F. Supp. 686, 687 (W.D. Mo. 1938) ("It would be a harsh rule for the courts to promulgate to the effect that, an employer carrying employers' liability insurance having transferred its assets to another employer which assumed the liabilities of the transferer, the insurance carrier would be excused from meeting its obligations on losses occurring prior to the transfer . . .").

75. See *supra* notes 76, 78, and 81 and cases cited therein.

76. 955 F.2d 1353 (9th Cir. 1992).

77. *Id.* at 1357.

78. *B.S.B. Diversified Co. v. American Motorists Ins. Co.*, 947 F. Supp. 1476, 1481 (W.D. Wash. 1996).

79. *Id.*; see also *Aetna Life & Cas. v. United Pac. Reliance Ins. Cos.*, 580 P.2d 230, 232 (Utah 1978) (footnote omitted) ("[I]nasmuch as [the surviving corporation] is held responsible for the liability of [the merged corporation], it is entitled to the protection which [the merged corporation] had . . . at the time of the accident, and . . . , as an asset of [the merged corporation], such coverage passed to . . . the surviving corporation.").

also must consider the various factual issues and legal rules applying to a transfer of coverage rights (*e.g.*, whether the predecessor transferred rights, the general contract law of assignment, and successor liability). In such cases, a court may be more inclined to consider extra-contractual concerns such as "fairness."

Fairness, however, is already included in the analysis of whether enforcement of the contract by the successor harms the insurer.<sup>80</sup> Also, when a successor seeks coverage under predecessor policies, it seeks coverage for the exact risk underwritten by the insurer—environmental liability resulting from the operations or property of the predecessor company. Thus, an insurer would reap a windfall if a court denied coverage under the predecessor policies. The insurer collected a premium for a particular risk, yet would owe no coverage upon the occurrence of that exact risk. Thus, "fairness" concerns seem to cut in the successor's favor.<sup>81</sup>

#### CONCLUSION

When a company acquires pollution-laden properties or operations, it may find itself unexpectedly without coverage for environmental liabilities. This may be true even if both the acquiring company and the acquired company had faithfully purchased CGL insurance throughout the period that contamination was gradually occurring. Curiously, while CGL insurance may cover environmental liabilities generally, courts have been reluctant to find coverage under either pre-acquisition policies or predecessor policies.<sup>82</sup> Indeed, two commentators have noted that "[t]he complete implausibility" of coverage under pre-acquisition policies "seems undeniable."<sup>83</sup> As a result, a company that acquires pollution-suspect property or operations may

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80. See *supra* note 66 and accompanying text.

81. See *Paxton & Vierling Steel Co. v. Great Am. Ins. Co.*, 497 F. Supp. 573, 578 (D. Neb. 1980) (describing cases that afforded coverage under predecessor policies as "logical, reasonable and, most importantly, fair"). The one possible exception, however, may be when a predecessor divides a single pollution-prone operation into many "pieces" such that many successors, rather than just one, are now liable for the predecessor's operations. Historically, such "partial assignments" were said to unfairly prejudice the obligor. See *generally* 4 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 889 (1951) ("It is unjust to subject the debtor to a possible horde of claimants . . ."). The modern approach, however, is not to relieve the obligor of its obligations altogether, but rather to require that all partial assignees be joined in a single proceeding. See RESTATEMENT (SECOND) OF CONTRACTS § 326(2) (1981) (requiring that either "all the persons entitled to the promised performance [be] joined in the proceeding," or if "joinder is not feasible," that "it is equitable to proceed without joinder").

82. See, *e.g.*, *General Accident Ins. Co. of Am. v. Superior Ct.*, 64 Cal. Rptr. 2d 781 (Ct. App. 1997) (predecessor policies), *review denied*, 1997 Cal. LEXIS 6025 (Sept. 24, 1997); *A.C. Label Co. v. Transamerica Ins. Co.*, 56 Cal. Rptr. 2d 207, 208 (Ct. App. 1996) (pre-acquisition policies), *review denied*, 1996 Cal. LEXIS 5943 (Oct. 16, 1996).

83. OSTRAGER & NEWMAN, *supra* note 1, at § 19.02.

have an unexpected gap in liability coverage, even though both it and the prior owner have paid yearly premiums.

The resulting gap in coverage for the successor to contaminated property or operations seems unjustified by a traditional analysis of the policy language and legal principles applicable to transfer of coverage rights. If environmental harm occurs during the policy period, coverage under CGL policies is triggered. There is no policy language or external consideration that additionally requires the attachment of liability or the ownership of property during that same period. Notwithstanding courts' prior recognition that occurrence-based policies afford open-ended coverage, some courts have held that pre-acquisition policies afford no coverage for the successor to pollution-prone property or operations. Policyholders have fared somewhat better under predecessor policies. Courts have recognized that post-loss transfers of coverage rights to successor companies do not harm an insurer. It is probably too early, however, to talk about "trends" under pre-acquisition and predecessor policies in the environmental context. This is an emerging issue, as only a handful of reported cases decided it.<sup>84</sup>

It is unlikely that insurers or their insureds contemplated the environmental liability that American businesses have confronted since the passage of CERCLA in 1980,<sup>85</sup> much less the unique coverage issues arising from such liability. That is no reason, however, to abandon settled insurance doctrines. The policy language underlying the traditional focus on timing of harm, the public policy justifying the insurable interest doctrine, the reasons for common-law doctrines that permit avoidance of policy language, the rationale for no-assignment clauses, the common law of assignment—these are all old considerations that ought inform this new dispute.

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84. See *General Accident*, 64 Cal. Rptr. 2d at 785 ("California law on this issue is sparse . . .").

85. See *Owens-Ill., Inc. v. United Ins. Co.*, 650 A.2d 974, 991 (N.J. 1994) ("At least in the case of property damages due to environmental contamination, the retroactive imposition of absolute liability under laws like CERCLA . . . was surely unknown, if not unknowable.").

