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The Direct Action Against Insurers in CERCLA Insolvency Cases: An Ideal Whose Time Has Come?

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THE DIRECT ACTION AGAINST INSURERS IN CERCLA INSOLVENCY CASES: AN IDEA WHOSE TIME HAS COME?

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Since the passage of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund")¹ in 1980, an ever-increasing number of bankruptcy filings raise environmental issues. Much has been written, both by the courts and commentators, as to the scope and treatment of environmental liabilities in bankruptcy.²

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1. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991)).

2. See, e.g., Joel M. Gross & Suzanne Lacampagne, *Bankruptcy Estimation of CERCLA Claims: The Process and the Alternatives*, 12 VA. ENVTL. L.J. 235 (1993); Morris G. Shanker, *A Bankruptcy Superfund for Some Super Creditors*, 61 AM. BANKR. L.J. 185 (1987); Douglas G. Baird & Thomas H. Jackson, *Kovacs and Toxic Wastes In*

Similarly, the law of insurance with respect to environmental liabilities has expanded rapidly as companies and their insurers square-off over ultimate responsibility for liabilities that can easily reach millions of dollars.³

This Article deals with the convergence of these areas of the law. In particular, it explores the situation in which a bankrupt company with significant environmental liabilities has insurance policies that may cover some or all of those liabilities. The Article focuses on the situation from the perspective of an environmental creditor, whether governmental or private, that incurs cleanup costs in connection with a contaminated facility and then is forced to choose between having a debtor's limited assets go towards partial, though relatively certain, reimbursement of cleanup costs, or using the assets to pay for the pursuit of an uncertain, though possibly greater, insurance recovery. The insurance direct action⁴ is discussed as a possible solution to this dilemma.

At the time of this writing, Congress was gearing up for hearings to consider the second reauthorization of CERCLA.⁵ In the reauthorization debate, the insurance industry will likely be one of the most vocal and most critical voices.⁶ One likely criticism relates to the so-called high "transaction costs" associated with Superfund cases, that is, the costs associated with litigating and defending Superfund cases

Bankruptcy, 36 STAN. L. REV. 1199 (1984).

3. A number of insurance cases are cited throughout this Article. For further discussion on some of the issues that arise in pollution coverage litigation, see Nancer Ballard & Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610 (1990).

4. The term "direct action," as used in this Article, refers to a statutorily-authorized action against an insurer by one injured by an insured. A direct action also might be an action brought by the injured party against the insured through an assignment of the insured's rights under its policy. A discussion of issues that can arise through an assignment of a liability policy is beyond the scope of this article. For a good general discussion of these issues, see *Xebec Dev. Partners, Ltd. v. National Union Fire Ins. Co.*, 15 Cal. Rptr. 2d 726 (Cal. Ct. App. 1993).

5. The first reauthorization of CERCLA took place in 1986. Pub. L. No. 99-499, 100 Stat. 1613 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991)). The next reauthorization of CERCLA will occur in 1994.

6. See Jerry Geisel Washington, *Superfund Needs Repair Coalition Says*, BUS. INS., Apr. 12, 1993, at 2.

versus the amount of money actually spent on cleanup.⁷ It is not the purpose of this Article to enter that debate. Nevertheless, it is at least worth noting that the direct action, in cases of insolvency, may provide one method of reducing transaction costs by simply reducing the number of lawsuits that are filed in connection with a particular facility.

Section I describes the dilemma faced by entities with CERCLA claims against an insolvent but insured debtor⁸ through the use of a hypothetical CERCLA-bankruptcy-insurance case. A hypothetical is necessary because to date only one reported decision exists in which a creditor has attempted to pursue an insurer directly under CERCLA's direct action provision.⁹ Section II describes CERCLA's direct action provision and its current scope. Section III discusses the constitutionality of clarifying CERCLA's direct action provision to specify that the direct action provision can be utilized to pursue insurance policies that predated CERCLA's enactment. Section IV outlines some important issues that any entity contemplating an insurance direct action may wish to consider.

I. THE HYPOTHETICAL INSURED BANKRUPT

Mirage Plating, Inc., has operated a plating plant for many years. Until the passage of the Resource Conservation and Recovery Act ("RCRA")¹⁰ in 1976, Mirage disposed of its plating wastewater by simply pumping it onto the ground outside of its plant. Following the passage of RCRA, however, Mirage began transporting its wastewater to a RCRA-permitted facility. Unfortunately for Mirage, however, its wastewater treatment began a day late and, as Mirage would ultimately find out, far too many dollars short.

After receiving a complaint from a citizen whose well was contaminated downgradient of Mirage's plating operation, EPA began an investigation to determine both the source and the extent of the

7. See, e.g., William H. Hedeman, et al., *Superfund Transaction Costs: A Critical Perspective on the Superfund Liability Scheme*, 21 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,413 (July 1991).

8. In this article, "debtor" and "potentially responsible party" ("PRP") are used interchangeably.

9. See *Port Allen Marine Services v. Chotin, Inc.*, 765 F. Supp. 887 (M.D. La. 1991).

10. Pub. L. No. 94-580, 90 Stat. 2796 (1976) (codified as amended at 42 U.S.C. §§ 6901-6991 (1988 & Supp. III 1991)). RCRA is a regulatory statute that tracks solid and hazardous wastes from "cradle to grave."

contamination. An information request from EPA¹¹ to Mirage led to an on-site investigation of Mirage's property and the discovery of the plating wastewater pit. Thereafter, Mirage's facility received the dubious distinction of being placed on EPA's National Priorities List ("NPL"), EPA's list of the most seriously contaminated facilities in the country.¹² Through a "special notice"¹³ procedure under CERCLA, EPA requested that Mirage conduct the cleanup, a pump and treat remedy that EPA projected would cost several million dollars. Mirage transmitted the special notice letter to its insurers, who nevertheless declined to provide either a defense or coverage for the EPA claim,¹⁴ citing a variety of exclusions in their policies insuring Mirage.¹⁵

When Mirage notified EPA that it would not perform the cleanup, EPA issued an administrative order against it,¹⁶ and when Mirage failed to comply with the administrative order, the United States commenced an injunctive action against Mirage pursuant to section 106 of

11. Section 104(e) of CERCLA authorizes EPA to request various types of information, including information concerning a person's ability to pay. 42 U.S.C. § 9604(e).

12. CERCLA § 105, 42 U.S.C. § 9605. EPA considers facilities for addition to the NPL according to a hazard ranking system. Once a facility is listed on the NPL, EPA's "remedial," as opposed to "removal," authorities are triggered. See *id.* § 101(23), (24), 42 U.S.C. § 9601(23), (24). This triggering of remedial authority usually means that a remedial investigation and feasibility study ("RI/FS") will be performed to determine the nature and extent of the contamination. *Id.* § 104, 42 U.S.C. § 9604. When the RI/FS is completed, EPA must select the cost-effective remedy that assures protection of human health and the environment. *Id.* 121(a), 42 U.S.C. § 9621(a).

13. "Special notice" refers to a statutory procedure which gives PRPs an opportunity to conduct a cleanup. *Id.* § 122(e), 42 U.S.C. 9622(e). If a PRP provides a good faith offer to perform the cleanup, the PRP enjoys a moratorium from facing a federal lawsuit for a 120-day period during which the PRP and the government attempt to reach a settlement. *Id.* § 122(e)(2)(A), 42 U.S.C. § 9622(e)(2)(A).

14. Typically, upon notification of a potential claim under a standard liability policy, an insurer has three options. The insurer can seek a declaratory judgment regarding its duty to defend, either before or during an underlying action against its insured. The second option is to defend its insured while reserving its rights against its insured. Finally, the insurer can do neither and face the peril of having any judgment entered against its insured collaterally estop it from litigating either the merits of the underlying claim or coverage under its policy. See *LaSalle Nat'l Trust, N.A. v. Schaffner*, 818 F. Supp. 1161, 1167 (N.D. Ill. 1993).

15. See discussion *infra* Section IV.

16. CERCLA § 106(a), 42 U.S.C. § 9696(a).

CERCLA.¹⁷ Mirage's insurers still refused to provide a defense. Finding its options limited, Mirage filed for relief under the Bankruptcy Code.¹⁸

To present the issue from a private party's perspective, the hypothetical case needs to be modified only slightly. Rather than owning the land on which its facility operates, Mirage leases the facility but otherwise conducts its business as described above. In the leasing situation, however, the lessor receives the citizen's complaint. After meeting with Mirage and investigating the wastewater pit, the lessor contacts EPA and agrees to pay for and perform a cleanup action.

For an entity that incurs cleanup costs in connection with a facility like the one operated by Mirage, this situation can present a real dilemma. As with the Mirage case, assets in a bankruptcy estate are often insufficient to pay for a cleanup, even in cases where the cleanup obligation is treated as an administrative, or priority, expense of the debtor's estate.¹⁹ On the other hand, if the coverage provided by a comprehensive general liability policy could be tapped directly,²⁰ a "win-win" situation could occur: the entity that paid for the cleanup could be reimbursed its costs, and the debtor might be able to reorganize, no longer saddled with the environmental liability.

The rub is that pursuing insurance coverage costs money, and every dollar paid in pursuit of coverage from a bankrupt debtor is a dollar potentially taken away from a cleanup. Thus, unless the parties in interest agree that the debtor's limited assets should be used to pursue an insurance coverage claim, the assets will be paid to the debtor's creditors according to the Bankruptcy Code's priority scheme,²¹ instead of being used to pursue an uncertain insurance recovery. On the other hand, if the entity that incurred the cleanup costs could directly pursue the debtor's insurer, the dilemma could be lessened, if not avoided, because the entity with CERCLA claims could undertake the coverage action on its own

17. 42 U.S.C. § 9606.

18. See 11 U.S.C. §§ 101-1330 (1988 & Supp. IV 1992).

19. Many courts have now held that post-petition CERCLA cleanup costs incurred with respect to property of the estate should be paid as administrative expenses. See, e.g., *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991) (citing similar cases). The Bankruptcy Code defines administrative expenses as the "actual, necessary costs of preserving the estate." 11 U.S.C. §§ 503(b)(1)(A), 507(a)(1).

20. See Ballard & Manus, *supra* note 3 (discussing insurance coverage in the context of environmental claims).

21. See 11 U.S.C. § 507.

behalf.

II. CERCLA'S DIRECT ACTION PROVISION

Since CERCLA was originally passed in 1980, it has included a provision, section 108(c)(2),²² that allows certain entities, including the government, to proceed directly against persons who provide evidence of financial responsibility for a facility.²³ The two devices that trigger the financial assurances provided pursuant to section 108 are "a release or threatened release"²⁴ from the "facility," presumably of a "hazardous

22. 42 U.S.C. § 9608(c)(2). This section provides:

In the case of a release or threatened release from a facility, any claim authorized by section 9607 or 9611 of this title may be asserted directly against any guarantor providing evidence of financial responsibility for such facility under subsection (b) of this section, if the person liable under section 9607 of this title is in bankruptcy, reorganization, or arrangement pursuant to the Federal Bankruptcy Code, or if, with reasonable diligence, jurisdiction in the Federal courts cannot be obtained over a person liable under section 9607 of this title who is likely to be solvent at the time of judgment. In the case of any action pursuant to this paragraph, the guarantor shall be entitled to invoke all rights and defenses which would have been available to the person liable under section 9607 of this title if any action had been brought against such person by the claimant and all rights and defenses which would have been available to the guarantor if an action had been brought against the guarantor by such person.

Id.

23. Section 108(c)(1) authorizes direct actions by the government against guarantors of financial responsibility for "vessels." See *id.* 42 U.S.C. § 9608(c)(1). Section 108(c)(2) authorizes direct actions by the government against guarantors of financial responsibility for "facilities." See *id.* 42 U.S.C. § 9608(c)(2). The two provisions are substantially the same, except that the defenses available to guarantors of financial responsibility for vessels are more limited than the defenses available to guarantors of financial responsibility for "facilities." See *id.* 42 U.S.C. §§ 9607(b), 9608(a)-(c).

"Facility" is a broadly-defined term under CERCLA that essentially encompasses every place where a hazardous substance has been stored, deposited, placed, disposed of, or has otherwise come to be located. See *id.* 42 U.S.C. § 9601(9).
24. *Id.* 42 U.S.C. § 9608(c)(2). The original § 108(c) did not contain the "release or threatened release language":

Any claim authorized by section 9607 or 9611 of this title

substance,"²⁵ and the insolvency of the person who is liable for the release under section 107(a) of CERCLA.²⁶ The insolvency

may be asserted directly against any guarantor providing evidence of financial responsibility as required under this section. In defending such a claim, the guarantor may invoke all rights and defenses which would be available to the owner or operator under this subchapter. The guarantor may also invoke the defense that the incident was caused by the willful misconduct of the owner or operator, but such guarantor may not invoke any other defense that such guarantor might have been entitled to invoke in a proceeding brought by the owner or operator against him.

Id. § 9608(c) (1980).

25. Although § 108(c)(2) does not refer to a release of a "hazardous substance," the general liability provision of CERCLA, § 107(a), to which § 108(c)(2) refers, does. 42 U.S.C. §§ 9607(a), 9608(c)(2); *see infra* note 26 (reciting text of § 107(a)). The term "hazardous substance" includes within its definition, among other things, hazardous substances under CERCLA (CERCLA § 102, 42 U.S.C. § 9602) and substances treated as hazardous waste under RCRA (RCRA § 3001, 42 U.S.C. § 6921 (1988 & Supp. III 1991)). CERCLA § 101(14), 42 U.S.C. § 9601(14) (1988).

26. 42 U.S.C. § 9607(a). Section 107(a) provides in parts relevant to this Article:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--
 - (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; [and]
 - (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan

requirement derives from the language in section 108(c)(2), which states that a party must be "in bankruptcy, reorganization, or arrangement pursuant to the Federal Bankruptcy Code, or ... with reasonable diligence, jurisdiction in the Federal courts cannot be obtained over a person liable under section 9607 of title who is likely to be solvent at the time of judgment."²⁷

CERCLA refers to persons who provide evidence of financial responsibility as "guarantors."²⁸ "Guarantor" is defined in CERCLA as "any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator under this chapter."²⁹ Until the passage of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"),³⁰ Congress did not clarify further the application of section 108 as to the persons included within the definition of "guarantor" with respect to facilities. In SARA, however, Congress amended section 108(b)(2) of CERCLA to provide that "[f]inancial responsibility may be established by ... insurance, guarantee, surety bond, ... or qualification as a self-insurer."³¹ Based upon this straight-forward reading of section 108, the definition of "guarantor" would appear to include insurers. The one court to have considered the liability of guarantors under section 108(c), however, held otherwise.³²

A. *Port Allen Marine Services, Inc. v. Chotin*

*Port Allen Marine Services, Inc. v. Chotin*³³ involved a contribution action brought by Chotin and Port Allen Marine against Chotin's insurer under CERCLA and various Louisiana state law theories. In granting the insurer's motion to dismiss for failure to state a claim, the court relied on the fact that the list of persons liable under

Id.

27. *Id.* 42 U.S.C. § 9608(c)(2).

28. *Id.* § 9601(13).

29. *Id.*

30. Pub. L. No. 99-499, 100 Stat. 1672 (1986) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. 1991)).

31. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. § 9608(b) (1988)). Section 108(a) of CERCLA, which is the provision that enables EPA to promulgate financial assurance requirements for vessels, includes identical language. 42 U.S.C. § 9608(a)(1).

32. *Port Allen Marine Services, Inc. v. Chotin*, 765 F. Supp. 887 (M.D. La. 1991).

33. *Port Allen Marine*, 765 F. Supp. 887.

section 107(a) of CERCLA did not include "insurers."³⁴ This reasoning is flawed, however, because it ignores the fact that section 108(c) of CERCLA specifically *allows* for direct actions against *guarantors*, which could, as stated, include insurers.³⁵ Congress simply dealt with the liability of insurers through a section of CERCLA different from the general liability provision. Perhaps recognizing this flaw in its reasoning, the court in *Port Allen Marine* then added in a footnote another reason for not allowing the direct action to go forward: "Section 9608(c) does allow a direct right of action against guarantors, but only for third party claims under §§ 9607 or 9611 rather than for claims for contribution."³⁶

This somewhat oblique statement by the court was apparently a reference to the fact that CERCLA has two types of cost recovery actions, the direct action under section 107(a)³⁷ and the contribution action under section 113(f).³⁸ Although one may reason that section 108(c), by its terms, only refers to claims "authorized by section 9607 or 9611 of this title"³⁹ and that CERCLA technically authorizes contribution in section 113(f),⁴⁰ this reasoning says nothing about

34. See 42 U.S.C. § 9607(a). "To read [section 107(a) to include insurers] would require the Court to ignore and disregard the clear language of § 9607(a). [footnote omitted] If insurers are to be sued directly under § 9607(a), the Congress, and not this Court, must amend the § 9607(a) to provide this right." *Port Allen Marine*, 765 F. Supp. at 889.

35. See 42 U.S.C. § 9608(c)(1)-(2). The legislative history to § 108 resolves any doubt about this interpretation:

Guarantor is the third major class subject to liability under the Act. It is a generic term that describes any person, except an owner or operator, who provides the evidence of financial responsibility required under section 105 [section 108 of CERCLA]. The term includes any person providing insurance, guarantees, or surety bonds for liability imposed on an owner or operator under the Act.

H.R. REP. NO. 1016, Pt. 2, 96th Cong., 2d Sess. 37 (1980) *reprinted in* 1980 U.S.C.C.A.N. 6151, 6182.

36. *Port Allen Marine*, 765 F. Supp. at 889 n.4.

37. 42 U.S.C. § 9607(a)(1)-(4)(A) & (B).

38. *Id.* § 9613(f).

39. *Id.* § 9608(c).

40. The word "technically" is used because § 113(f), the contribution provision, refers back to § 107(a) in authorizing a contribution action: "Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title

whether the term "guarantor" as it is used in section 108(c)(2) encompasses insurers.⁴¹ On the contrary, the plain language of section 108 indicates that Congress envisioned insurers as potential guarantors.

Although Congress may have envisioned insurer liability under section 108(c), any entity that incurs response costs may not necessarily sue an insurer if its insured is liable under section 107(a) of CERCLA and is insolvent.⁴² Section 108(c)(2) provides that the insurer must have provided insurance as evidence of financial responsibility "under subsection (b)."⁴³ Subsection (b) of section 108 authorizes and indeed

or under section 9607(a) of this title." *Id.* § 9613(f). Thus, although § 108(c) is technically dependent upon a claim, and thus a liability, arising under § 107(a), one must note that so too is § 113(f). Distinguishing the two types of action does not seem logical when one examines § 108(c), which is premised on providing a mechanism for a person to recover its response costs from the insurer of an insolvent PRP.

The word "technically" also is used because some debate exists as to whether § 107(e)(2) of CERCLA implicitly authorizes a contribution action, as some courts held prior to the passage of SARA. See *United States v. Miami Drum Services, Inc.*, 25 Env't Rep. Cas. (BNA) 1469, 1475 (S.D. Fla. 1986); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 807 n.3 (S.D. Ohio 1983).

41. The court in *Port Allen Marine* implicitly recognized this flaw in its own reasoning:

Section 9608(c), as amended in 1986 [citation omitted], provides for direct actions against *guarantors* in limited circumstances. There are no exceptions set forth in the statute which permit direct action against insurers. An insurer is not *necessarily* a guarantor. Therefore, considering the clear meaning of the statute, the Court can logically conclude that Congress only intended to allow direct actions in cases involving guarantors. As noted earlier, it is for the Congress and not this Court to provide for direct actions against an insurer where the statute has a clear and unambiguous meaning.

Port Allen Marine, 765 F. Supp. at 889-90 (citation omitted) (emphasis altered). As stated in the text, an insurer is not *necessarily* a guarantor, but an insurer could be. By not discussing CERCLA's definition of guarantor, as clarified by § 108(b)'s express reference to "insurers," the court in effect retreated from its prior determination that "insurer" was not one of the listed liable parties under § 107(a).

42. The "insolvency" requirement was added by the 1986 amendments to CERCLA. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. § 9608(c)(2) (1988)).

43. The House Report supports this interpretation:

[S]ection [108] makes explicit and uniform how evidence of financial responsibility is to be provided. First, the section requires that

obligates EPA⁴⁴ to promulgate financial responsibility regulations within five years after the passage of CERCLA for facilities "consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances."⁴⁵ EPA did not promulgate these regulations within the specified period, nor has it done so since the deadline passed.⁴⁶ Because the subsection (b) requirements

evidence of financial responsibility is to be provided in accordance with regulations promulgated by the Administrator of EPA. Thus, for example, the mere purchase of insurance by an owner or operator is not sufficient, in and of itself, to meet the financial responsibility provisions of CERCLA. *Rather, in order to meet the requirements of the statute, an owner or operator must obtain from a guarantor insurance or some other form of financial guarantee that qualifies as evidence of financial responsibility pursuant to EPA's regulations.*

H.R. REP. NO. 253, Pt. 4, 99 Cong. 2d Sess. 76 (1986) (emphasis added).

44. CERCLA actually grants the authority to promulgate the financial responsibility requirements to the President, who has in turn delegated that authority to the Administrator of EPA. See 42 U.S.C. § 9608(b).

45. CERCLA § 108(b)(1), 42 U.S.C. § 9608(b)(1). EPA "[t]o the maximum extent practicable ... [must] cooperate with and seek the advice of the commercial insurance industry in developing financial responsibility requirements." *Id.* § 108(b)(2), 42 U.S.C. § 9608(b)(2). Although Congress expected that the financial responsibility requirements ultimately imposed by the regulations would be imposed "incrementally, ... in no event [were they to be imposed] more than 4 years after the date of promulgation." *Id.* § 108(b)(3), 42 U.S.C. § 9608(b)(3). EPA never promulgated the financial assurance regulations.

46. Although it is clear from the legislative history of § 108 of CERCLA that Congress intended EPA to promulgate financial assurance requirements for CERCLA facilities, it is not exactly clear *why*. If the intent was to ensure that funds would be available to respond to "existing" CERCLA facilities (apart from the financial condition or availability of the PRP), then § 108 of CERCLA would not appear to have much utility. This is because CERCLA facilities are not "tracked" by EPA unless there has been a release or threatened release of a hazardous substance at the facility. See CERCLA §§ 104, 105, 42 U.S.C. §§ 9604, 9605. If there has been a release or threatened release of a hazardous substance, then insurance would not be available, because the event to be insured against would already have occurred, see *infra* note 51, and it simply would be a matter of determining what amount of money is sufficient to assure that the work will be completed, which is an issue that is already being addressed by EPA through the model consent decree financial assurance requirements. On the other hand, if the intent was to ensure that funds are available for the cleanup of facilities where there has not been a release or threatened release of a hazardous substance, then it is likely that many of these facilities would already be subject to RCRA's financial assurance provision. See 40 C.F.R. § 264.143(f) (1992).

have never been promulgated, one may question whether suit could be brought directly against any entity that provides evidence of financial responsibility for a CERCLA facility based *solely* on section 108(c) of CERCLA.⁴⁷

B. *Present Financial Responsibility Requirements Under CERCLA*

For the reasons discussed above, Congress appears to have drafted section 108 of CERCLA for prospective application only, for the case in which a guarantor provides financial assurances in conformance with regulations promulgated by EPA. EPA has not addressed, however, the subject of financial assurances for CERCLA facilities, except in the context of settlements and primarily with respect to settlements authorized by section 122 of CERCLA.⁴⁸ The basis for these section 122 settlements, also known as remedial design/remedial action ("RD/RA")⁴⁹ settlements, is EPA's model consent decree.⁵⁰

Under the model consent decree, a settling PRP must provide financial assurances as part of the settlement, although EPA's regional offices generally determine the amount of financial assurances that must be provided for a specific facility.⁵¹ Settling PRPs, however, have the ability to provide financial assurances through a variety of mechanisms, including performance bonds, letters of credit, and compliance with RCRA's financial assurance requirements. These mechanisms are essentially the same financial assurance mechanisms authorized by

Recognition of either of these points would perhaps explain why the financial assurance requirements have not yet been promulgated.

47. The court in *Port Allen Marine* hinted at this questionable cause of action in a footnote: "As the plaintiffs concede, the government has not passed the regulations necessary to put § 9608 into effect." *Port Allen Marine*, 765 F. Supp. at 889 n.4.

48. 42 U.S.C. § 9622.

49. See CERCLA § 122(a), 42 U.S.C. § 9622(a). The RD/RA settlements give EPA the discretion to enter into agreements with any PRP to facilitate response action performance. The settlement option "expedite[s] effective remedial actions and minimize[s] litigation." *Id.*

50. 56 Fed. Reg. 30,996 (1991). The model consent decree must be used in any RD/RA negotiation that post-dates the model's publication in the federal register by sixty days. *Id.* at 30,997. The model itself, however, is not a "rule," so that EPA may modify its terms depending on the needs of a particular case. *Id.* at 30,996.

51. The financial assurances provision of the model is not one of the ten provisions of "national significance," meaning that EPA regional offices can modify the provision without EPA headquarters approval. *Id.*

section 108 of CERCLA, with one important exception -- insurance is not listed as one of the acceptable financial assurance mechanisms.⁵²

EPA's model consent decree financial assurance requirements thus appear to be a sort of surrogate for section 108's financial assurance requirements, at least for facilities where a settlement is in place. Because EPA did not adopt the model consent decree as a formal rule, however, the model consent decree probably would not provide the mechanism necessary to trigger the direct action provisions of section 108(c). Consequently, unless and until EPA formally enacts regulations to codify financial assurance requirements for CERCLA facilities, any direct action against a "guarantor" premised *solely* on section 108(c) probably will not succeed.⁵³

This conclusion is further supported by section 108(b)(2) of CERCLA, which authorizes EPA "to specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable, in establishing such evidence of financial responsibility in order to effectuate the purposes of [CERCLA]." ⁵⁴ These terms, when specified, should effectively become part of any policy of insurance provided as evidence of financial responsibility,⁵⁵ whether or not they are actually written into the policy.⁵⁶ Until these terms are specified,

52. See *id.* at 31,004. The omission of insurance is not as surprising as it might seem at first, when one considers that insurance is a "wager against the occurrence of a specified event." *Bartholomew v. Appalachian Ins. Co.*, 655 F.2d 27, 29 (1st Cir. 1981). As the court stated in *Bartholomew*, EPA requiring insurance as a financial assurance mechanism for a CERCLA facility which is the subject of a settlement to perform a cleanup is similar to a homeowner attempting to insure his "house against flood damage when the rising waters were already in his front yard." *Id.*

53. This reasoning does not necessarily preclude an action against a person, such as a guarantor, who provided evidence of financial assurances in connection with an RD/RA consent decree. Rather, the argument suggests that such an action would necessarily have to be based on the guarantee itself, as opposed to the direct action provision.

54. 42 U.S.C. § 9608(b)(2).

55. This language was added to § 108 in the 1986 Superfund Amendments specifically to address the possibility that "a guarantor might use its policy terms and conditions to diminish the risk it was undertaking, and therefore the value of the financial responsibility it had provided." H.R. REP NO. 99-253(I), 99th Cong., 1st Sess., pt 1, at 75-76 (1985).

56. Cf. *Shockley v. Sallows*, 615 F.2d 233, 237 (5th Cir. 1980), *cert. denied sub nom. Colonial Penn. Ins. Co. v. Shockley*, 449 U.S. 838 (1980) (applying provisions of state financial responsibility law to liability policy, where policy stated that it had been issued in compliance with financial responsibility law). *Accord* *Continental Casualty*

however, it is difficult to envision a direct action case based upon an insurance policy that is supposed to incorporate them, unless such policies specifically state that they comply with any applicable financial responsibility laws and provide substantially the same coverage required by such laws.⁵⁷ In any event, there are several reasons why the likelihood of a direct CERCLA action based upon section 108 as it is currently drafted may be largely academic, at least for the foreseeable future.

Not long after the passage of CERCLA, insurance companies began writing "absolute" pollution exclusion policies.⁵⁸ Unlike their predecessors, which did not exclude pollution at all or covered pollution as long as it was due to a sudden and accidental event,⁵⁹ these new policies have pollution exclusion provisions that purport to exclude pollution absolutely.⁶⁰ In order for insurance to have any substantive vitality as a financial responsibility mechanism under section 108, two events therefore would have to occur. First, EPA and the insurance industry would probably have to convene a virtual financial assurance "summit" because section 108(b) of CERCLA requires that EPA, prior to promulgating the regulations and "to the maximum extent practicable," "cooperate with and seek the advice of the commercial insurance industry in developing [these new] financial responsibility requirements."⁶¹ Second, unless the insurance industry also supported the new financial assurance requirements for insurance policies proposed by EPA, EPA would have to exercise its authority under section 108(b) to override the absolute pollution exclusion provisions that are now in vogue, which the insurance industry would likely oppose.⁶² In light of these

Co. v. Phoenix Construction Co., 296 P.2d 801 (Cal. 1956)

57. See *Shockley*, 615 F.2d at 233; *Continental Casualty Co.*, 296 P.2d at 801.

58. See James T. Hendrick & James P. Wiesel, *The New Commercial General Liability Forms -- An Introduction and Critique*, 36 FED'N INS. & CORP. COUNS. Q. 319, 346-47 (1986); cf. *United States v. Conservation Chemical Co.*, 653 F. Supp. 152, 204 (W.D. Mo. 1986) (agreeing that if a policy contains a "total pollution exclusion" clause, coverage for pollution should be excluded under policy).

59. *Conservation Chemical Co.*, 653 F. Supp. at 201.

60. See also Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 958-59 (1988).

61. 42 U.S.C. § 9608(b)(2).

62. *Id.* Congress in fact expressed concern in this regard in connection with the 1986 amendments to § 108: "At the time of enactment of CERCLA, there was some concern that a guarantor might use its policy terms and conditions to diminish the risk it was undertaking, and therefore the value of the financial assurance responsibility it had

contingencies, it seems fair to say that, at a minimum the section 108 financial responsibility requirements will not likely become effective soon.

If liability insurance is not likely to be a significant financial assurance mechanism in the near future, one wonders whether Congress should apply CERCLA's direct action provision to insurance policies in existence before 1980.

III. THE RETROACTIVE APPLICATION OF CERCLA'S DIRECT ACTION PROVISION

CERCLA's direct action provision, like the automobile direct action provisions upon which it likely was based,⁶³ is a provision that was designed to address a particular evil, namely the insolvency of a person who is liable for the release or threatened release of a hazardous substance from a facility.⁶⁴ To this end, Congress authorized a direct

provided. The section authorizes the Environmental Protection Agency to specify policy or other contractual terms, conditions or defenses which EPA deems to be necessary or to be unacceptable in establishing evidence of financial responsibility." H.R. REP. NO. 253, 99th Cong., 2d Sess., pt. 1 at 75-76 (1986).

63. The purpose of direct action provisions generally is to secure to travelers and to injured persons a beneficial interest in the proceeds of an insurance policy. Where the direct action provision is conditioned on the insolvency of the insured, the narrower purpose is to protect the injured person from the insolvency of the insured. COUCH ON INSURANCE 2D § 45:798, at 454 (Rev. ed. 1981).

64. The House Report in connection with the 1986 amendments to § 108 described the purpose of the direct action provision:

Absent the right of direct action, an injured party would file an action only against the person who allegedly had caused the injury, and it is that person's liability which is litigated in the action. The insurer's obligation is to its insured, with whom the insurer has a contract. If the insured is found liable, then the insurer is obligated to make payment to the insured in accordance with and subject to the terms of the contract.

In some instances, however, an injured party, who is the intended beneficiary of the financial responsibility requirements in CERCLA, may not be able to bring an action against the owner or operator to recover from that owner or operator or their guarantor. There are two circumstances where this may occur. First, it is possible that a claimant may not be able to obtain court jurisdiction over the owner or operator either voluntarily or involuntarily may be

action against the insolvent PRP's guarantor, and it defined guarantor to include persons who provide evidence of financial responsibility, including insurers, according to regulations promulgated by EPA. By limiting the reach of the direct action statute to policies issued either subsequent to CERCLA's enactment or in conformance with regulations not yet promulgated by EPA, however, Congress severely circumscribed the universe of potential direct action cases. In light of this limitation, one wonders whether section 108 could have been drafted to apply retroactively to insurance policies issued prior to the enactment of CERCLA.

As a general rule, legislation "is not unlawful solely because it upsets otherwise settled expectations," even if it imposes "a new duty or liability based on past acts."⁶⁵ Due process is satisfied "simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose."⁶⁶ Thus, the level of judicial scrutiny for retroactive and prospective legislation is the same -- whether there is a rational relation to a legitimate legislative purpose.⁶⁷ Courts may hesitate, however, to approve a statute that imposes liability retroactively on any theory of deterrence or blameworthiness.⁶⁸ As discussed further below in connection with a discussion of state direct action statutes, little doubt exists that CERCLA's direct action provision would not satisfy a

in bankruptcy. These two circumstances include cases where an owner or operator may be identified and subject to court jurisdiction, but clearly unlikely to be solvent (i.e., capable of paying the judgment) at the time the litigation is resolved. The section would afford a claimant the right of direct action in both instances.

H.R. Rep. 253, Pt. 4, 99th Cong. 2d Sess. 51-52 (1986).

65. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976), *superseded by statute as stated in*, *Freeman United Coal Mining Co. v. Office of Workers' Compensation Program*, 999 F.2d 291 (7th Cir. 1993).

66. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984), *superseded by statute as stated in*, *Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730 (7th Cir. 1991).

67. *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). In *Pension Benefit Guar. Corp.* the United States Supreme Court reiterated that *Turner Elkhorn* provides the analysis for resolving constitutional challenges to retroactive civil legislation. *Pension Benefit Guar. Corp.*, 467 U.S. at 728-730. "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Id.* at 729.

68. *Turner Elkhorn*, 428 U.S. at 17-18.

constitutional challenge measured against this yardstick, even if it expressly operated retroactively.

Direct action statutes, until recently, were primarily a creature of state legislatures. As a result, the constitutional law relating to direct action statutes has developed under the Contracts Clause, which applies to the states but not to the federal government.⁶⁹ Nevertheless, the Contracts Clause body of law is useful from the perspective of understanding the nature and operation of direct action statutes generally, as well as arguments that likely would be advanced if CERCLA's direct action provision were to be amended expressly to have retroactive application.

As a general rule, legislation that is "remedial" in nature can constitutionally be applied retroactively.⁷⁰ Broad agreement exists that direct action statutes are remedial in nature because they facilitate the recovery by an injured person without the necessity of first having to pursue the tortfeasor.⁷¹ Courts agree that CERCLA is remedial in nature, and that CERCLA's liability scheme is not unconstitutional

69. "No State shall ... pass any ... law impairing the Obligation of Contracts." U.S. Const. Art. I, § 10 (emphasis added). Some debate has occurred as to whether the Contracts Clause operates against the federal government through the Due Process Clause of the Fifth Amendment. The debate centers around the meaning to be given to the Supreme Court's decision in *Lynch v. United States*, 292 U.S. 571 (1934), in which the Court stated that "[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Id.* at 579. Decisions issued both before and after *Lynch*, however, have emphasized that the Fifth Amendment's protections are stated in terms of property interests *against* the federal government, and that Congress has always had broader authority under its commerce power to impair contracts between private parties. See *Larionoff v. United States*, 431 F.2d 1167, 1179-80 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977); see also *Thorpe v. Housing Authority*, 393 U.S. 268, 279 n.33 (1969); *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 482 (1911); *Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899, 903 (9th Cir. 1979) ("the Supreme Court has never held the Contract Clause applicable to federal as opposed to state action"); *S & M Paving, Inc. v. Construction Laborers Pension Trust of Southern California*, 539 F. Supp. 867, 869 (C.D. Cal. 1982).

70. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 2.11, at 47 (4th ed. 1991); COUCH ON INSURANCE 2D, *supra* note 63, at 455 (and cases cited therein); see also *Penny v. Powell*, 347 S.W.2d 601, 603-04 (Tex. 1961); *Hasselstrom v. Rex Chainbelt, Inc.*, 184 N.W.2d 902, 907 (Wis. 1971).

71. NOWAK & ROTUNDA, *supra* note 70; COUCH ON INSURANCE 2D, *supra* note 63; *Penny*, 347 S.W.2d at 604; *Hasselstrom*, 184 N.W.2d at 907.

because of its possible retroactive application.⁷²

Although direct action statutes are remedial in nature, courts considering their constitutionality typically further inquire as to whether the direct action provision in question operates "substantively" or "procedurally."⁷³ Where the statute essentially operates as a joinder provision, similar to Rule 14 of the Federal Rules of Civil Procedure, courts have had little trouble in labeling the statute "procedural" and in finding that it does not impair contract obligations.⁷⁴ Where the statute imposes liability on the insurer as a result of its insured's actions, other courts have been reluctant to apply the statute retroactively, concluding that the provision is "substantive."⁷⁵

Several of the cases that have considered the impairment of contract issue have done so in the context of the collision that necessarily occurs between direct action statutes and insurance policies that contain "no action," or "no joinder," clauses. A "no action" provision typically requires the injured party to obtain a judgment against the insured prior to initiating an action against the insurer.⁷⁶ Although some authority exists for the proposition that a direct action provision cannot retroactively nullify the operation of a "no action" clause,⁷⁷ the better

72. See, e.g., *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 733 (8th Cir. 1986) *cert. denied*, 484 U.S. 848 (1987). ("[T]he language used in the key liability provision, CERCLA § 107, 42 U.S.C. § 9607, refers to actions and conditions in the past tense," and "[f]urther, the statutory scheme itself is overwhelmingly remedial and retroactive.") Some courts have even questioned whether CERCLA is, in fact, retroactive in the constitutional sense because liability is premised on the present release or threatened release of a hazardous substance, which is the present or future result of a past action. See, e.g., *id.* at 733 n.4; *United States v. Miami Drum Services, Inc.*, 25 Env't Rep. Cas. (BNA) 1469, 1477 (S.D. Fla. 1986).

73. See *Shockley v. Shallows*, 615 F.2d 233, 238 (5th Cir. 1980).

74. *Id.*

This [direct] right of action has been characterized as procedural for some purposes and substantive for others. As to impairment of contract obligations, it is deemed procedural or remedial. It is substantive in the sense that a federal court in Louisiana will permit direct actions where jurisdiction is based on diversity.

Id.

75. See *Bradford v. Commonwealth Casualty Co.*, 158 A. 840 (N.J. Misc. 1932).

76. See ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* § 9.9(c), at 1096 (West 1988).

77. See *Hasselstrom v. Rex Chainbelt, Inc.*, 184 N.W.2d at 902, 908 (Wis. 1971).

view is that it can, for at least two reasons.

"No action" clauses were drafted to protect insurance carriers against excessive jury sympathies for injured plaintiffs, which insurers feared would occur if the tortfeasor's liability were tried simultaneously with the coverage issues.⁷⁸ Insurers also feared possible jury prejudices against insurers generally.⁷⁹ "No action" clauses also have been justified as necessary to avoid potential confusion between issues relating to the liability of the insured, which typically involves questions of tort law, and issues relating to the liability of the insurer, which relate to the insurer's contract of insurance.⁸⁰ In the context of a CERCLA action, however, none of these arguments applies because CERCLA cases are tried to the court rather than to a jury.⁸¹ Similarly, because CERCLA actions are tried to the court, jury confusion should not be an issue.

Second, "no action" provisions are ignored by most federal courts because they contravene the purposes of the rules of joinder of parties.⁸² As one court eloquently stated with respect to a direct action provision, "[t]he Legislature evidently felt that our courts should not be made to become circumlocution officers winding and unwinding red tape, but felt that the nearest point to a given object was a straight line."⁸³ At least one court has specifically recognized that the very purpose of direct action provisions is to invalidate "no action" clauses.⁸⁴

Returning to CERCLA's direct action provision with this background in mind, one can make a number of observations. First, section 108(c) of CERCLA appears to have been modeled after the direct action statutes that have been held to be procedural, rather than substantive, in nature. Section 108 does not impose liability; it merely grants an entity that has a claim against a guarantor of a PRP under

78. KEETON & WIDISS, *supra* note 76, at 1097.

79. *Id.*; see also *Bankers Trust Co. v. Republic Ins. Co.*, 959 F.2d 677, 682 (7th Cir. 1992).

80. KEETON & WIDISS, *supra* note 76, at 1097-98.

81. See, e.g., *Northeastern Pharmaceutical & Chemical*, 810 F.2d at 749.

82. See *LaSalle Nat'l Trust v. Schaffner*, 818 F. Supp. 1166 (N.D. Ill. 1993)(and citations therein).

83. *Home Ins. Co. v. Highway Ins. Underwriters*, 62 So.2d 828, 831 (La. 1952); see also *Bankers Trust*, 959 F.2d at 682 (suggesting that in certain circumstances it may actually be necessary for a victim of an insured to proceed directly against the insurer in order to protect the victim's potential recovery under the insured's policy).

84. *Symoenides v. Cosmar Compania Naviera, S.A.*, 494 F. Supp. 240 (M.D. La. 1980).

section 107 of CERCLA the right to bring an action directly against the guarantor without first obtaining a judgment against the PRP.⁸⁵

Section 108(c) also expressly reserves to the guarantor the ability to assert whatever defenses its insured would have had in an action under section 107 of CERCLA, as well as whatever defenses it would have in a coverage action based upon its contract of insurance.⁸⁶ Moreover, the 1986 Superfund Amendments amended section 108(d)(1) to provide explicitly that the extent of an insurer's direct liability will not exceed the limits of the coverage provided in its insurance policy.⁸⁷ In this regard, guarantors occupy an unusual position because generally contracts allocating responsibility under CERCLA are of no effect insofar as liability under section 107(e) of CERCLA is concerned.⁸⁸

Thus, while perhaps upsetting an insurer's expectation that a judgment first be obtained against its insured, the retroactive application of CERCLA's direct action provision seems to be a rational way of avoiding an otherwise unnecessarily circuitous litigation trail involving an insolvent or otherwise unavailable PRP.⁸⁹ To use the language of the Supreme Court's decision in *Turner Elkhorn*,⁹⁰ the retroactive application of CERCLA's direct action provision would be a minor adjustment of "the burdens and benefits of economic life."⁹¹

85. 42 U.S.C. § 9608(c).

86. *Id.*

87. *Id.* § 9608(d)(1).

88. *Id.* § 9607(e).

89. *But see* Abraham, *supra* note 60, at 949, wherein the author argues that the combination of retroactive and joint and several liability under CERCLA has created liabilities that far exceed the risks insurers undertook in drafting insurance policies prior to CERCLA's enactment. Whether this is true or not, this argument fails to address the impact of CERCLA liability from the standpoint of the insured, who paid a premium for insurance based upon a contract drafted by the insurer.

90. *Turner Elkhorn*, 428 U.S. 1.

91. *Id.* at 15. One area in which the impairment of contract rights might occur relates to EPA's ability to dictate the terms of acceptable financial responsibility. Under § 108(b) of CERCLA, EPA has the authority to draft regulations that specify not only the financial assurance amount required for a given class of facility, but also the term of an insurance policy that would be acceptable for financial assurances purposes. If EPA were to utilize this authority in a way that changed the terms or limits of existing policies, then section 108(c)'s procedural character would quickly become substantive. Of course, for the reasons discussed above, it is fairly clear that this rulemaking authority was expected to be utilized prospectively only.

IV.. LITIGATING A DIRECT ACTION CASE

Because CERCLA's direct action provision expressly preserves both underlying liability and coverage defenses to the insurer, the ability to bring a direct action is only one step towards ultimately prevailing on a coverage claim.⁹² In light of this, a creditor considering direct action litigation would be well-advised to begin by obtaining the insurance policies of the insured. In this regard, the government might have an advantage over a private creditor. Under CERCLA, EPA has the authority not only to request information relating to a PRP's operations, but also to request information about its ability to pay for a cleanup.⁹³ EPA routinely requests and obtains from PRPs their insurance policies pursuant to this authority.

Creditors also should request information concerning the notices that the insured has or has not given to its insurer concerning its environmental liabilities. If the response to this request is that policies are missing or cannot be obtained, the creditor should depose former managers and officers of the debtor as to their recollection of the company's prior carriers and the years particular carriers provided coverage. Discovery then can be directed to the identified insurers in an effort to obtain copies of the insured's policies or, at a minimum, some correspondence indicating the existence of prior coverage.⁹⁴

Once the debtor's insurance policies have been obtained, they should be read closely to determine the extent to which pollution was or was not excluded from coverage.⁹⁵ If pollution were excluded from

92. CERCLA § 107, 42 U.S.C. § 9607.

93. *Id.* § 104(e)(2)(C), 42 U.S.C. § 9604(e)(2)(C).

94. If any indications exist that policies had been issued but they simply cannot be found, the court possibly would accept the standard policy approved by the state's insurance board at the time.

95. Whether pollution was excluded from the coverage or not may not be readily apparent. Although most pollution coverage cases have turned on the definition of "property damage" and the exclusions associated with that term, some courts recently have recognized the possibility that pollution may fall within the definition of "personal injury." *See, e.g.,* Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1042 (7th Cir. 1992); Scottsdale Ins. Co. v. American Empire Surplus Lines Ins. Co., 811 F. Supp. 210 (D.Md. 1993). *Cf. Clausen v. Aetna Casualty Co.*, 676 F. Supp. 1571 (S.D. Ga. 1987)(finding no personal injury coverage). The possibility of coverage for pollution under the definition of "personal injury" is important because it may avoid the necessity of overcoming a number of coverage hurdles, including whether the damage or loss was expected or intended by the insured. *See, e.g., Zurich*

coverage during some years but not others, creditors should compare this information with information relating to the debtor's past operations in an effort to determine the likelihood of ultimately prevailing under each policy.⁹⁶

Creditors should review the policies to determine whether they are "occurrence" policies or "claims made" policies. An "occurrence" policy typically requires that "damage" or "loss" have occurred during the coverage period, whereas a "claims made" policy generally requires that a claim be asserted while the policy is effective.⁹⁷ In either case, if the creditor previously made a demand against the insured, the creditor should forward a copy of the demand to the insured's insurers.⁹⁸

Creditors should further review the policies to determine which jurisdiction's laws apply.⁹⁹ The law that a court applies can be critical to the ultimate outcome of a CERCLA insurance case. Applicable law can determine central issues such as whether response costs are "damages" under a liability policy;¹⁰⁰ whether the pollution was "sudden and accidental;"¹⁰¹ and whether the damage was "expected or intended from the standpoint of the insured."¹⁰² Assuming a review of these and other coverage issues indicates that coverage might be available, the ultimate decision to proceed directly against the insurer may, in large part, depend on whether the debtor is liquidating or

Ins. Co. v. Peterson, 232 Cal. Rptr. 807 (Ct. App. 1986).

96. In many cases, a creditor will not know the full extent of a PRP's past operations until it initiates a lawsuit and undertakes extensive discovery.

97. See *United States v. Conservation Chemical Co.*, 653 F. Supp. 152, 181-83, 194-97 (W.D. Mo. 1986).

98. Typically, policies require insureds to notify insurers "as soon as practicable," or words to that effect, of a claim made upon the insured. See *Xebec Dev. Partners, Ltd. v. National Union Fire Ins. Co.*, 15 Cal. Rptr. 2d 726, 740-41 (Cal. Ct. App. 1993).

99. For a general discussion of choice of law principles, see *Conservation Chemical*, 653 F. Supp. at 176-78. In this regard, one should note that a federal rule of decision may be appropriate, at least as to policies that do not contain provisions regarding applicable law.

100. See, e.g., *Aetna Casualty & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507 (9th Cir. 1991), amended 1991 U.S. App. LEXIS 30068.

101. See, e.g., *New Castle County v. Hartford Accident and Indem. Co.*, 933 F.2d 1162, 1169, 1199-1203 (3d Cir. 1991); *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991).

102. See, e.g., *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1150-51 (2d Cir. 1989). A detailed discussion of these issues is beyond the scope of this Article. For a discussion of many of these issues, see *Conservation Chemical*, 653 F. Supp. at 152.

reorganizing.

In general, the debtor and the creditors are more likely to support the debtor's *own* pursuit of its insurers in a reorganization than in a liquidation. Such efforts by the debtor might therefore avoid the need for direct action by a creditor. In a liquidation, on the other hand, a trustee makes the decision to pursue insurance claims,¹⁰³ and the trustee may not be as inclined to gamble the estate's limited assets on an uncertain insurance recovery as the debtor would be in a reorganization.¹⁰⁴ In a reorganization, the debtor tends to take a keen interest in whether coverage claims will be pursued against its insurer, and, if so, by whom.¹⁰⁵ For these reasons, the most likely case for a direct action against an insolvent PRP's insurer would be most likely to occur when the debtor's assets were being liquidated.¹⁰⁶

103. See 11 U.S.C. § 701. "*Promptly* after the order for relief under this chapter, the United States trustee shall appoint one disinterested person that is a member of the panel of private trustees ... to serve as interim trustee." *Id.* (emphasis added).

104. See 11 U.S.C. § 704 ("The trustee shall -- (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estates as expeditiously as is compatible with the interest of parties in interest ...").

A governmental entity might be able to force the issue to a certain extent by simply initiating a cost recovery action against the debtor. In that case, the insurer would likely have to determine whether to defend its insured. If the insurer did not provide a defense and the government prevailed in its cost recovery action, then the insurer should be collaterally estopped from relitigating the insured's liability in the context of a later action to enforce its judgment against the insurer. See *Xebec Development*, 15 Cal. Rptr. 2d at 745 (discussing this theory in the context of a spousal support agreement).

105. Although a CERCLA cost recovery action by a private party would be stayed by the automatic stay, 11 U.S.C. § 362(a), a similar action by a governmental entity would not be. 11 U.S.C. § 362(b)(4)-(5). See, e.g., *United States v. Nicolet, Inc.*, 857 F.2d 202 (3d Cir. 1988). Nevertheless, if a governmental entity attempted to proceed directly against a debtor's insurer in a reorganization, either outside of a confirmed plan or without obtaining other appropriate court order, the debtor might seek a stay of the action pursuant to the bankruptcy court's broad powers under 11 U.S.C. § 105, on the theory that the direct action was affecting property of the estate. See 11 U.S.C. § 362(a)(3). The governmental entity could respond by simply adding a debtor as a defendant in its direct action case. In any event, an environmental claimant probably would want to examine the debtor's disclosure statement before it considered initiating a direct action. Such claimant should seek the blessing of the bankruptcy court for this course of action before undertaking it.

106. An occasion might arise in which a direct action might be appropriate in connection with a reorganization. For example, if the plan pays unsecured creditors only a fraction of their claims, and if the environmental creditor's claim were to be

V. CONCLUSION

Since 1980, CERCLA has contained a provision that provides for a direct action against guarantors of insolvent PRPs. Through amendments to this provision, Congress has made clear its intent to include insurers in the class of potential guarantors.

To date, an entity has attempted to proceed under CERCLA against the insurer of an insolvent PRP in only one reported decision. This attempt failed because the court concluded that the vitality of CERCLA's direct action provision depends on the issuance of regulations specifying acceptable financial assurances and that these regulations had not been promulgated. Consequently, the discussion of direct actions against insurers, like the discussion of Mirage Plating in Section I of this Article, appears doomed to remain hypothetical at least until financial assurance regulations are promulgated.

Entities with existing claims against insolvent PRPs consider a certain issue to be pressing -- clarification of whether they may pursue their claims in direct actions against insurers who issued policies to PRPs prior to the passage of CERCLA. An amendment addressing this issue would increase the ability of parties to recover response costs incurred due to the liabilities of insolvent PRPs. An amendment also would further CERCLA's broad goal of making those who benefited from the past improper disposal of hazardous waste pay for it¹⁰⁷ by making insurers, who undertook the risk of their insured's pollution, responsible along with their insureds for paying for the cleanup of that pollution.

estimated for *allowance* purposes, the creditor might consider taking an assignment of the debtor's policy in order to pursue a larger recovery on its own.

107. See *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985) ("In enacting CERCLA in 1980, Congress sought to provide the federal government immediately with tools necessary for prompt and effective response to the nationwide threat posed by hazardous waste disposal and to impose the costs and responsibility for remedial action upon the persons responsible for the creation of the hazardous waste threat.").