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IX. Insurance Law

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Mraz v. Canadian Universal Insurance Co.: *Determining When Hazardous Waste Damage Occurs for Purposes of Insurance Coverage*

In response to the growing number of environmental problems resulting from improper disposal of hazardous wastes, in 1980 Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[1] Under CERCLA Congress authorizes the Environmental Protection Agency (EPA) to clean up hazardous waste sites on behalf of the state and federal government.[2] In enacting CERCLA Congress sought to

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1. 42 U.S.C. §§ 9601-9657 (1982 & Supp. III 1985), *as amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (to be codified as amended in scattered sections of 42 U.S.C.). Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980. *Id.*; *see* Comment, *Successor Landowner Suits for Recovery of Hazardous Waste Cleanup Costs: CERCLA Section 107(a)(4)*, 33 UCLA L. REV. 1737, 1739-42 & nn.16-29 (1986) (summarizing history of CERCLA's enactment). In 1986 Congress amended CERCLA by enacting the Superfund Amendments and Reauthorization Act of 1986 (SARA). Superfund Amendment and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (to be codified as amended in scattered sections of 42 U.S.C.). SARA extended the effective date of CERCLA from 1986 until December 31, 1990. SARA, 42 U.S.C. § 511 (1986). In addition, SARA provides the government with guidelines for cleaning up and making settlements with parties responsible for hazardous waste disposal. *Id.* at §§ 121, 122, 205 (1986).

While Congress has provided little legislative history behind the enactment of CERCLA, Congress enacted CERCLA for two primary purposes. *See CERCLA Defendants: The Problem of Expanding Liability and Diminishing Defenses*, 31 WASH. U.J. URB. & CONTEMP. L. 289, 289 (1987) [hereinafter, *CERCLA Defendants*] (discussing legislative history and purposes of CERCLA). *See generally* H. REP. No. 1016, 96th Cong., 2d Sess. 5, *reprinted* in CERCLA, 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6153 (same). First, CERCLA provides an expeditious and efficient means for the federal government to remove hazardous wastes. *CERCLA Defendants*, *supra*, at 289. Accordingly, CERCLA authorizes the government to clean up a hazardous waste site before litigating a party's liability for improperly dumping the wastes. *Id.* In addition, Congress created a fund under CERCLA to provide the government with funds to clean up a hazardous waste site (the Superfund). *Id.* Second, in enacting CERCLA, Congress intended to impose liability on parties responsible for disposing toxic substances. *Id.* Thus, the parties involved in the dumping of hazardous wastes must reimburse the Superfund for the costs originally paid by the government to clean up the sites. *Id.*

In addition to the federal government enacting a statute to expedite the clean up of and removal of hazardous wastes, approximately half of the states have enacted statutes similar in substance to CERCLA. *See* Hadzi-Antich, *Coverage for Environmental Liabilities Under the Comprehensive General Liability Insurance Policy: How to Walk a Bull Through a China Shop*, 17 CONN. L. REV. 769, 774 & nn.31-38 (1985) (discussing state legislation similar to CERCLA). States have created various types of funds to finance clean ups under state statute. *Id.* at 774 & n.32. Some statutes finance only certain types of hazardous waste damage while other statutes are comprehensive. *Id.* at 774 & nn.32-37.

2. § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (1982 & Supp. III 1985). In addition to authorizing the state and federal government to clean up hazardous waste sites, CERCLA authorizes private individuals to clean up hazardous waste sites. § 107(a)(4)(B), 42 U.S.C. § 9607 (1982 & Supp. III 1985). Individuals may seek reimbursement for the clean up costs either

expedite the government's clean up of hazardous waste sites by providing the government with immediately available funds through a fund known as the Superfund.[3] The Superfund enables the government to clean up hazardous waste sites before establishing a party's liability for dumping the hazardous wastes.[4] Once the government establishes liability, however, companies and owners of companies responsible for discharging toxic substances into the environment are strictly liable for reimbursing the Superfund for any costs the government incurs in cleaning up the toxic wastes.[5]

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from the party responsible for the improper dumping of hazardous wastes or from the Superfund. § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1982 & Supp. III 1985). If a private party seeks reimbursement from the Superfund, CERCLA states that the individual's clean up must comply with the standards set by the National Contingency Plan. *Id.*; *see generally CERCLA Defendants*, *supra* note 1, at 305-307 nn.125-139 (describing right of state and federal government as well as individuals to clean up dump sites under CERCLA); Note, *The Right to Contribution for Response Costs Under CERCLA*, 60 NOTRE DAME L. REV. 345, 349-50 & nn.35-6 (1985) (describing procedure to obtain reimbursement for clean up from the Superfund).

3. 42 U.S.C. § 9631 (1982 & Supp. III 1985); *see* Note, *supra* note 2, at 345, 349-50 & nn.35-8 (1985) (describing Superfund). Under the 1986 amendments to CERCLA, Congress increased the amount appropriated to the Superfund from $1,600,000,000 to a maximum of $8,500,000,000 over the next five years to the Superfund. Sara, 42 U.S.C. § 111 (1986). Congress finances the Superfund by imposing excise taxes on producers of oil and gas. *See* §§ 511-14, 42 U.S.C. § 4611(d) (1982 & Supp. III 1985) (describing imposition of taxes financing CERCLA). Congress also imposes excise taxes on operators of hazardous waste sites and generators of chemical and petroleum products to finance the Superfund. § 211, 26 U.S.C. §§ 4611, 4612, 4661, 4662 (1982 & Supp. III 1985).

4. § 107, 42 U.S.C. § 9607 (1982 & Supp. III 1985). The Superfund speeds up the clean up of hazardous wastes because the Superfund eliminates the need to establish a party's liability and provides the government with funds to clean up the hazardous waste site. *See* Note, *supra* note 2, at 349-50 nn.35-39 (describing how Superfund facilitates government's clean up of hazardous waste sites). However, before the government or a private party can make a successful claim against the Superfund, the government or private party must satisfy certain prerequisites. *See* Bulk Distribution Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1442 nn.11-14 (S.D. Fla. 1984) (outlining steps required to file claim against Superfund); Note, *supra* note 2, at 350-51 & nn.40-47 (describing prerequisites necessary to obtain reimbursement under CERCLA for clean up costs). First, hazardous wastes must be released. *See* § 101(22), 42 U.S.C. § 9601 (1982 & Supp. III 1985) (defining release as spillage, leakage or discharge into the environment); Note, *supra* note 2, at 350 & nn.40 & 42 (discussing definition of release). Second, the release of the hazardous wastes must constitute a "reportable quantity," defined as harmful amounts of wastes under the Clean Water Act. *See* 40 C.F.R. §§ 117.1(a), 117.3 (1987) (defining reportable quantities and amounts of hazardous wastes considered harmful); *supra* notes 1 & 3 and accompanying text (describing how Superfund expedites government's clean up of hazardous wastes). Once the government establishes that an individual has released a reportable quantity of hazardous wastes, the government may proceed to clean up the waste. *See Constitutional Implications of CERCLA: Due Process Challenges to Response Costs and Retroactive Liability*, 31 WASH. U.J. URB. & CONTEMP. L. 279, 279 & n.3 (1987) (describing government's clean up). CERCLA refers to the government's costs in cleaning up hazardous waste sites as response costs. *See id.* (describing response costs).

5. § 107, 42 U.S.C. § 9607 (1982 & Supp. III 1985); *see* Comment, *Personal Liability for Hazardous Waste Cleanup: An Examination of CERCLA Section 107*, 13 B.C. ENVTL. AFF. L. REV. 643, 653 (1986) (describing liability of parties discharging hazardous wastes). Courts have concluded that CERCLA imposes strict liability as well as joint and several

As a result of the liability provisions under CERCLA, companies handling the storage of hazardous wastes have submitted an increased number of claims for environmental damages to insurance carriers.[6] Usually insurance companies issue a standardized general liability policy to companies handling hazardous wastes.[7] A general liability policy typically insures

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liability on responsible parties. *See* Bulk Distribution Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1442-3 nn.15-16 (S.D. Fla. 1984) (finding that CERCLA imposes strict liability and joint and several liability on parties responsible for hazardous waste damage); Lotz, *Liability Issues under CERCLA*, 23 A.F.L. REV. 370 (1982-83) (discussing strict liability and retroactive application of CERCLA); Comment, *supra*, at 655-57 nn.106-31 (discussing courts' interpretation of strict liability provisions under CERCLA). CERCLA provides little opportunity for a defendant to avoid liability. *See* § 107(b), 42 U.S.C. § 9607(b) (1982 & Supp. III 1985) (describing defenses to allegations of liability under CERCLA). Accordingly, courts only find for defendants in a CERCLA proceeding if the defendant successfully proves that the releases of hazardous wastes resulted from an act of God, nuclear war or an act of a third party not related to the defendant. §§ 107(b)(1)-(3), 42 U.S.C. § 9607(b)(1)-(3) (1982 & Supp. III 1985). Thus, CERCLA imposes a heavy burden on potential defendants because of the limited defenses available to the defendant. Comment, *supra*, at 654-55 & nn.100-05.

CERCLA also imposes criminal and civil liability on parties responsible for improper disposal of hazardous wastes. §§ 103, 106-07, 42 U.S.C. §§ 9603, 9606-07 (1982 & Supp. III 1985); Comment, *supra*, at 644 & nn.13-14 (describing civil and criminal liability provisions under CERCLA). Section 107 of CERCLA provides that owners and operators of hazardous waste facilities, transporters of hazardous wastes and generators of hazardous wastes are civilly liable for the improper disposal of hazardous wastes and subject to liability for the government's clean up costs. § 107(a), 42 U.S.C. § 9607(a) (1982 & Supp. III 1985); *see* § 103, 42 U.S.C. § 9603 (1982 & Supp. III 1985) (describing criminal liability under CERCLA); Comment, *supra*, at 644-46 nn.12-16 & 30-32 (describing civil and criminal liability under CERCLA for improper disposal of hazardous wastes). In addition, courts have found corporate officers liable under section 107 of CERCLA for a corporation's improper disposal of hazardous wastes. *See* Comment, *supra*, at 660-61 & nn.160-65 (discussing corporate officers' liability under CERCLA). Furthermore, a party's liability for hazardous waste damage attaches even though the responsible party did not foresee that the disposal of hazardous wastes would result in damage. *See* United States v. Northeastern Pharmaceutical and Chem. Co., 579 F. Supp. 823, 847-48 (W.D. Mo. 1984) (holding that person as used in CERCLA includes officers and employees of corporation), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986); *see* Comment, *supra*, 643-71 (examining application of CERCLA to individuals and extent of individual liability for government's clean up costs of hazardous waste).

6. See Chesler, Rodburg & Smith, *Patterns of Judicial Interpretation of Insurance Coverage For Hazardous Waste Site Liability*, 18 RUTGERS L.J. 9, 9-20 (1986) (summarizing various provisions of CERCLA and response of insurance industry to hazardous waste liability). Most of the litigation arising under CERCLA involves a suit brought by the government against a policy holder of an expired policy. *Insurers' Liability under CERCLA: Shifting Hazardous Waste Site Cleanup Costs to the Insurance Industry*, 31 WASH. U.J. URB. & CONTEMP. L. 259, 265-68 (1987) (examining development of insurance policies covering hazardous wastes and concluding that insurers have broad duty to defend or indemnify insured in CERCLA litigation) [hereinafter *Insurers' Liability under CERCLA*]; H. Kaplan, J. Balloun, S. Stigall, *Defense Strategies and Insurance Coverage Issues in a "Superfund" Case*, 53 INS. COUNS. J. 554, 558 (1986) (discussing effect of CERCLA and defense strategy in insurance coverage controversies).

7. *See* Hadzi-Antich, *supra* note 1, at 769-70 & nn.4-6 (discussing development of general liability insurance). Insurance companies usually issue a standardized policy known as Comprehensive General Liability (CGL) insurance to parties handling the storage of hazardous

the policy holder against an occurrence, defined as unintended or unexpected damages to a third party's property, including injurious exposure to conditions resulting in property damage.[8] While most property damage occurs almost simultaneously with a wrongful event or condition that causes damage, hazardous waste damage causes slow, continuous and degenerative property damage over a long period of time.[9] Therefore, the dumping of

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wastes. *Id.* at 778 n.69. A CGL policy insures the holder of the policy against property damage or bodily injury to a third party rather than to the policy holder. *Id.* at 778. Under a CGL policy, the carrier usually agrees to defend the insured against claims for property damage and injuries. *Id.*; *see generally* Arness & Eliason, *Insurance Coverage for "Property Damage" in Asbestos and Other Toxic Tort Cases*, 72 VA. L. REV. 943, 946-48 (1986) (discussing standardized CGL insurance coverage provisions).

8. *See* Hadzi-Antich, *supra* note 1, at 779 (discussing how occurrence triggers insurance coverage). For a policy to cover a claim for property damage, the claim must fall within the policy's definition for property damage. Chesler, Rodburg & Smith, *supra* note 6, at 13 n.27. Typically, the standard definition of property damage includes physical destruction or loss of use of the property at any time during the policy period. *Id.* In addition, property damage includes property that is not physically destroyed, but is no longer useful for purposes of the insured. *Id.*

Prior to 1966 insurance policies covered property damage only when the damage occurred as a result of an accident. *See* Hadzi-Antich, *supra* note 1, at 779. Generally, the policies contain a pollution exclusion clause stating that insurance coverage does not apply to property damage caused by the release of various contaminants, smoke, chemicals, and other irritants unless the release is "sudden and accidental." *See* Chesler, Rodburg & Smith, *supra* note 6, at 13 (discussing pollution exclusion clause). In 1966, however, insurance companies revised the language in CGL policies to provide coverage for an occurrence, rather than an accident. *See* Hadzi-Antich, *supra* note 1, at 779-80 (discussing insurance industry's switch from accident to occurrence as trigger for coverage). Generally, policies define an "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended by the insured." *See* Chesler, Rodburg & Smith, *supra* note 6, at 31 (discussing definition of occurrence in insurance policies). The shift from the term accident to the term occurrence broadened insurance coverage and created two important changes in favor of the insured. *Id.* at 31-32. First, the insured's coverage is no longer limited to damage resulting from sudden events because the definition of occurrence in CGL policies includes injurious exposure to conditions. *Id.* at 31 n.115. Second, even though the insured intended to commit the act giving rise to property damage, the policy covers the claim for damage if the insured did not expect the intentional act to result in damage. *Id.* Accordingly, the shift from the term accident to occurrence broadened insurance coverage because the term occurrence covers a broader range of events. *Id.*

Most CGL policies require the insurer to defend the insured against any third party claim even if the claim has no merit. *Id.* at 17. In attempting to determine whether the insurer has a duty to defend the insured against a claim for property damage, most jurisdictions invoke the comparison test to determine whether the third party's claim falls under the provisions of the policy. *Id.* at 17 n.38. Under the comparison test, the court compares the allegations against the insured in the third party's complaint with the policy provisions. *Id.* If the court finds that the allegations against the insured are covered under the policy, the court holds that the insurer has a duty to defend the insured in the third party's suit. *Id.*

9. *See* Continental Ins. Cos. v. Northeastern Pharmaceutical and Chem. Co., 811 F.2d 1180, 1189-90 (8th Cir.) (noting property damage begins immediately upon exposure to hazardous wastes, though damage remains latent over a period of time), *reh'g granted*, 815 F.2d 51 (1987); *Insurer's Liability under CERCLA*, *supra* note 6, at 275 (stating that damage may not manifest until long after hazardous waste exposure because hazardous wastes cause slow continuous damage to property).

the hazardous wastes may take place during the policy period, while the resulting property damage may not appear until after the policy period expires.[10] Since the third party complainant often fails to discover property damage resulting from hazardous waste exposure until after the policy period expires, the insured and insurer typically dispute whether the property damage took place within the meaning of the policy's definition of an occurrence.[11] The insured argues that even though the complainant did not discover the property damage until after the policy period expired, the property's exposure to the hazardous wastes took place during the policy period and, therefore, the damage is covered under the policy.[12] The insurer, however, argues that because the complainant did not discover the property damage until after the policy period expired, the damage did not take place within the meaning of the policy's definition of an occurrence and, therefore, the insurer refuses to defend or indemnify the insured against the third party complainant's claim for property damage.[13]

In construing the definition of an occurrence, courts commonly use one of three rules: the exposure rule, the manifestation rule, or the injury in fact rule.[14] Under the exposure rule courts require an insurer to provide coverage to an insured if exposure to the substance causing property damage took place during the policy period.[15] In contrast, courts applying the

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10. *See* Continental Ins. Cos. v. Northeastern Pharmaceutical and Chem. Co., 811 F.2d 1180, 1182-83 (8th Cir.) (drums released chemicals in 1971, but complainant failed to discover damage until 1980 after insurance policies had expired), *reh'g granted*, 815 F.2d 51 (1987); CPS Chem. Co. v. The Continental Ins. Co., 199 N.J. Super. 558, 565, 489 A.2d 1265, 1269 (1984) (company dumped hazardous wastes during policy period, but complainant failed to discover damage until after policy period expired), *rev'd on other grounds*, 203 N.J. Super. 15, 594 A.2d 886 (1985).

11. *See* Chesler, Rodburg & Smith, *supra* note 6, at 13 (stating that parties dispute insurance policy's definition of occurrence).

12. *See* Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1039 (D.C. Cir. 1981) (discussing insured's argument that bodily injury began before the disease manifest), *cert. denied*, 455 U.S. 1007 (1982) .

13. *See id.* (discussing insurers' argument that manifestation of the disease triggers insurance coverage).

14. *See* Hadzi-Antich, *supra* note 1, at 781 (stating that courts adopt certain rules to determine time of occurrence for property damage); Note, *Adjudicating Asbestos Insurance Liability: Alternatives to Contract Analysis*, 97 HARV. L. REV. 739, 740-43 (discussing various theories to determine when occurrence takes place). *See infra* notes 15-17, 50 & 76 and accompanying text (describing exposure rule, manifestation rule and injury in fact rules and courts' use of rules to determine when property damage takes place).

15. *See* Hadzi-Antich, *supra* note 1, at 782 (describing exposure rule). Under the exposure rule an occurrence takes place at the time an event or substance is exposed to property which causes injury or damage to the complainant or complainant's property. *See* Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1223 (6th Cir. 1980) (adopting exposure rule to determine when occurrence takes place), *aff'd and clarified on reh'g*, 657 F.2d 814, *cert. denied*, 454 U.S. 1109 (1981). One commentator argues that since damage does not always result from exposure to a potentially dangerous substance, the exposure rule is not reliable in determining the time of an occurrence. Hadzi-Antich, *supra* note 1, at 782. *See infra* note 18 (listing courts adopting exposure rule).

manifestation rule require an insurer to cover any damage that a third party complainant discovers during the policy period.[16] Finally courts adopting the injury in fact rule require an insurer to provide coverage for any damage that in fact took place during the policy period.[17] Courts construing the time of damage resulting from hazardous waste exposure generally have adopted the exposure rule.[18] In *Mraz v. Canadian Universal Insurance*

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16. *See* Hadzi-Antich, *supra* note 1, at 782 (describing manifestation rule). Under the manifestation rule, an occurrence takes place when a person discovers the property damage. *See id.* (discussing manifestation rule's application to bodily injury). Authorities also refer to the manifestation rule as the apparent injury rule. *Id.* at 782 & n.89; *see* Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 62 (3d Cir. 1982) (adopting manifestation rule).

17. *See* Hadzi-Antich, *supra* note 1, at 782 nn.84-89 (describing injury in fact rule). Under the injury in fact rule, an occurrence takes place if the insured proves an actual injury occurred during the policy period. *Id.* Thus, the injury in fact rule does not require the complainant to prove the complainant discovered the injury during the policy period, but that the complainant's injury or property damage actually took place during the policy period. *Id.*; *See infra* note 80 (listing cases adopting injury in fact rule). Some courts have adopted the diagnosable injury rule, a modification of the injury in fact rule, to determine when property damage takes place. *See* Hadzi-Antich, *supra* note 1, at 783 nn.95-98 (describing diagnosable injury rule). Under the diagnosable injury rule, courts require a professional's diagnosis to determine when injury takes place. *See id.* at 783 n.95 (limiting discussion of diagnosable injury rule's application to bodily injury); Sandoz, Inc. v. Employer's Liab. Assurance Corp., 554 F.Supp. 257, 266 (D.N.J. 1983) (adopting diagnosable injury rule and stating that insurers' liability would be determined on remand upon proof of medical evidence showing when injury in fact occurred). Thus, the diagnosable discovery rule requires a professional's independent judgment that an injury took place during the policy period in order for the policy to cover the claim. Hadzi-Antich, *supra* note 1, at 783 n.95. Accordingly, the diagnosable discovery rule imposes a stricter standard than the injury in fact rule which must be met before the insured receives coverage for a claim. *Id.*

18. *See Insurers Liability under CERCLA*, *supra* note 6, at 275 & n.102 (stating that courts generally apply exposure rule to determine whether release of hazardous wastes is an occurrence for insurance coverage). While courts have primarily adopted the exposure rule in cases involving hazardous waste damage, courts have not yet addressed whether the court's use of the exposure rule requires the complaining party to prove an injury in fact at the time of exposure. *Id.* Thus, in cases involving property damage from hazardous waste exposure, it is unclear whether courts have adopted the exposure rule or the injury in fact rule to determine the time of damage. *Id.*; *see also* Continental Ins. Cos. v. Northeastern Pharmaceutical and Chem. Co., 811 F.2d 1180, 1190 & n.26 (8th Cir.) (using exposure rule to determine time of property damage and stating that majority of jurisdictions have adopted the exposure rule to determine coverage in litigation involving degenerative injury), *reh'g granted*, 815 F.2d 51 (1987); CPS Chem. Co. v. The Continental Ins. Co., 199 N.J. Super. 558, 565-66, 489 A.2d 1265, 1269 (1984) (adopting exposure rule to determine when property damage occurs from hazardous waste damage), *rev'd and remanded on other grounds*, 203 N.J. Super. 15, 495 A.2d 886 (1985); Buckeye Union Ins. Co. v. Liberty Solvents and Chems. Co., 17 Ohio App. 3d 127, ____, 477 N.E.2d 1227, 1233 (1984) (holding that insurer had duty to defend when hazardous wastes were released into environment).

In addition to adopting the exposure rule, manifestation rule and injury in fact rule, courts have combined the exposure rule and manifestation rule to create two additional rules. *See* Hadzi-Antich, *supra* note 1, at 784-85 (describing double trigger rule and triple trigger rule as variations of exposure rule and manifestation rule). The two rules are known as the double trigger rule and the triple trigger rule. *Id.* Under the double trigger rule, an occurrence takes place both at the time of exposure to the event resulting in injury and at the time the

Co.,[19] however, the United States Court of Appeals for the Fourth Circuit adopted the manifestation rule to determine when hazardous waste damage occurs for purposes of insurance coverage.[20]

In *Mraz* Galaxy Chemicals, Inc. (Galaxy), a chemical corporation controlled by the plaintiffs, Paul J. and Sally Mraz (the plaintiffs) stored certain chemical wastes in drums buried in a clay pit in 1969.[21] Canadian Universal Insurance Company (the defendant) had issued a general liability insurance policy in which the defendant agreed to indemnify and defend Galaxy and the plaintiffs against any legal obligations resulting from property damage caused by an occurrence.[22] Under the policy, an occurrence took place if the plaintiffs did not intend or expect the property damage to take place as a result of the plaintiffs' actions.[23] The policy defined an occurrence to include exposure to conditions which results in unexpected or unintended property damage during the policy period.[24] The policy period began January 1, 1969 and ended January 1, 1970.[25]

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injury manifests itself. *Id.* at 785. The triple trigger rule provides coverage from the time of exposure up to and including the time the complainant discovers the bodily injury or property damage. *Id.* at 784. Accordingly, the triple trigger rule gives broader insurance coverage for the insured than the exposure rule, the manifestation rule, the injury in fact rule or the double trigger rule. *Id.* at 784.

19. 804 F.2d 1325 (4th Cir. 1986).

20. Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1328 (4th Cir. 1986).

21. *Id.* at 1326. In *Mraz* Mr. and Mrs. Mraz (the plaintiffs) incorporated Galaxy as a solvent recycling plant in 1960. *Id.* Soon after Galaxy began operating, parties complained that the plant was releasing odors. *Mraz v. American Universal Ins. Co.*, 616 F. Supp. 1173, 1176 (D. Md. 1985). As a result, certain state agencies, including the county health department investigated the complaints. *Id.* In 1969 the state filed an action against the company in the Circuit Court for Cecil County, Maryland. *Id.* As a result the court declared Galaxy a public nuisance. *Id.* In 1970 a neighborhood group successfully sued Galaxy for bodily injuries resulting from the fumes. *Id.* In response to the state's and neighborhood group's suits, Galaxy arranged to remove approximately 1300 barrels of chemical wastes from the plant site. *Id.* Galaxy previously had stored drums containing chemical wastes at the plant site before processing the materials. *Id.* State and county health officials worked with Galaxy in planning the removal and burial of the hazardous wastes. *Id.* Galaxy and state and county officials arranged to bury the chemical wastes in steel drums in a clay pit located on land known as the Leslie site. *Id.* The plaintiffs thought that the clay pit would form a barrier against any possible leakage of the chemicals from the drums. *Id.*

22. *Mraz*, 804 F.2d at 1327. In *Mraz* Canadian Universal Insurance Company (the defendant) had issued a policy insuring Galaxy against claims resulting from Galaxy's operations. *Id.* In addition the policy insured both of the plaintiffs, individually and within the scope of the plaintiffs' respective corporate duties at Galaxy. *Id.* The policy defined property damage as "injury to or destruction of tangible property." *Id.* The policy defined an occurrence as "an accident, 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." *Id.*

23. *See supra* note 22 and accompanying text (describing policy's definition of occurrence in *Mraz*).

24. *Id.*

25. *Mraz*, 804 F.2d at 1326.

In 1981 the EPA notified the plaintiffs that the buried wastes were hazardous and that the plaintiffs must clean up the dump site.[26] When the plaintiffs refused to clean up the wastes, the EPA removed and cleaned up the hazardous substances at the dump site.[27] Subsequently the United States filed an action (the Government's Complaint) pursuant to CERCLA against the plaintiffs to recover the costs that the government had incurred in cleaning up the hazardous wastes.[28] In response to the allegations contained in the Government's Complaint, the plaintiffs sought coverage under the policy the defendant had issued.[29] Upon the defendant's refusal to defend or indemnify the plaintiffs, the plaintiffs filed a declaratory judgment action in the United States District Court for the District of Maryland to determine the defendant's duties under the policy.[30] To support the plaintiffs' claim that the defendant had a duty to defend and indemnify the plaintiffs, the plaintiffs contended that property damage had occurred during the policy period because the chemicals began leaking and damaging property imme-

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26. *Id.* In *Mraz* the State of Maryland and the Environmental Protection Agency (EPA) conducted a study of the Leslie site and found that the drums buried at the Leslie site were hazardous. *Id.* Accordingly, the EPA ordered the plaintiffs to clean up the wastes or to pay for the government's costs of cleaning up the Leslie site. *Id.* When the plaintiffs refused to comply with the EPA's order, the EPA and the state of Maryland removed the buried drums from the Leslie site, removed and disposed of the contaminated soil located at the site, and treated the water contaminated from the chemicals buried at the site. *Id.* After the EPA and the state removed the wastes, the EPA asked Galaxy to reimburse the government for the clean up costs, but Galaxy refused. *Id.* Accordingly the United States Government filed suit against the plaintiffs to recover the costs of the clean up under CERCLA. *Id.*; *see* U.S. v. Bissell, Civ. No. Y-83-3745 (D. Md. Oct. 1983) (describing federal government's suit against the plaintiffs to recover cost of clean up).

27. *Mraz*, 804 F.2d at 1326.

28. *See id.* (describing government's suit against plaintiffs). In *Mraz* the Court of Appeals stated that the United States and the State of Maryland had filed the *Bissell* complaint (the Government's Complaint) in the United Sates District Court for the District of Maryland. *Id.* In the Government's Complaint, the United States alleged that the Leslie site had emitted hazardous substances into the surrounding air, water, and soil before the government cleaned up the site. Mraz v. American Universal Ins. Co., 616 F. Supp. 1173, 1177 (D. Md. 1985). The Government's Complaint alleged that the emissions caused an offensive smell and discolored a stream located near the Leslie site. *Id.* As a result, the government alleged the hazardous waste release threatened the health of area residents. *Id.* In addition, the government alleged that Galaxy was at least partially responsible for the release of the hazardous wastes. *Id.* Specifically, the United States and the State of Maryland sought reimbursement from the plaintiffs for the costs incurred in cleaning up and removing wastes from the Leslie site, as well as the administrative costs, fees and interest incurred in the removal of the hazardous wastes and related damage. *Id.*

29. *Mraz*, 804 F.2d at 1326.

30. Mraz v. American Universal Ins. Co., 616 F. Supp. 1173, 1177 (D. Md. 1985). In *Mraz* the plaintiffs and Galaxy originally filed suit against American Universal Insurance Company in the Circuit Court for Cecil County, Maryland in 1984. *Id.* at 1175. On the basis of diversity, the case was removed to the district court where the Government's Complaint was pending. *Id.* The *Mraz* complaint was amended to include the defendant in 1985. *Id.* The court dismissed American Universal Insurance Co. from the suit. *Id.* In 1985 the court conducted a bench trial. *Id.* The district court entered judgment for the plaintiffs based on the evidence and oral arguments presented by the plaintiffs and defendant at trial. *Id.*

diately after the plaintiffs buried the drums in 1969.[31] Thus, the plaintiffs claimed that the chemicals had leaked during the policy period causing immediate damage to the surrounding property.[32] The defendant argued, however, that the property damage did not occur until after the policy's term expired in 1970 because the EPA did not notify Galaxy that the buried chemicals were hazardous until 1981.[33] Therefore, the defendant contended that the defendant had no duty to defend the plaintiffs against the claims for property damages because the Government's Complaint had alleged no occurrence under the terms of the insurance policy.[34]

Having heard the plaintiffs' and defendant's arguments, the district court in *Mraz* adopted the exposure rule to determine when the property damage occurred and held that the act of burying hazardous wastes was an occurrence since the plaintiffs did not intend the resulting damage.[35] In so holding, the court stated that while the plaintiffs intended to store the chemical wastes in a clay pit, the plaintiffs did not expect or intend for the drums or the pit to leak.[36] Reasoning that insurance companies intend to cover a broad range of occurrences, the *Mraz* court concluded that the policy's language covered the plaintiffs' claim because the leakage of the chemicals constituted property damage occurring during the policy period.[37] Since the complaint alleged that property damage had accrued at the time the plaintiffs buried the drums, the court reasoned that property damage occurred during the policy period.[38] Thus, the district court held that the

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31. *Id.* at 1177.

32. *Id.*

33. *Id.* at 1178.

34. *Id.*

35. *Id.* at 1179. In *Mraz* the district court held that the defendant had a duty to defend and possibly indemnify the plaintiffs against the allegations in the Government's Complaint. *Id.* In so holding, the district court adopted the exposure rule, reasoning that the purpose of the trial was neither to verify the factual allegations in the Government's Complaint nor to determine whether the defendant must pay for the damages claimed by the federal government for the clean up. *Id.* Rather, the district court stated that the function of the trial was to determine whether Canadian Universal had a duty to defend the plaintiffs in the government's suit. *Id.* The district court stated that the outcome of the government's action ultimately would determine whether the policy covered the plaintiff. *Id.* However, for purposes of the *Mraz* action the court reasoned that the court need only consider whether the Government's Complaint alleged an occurrence within the meaning of the policy. *Id.* The district court read the Government's Complaint to state that property damage began to take place at the time the plaintiffs dumped the chemicals in 1969. *Id.* The district court stated that the court could read the complaint to state that hazardous substances had been released from the drums, that the release had discolored a stream and that the result of the release was the air smelled bad in 1969. *Id.*; *see supra* note 28 and accompanying text (describing allegations in the Government's Complaint).

36. *American Universal Ins. Co.*, 616 F. Supp. at 1178.

37. *Id.*

38. *Id.* In *Mraz* the district court compared the allegations in the Government's Complaint with the provisions in the insurance policy and concluded that the defendant had a duty to defend and possibly indemnify the plaintiffs against the allegations in the Government's Complaint. *Id.* at 1177. *See supra* note 28 and accompanying text (describing allegations in

defendant had a duty to defend and possibly to indemnify the plaintiffs against the claims for property damage alleged in the Government's Complaint.[39] As a result of the court's decision, the defendant appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit.[40]

On appeal, the Fourth Circuit adopted the manifestation rule and held that an occurrence takes place when a third party complainant or an insured discovers property damage from hazardous waste exposure.[41] The Fourth Circuit reasoned that damage resulting from hazardous wastes is latent and generally occurs over a long period of time.[42] The court indicated that under the exposure rule or injury in fact rule a complaining party would have difficulty determining when the leaking began or when the property damage began to take place because the complainant might not discover the damage until years after a company dumps the hazardous wastes.[43] Accordingly, the Fourth Circuit stated that the property damage alleged in the Government's Complaint did not occur until after the policy period expired in 1970 because the EPA did not determine that the plaintiffs' dump site constituted a hazard until 1981.[44] Thus, the *Mraz* court held that the defendant had no duty to defend or indemnify the plaintiffs because neither the government nor the insured had discovered the hazardous waste damage during the policy period.[45]

In addition, the *Mraz* court supported the use of the manifestation rule to determine when property damage occurs on the basis of the wording of the policy.[46] The policy defined an occurrence as an accident resulting in the destruction of physical property during the policy period.[47] The Fourth

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Government's Complaint); note 22 and accompanying text (describing provisions in insurance policy). Accordingly, the district court stated that Canadian Universal had a duty to defend the plaintiffs in the government's suit because the allegations contained in the Government's Complaint potentially fell within the meaning of the policy. *American Universal Ins. Co.*, 616 F. Supp. at 1179. The *Mraz* district court stated that while the plaintiffs' burial of the wastes was intentional, the release of the chemicals from the drums was unintentional. *Id.* at 1178. The district court found that since the release of chemical substances resulted from the ruptured drums after the drums were buried, the release did not constitute an expected or intended event. *Id.* Thus, the court reasoned that the policy possibly covered the property damage from the hazardous waste exposure. *See supra* note 22 and accompanying text (discussing policy's definition of occurrence and definition's inclusion of unexpected and unintended events). Accordingly, the court found that the defendant had a duty to defend the plaintiffs against the allegations in the Government's Complaint. *Id.*

39. *See supra* note 38 and accompanying text (discussing *Mraz* district court's reasoning).

40. Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1326 (4th Cir. 1986).

41. *Id.* at 1328.

42. *Id.*

43. *Id.*

44. *Id. See supra* note 28 and accompanying text (describing allegations in Government's Complaint).

45. *Mraz*, 804 F.2d at 1328.

46. *Id.* at 1327.

47. *Id. See supra* note 22 (describing policy's definition of occurrence).

Circuit noted, however, that the Government's Complaint alleged that the release of the chemicals polluted the air, water and soil necessitating that the government clean up the dump site in 1982.[48] The Fourth Circuit stated that since the allegations in the Government's Complaint did not indicate that the damage occurred during the policy period no property damage occurred during the policy period.[49]

In contrast to the Fourth Circuit's use of the manifestation rule in *Mraz*, other jurisdictions deciding cases involving hazardous waste damage primarily have adopted the exposure rule to determine the time of an occurrence.[50] For example, in *CPS Chemical Co. v. Continental Insurance Co.*,[51] the Superior Court of New Jersey held that an occurrence under an insurance policy takes place at the time an insured exposes property to hazardous wastes.[52] In *CPS* several insurance companies issued general liability policies insuring a company against claims arising from property damage caused by an occurrence.[53] The policies defined an occurrence as an accident or exposure to conditions resulting in property damage.[54] The insured company contracted to have hazardous wastes removed from the insured's operations.[55] However, the company the insured contracted to remove the wastes illegally dumped the insured company's waste in the city

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48. *Mraz*, 804 F.2d at 1327. *See supra* note 28 and accompanying text (describing allegations in Government's Complaint).

49. *Mraz*, 804 F.2d at 1327. In *Mraz* the policy period commenced in 1969 and ended in 1970.

50. *See* Steyer v. Westvaco Corp., 450 F.Supp. 384, 388 (D. Md. 1978) (holding that occurrence under meaning of policy took place when mill discharged polluting substances into air); CPS Chem. Co. v. Continental Ins. Co., 199 N.J. Super. 558, 565-66, 489 A.2d 1265, 1269 (1984) (holding that occurrence took place when company illegally dumped insured's toxic wastes in city dump), *rev'd and remanded on other grounds*, 203 N.J. Super. 15, 495 A.2d 886 (1985); Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co., 17 Ohio App. 3d 127, ____, 477 N.E.2d 1227, 1233 (1984) (holding that occurrence took place when drum discharged chemicals into environment).

51. 199 N.J. Super. 558, 565-66, 489 A.2d 1265, 1269 (1984), *rev'd and remanded on other grounds*, 203 N.J. Super. 15, 495 A.2d 886 (1985).

52. CPS Chem. Co. v. Continental Ins. Co., 199 N.J. 558, 565-66 A.2d 1265, 1269 (1984).

53. *Id.* at 563, 489 A.2d at 1267. In *CPS* Continental Insurance Company (Continental) issued a CGL policy effective from 1974 to 1975 to cover the company against a third party's bodily injury and property damage. *Id.* United States Fidelity & Guaranty (USFG) issued a CGL policy effective from 1975 through 1977. *Id.* Thus, the consecutive terms of the policies ran from 1974 through 1977. *Id.*

54. *Id.* at 566, 489 A.2d at 1268. In *CPS* the policy defined an occurrence as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *Id.*

55. *Id.* at 562, 489 A.2d at 1267. In *CPS* the plaintiff contracted with ABM Disposal Company to remove toxic wastes from the plaintiff's plant site. *Id.* The plaintiff intended for ABM Disposal Company to dispose of the wastes properly. *Id.* However, ABM Disposal Company illegally dumped the plaintiff's wastes in the City of Philadelphia's dump on sixteen different occasions beginning in 1974 and continuing until 1975. *Id.*

dump.[56] After discovering the hazardous wastes in the dump site, the city sued the insured to recover the government's clean up costs under the liability provisions of CERCLA.[57] The insurance companies subsequently filed a declaratory judgment action to determine whether the insurance companies must defend and indemnify the insured in the city government's suit.[58]

In ruling on the insurance companies' declaratory judgment action, the New Jersey Superior Court in *CPS* adopted the exposure rule and held that the insurance companies must indemnify the insured for property damage even though the city discovered the damage after the policy period had expired.[59] The court in *CPS* reasoned that the city did not have to discover the property damage during the policy periods for the policies to cover the city's claim because the language of the policies did not limit coverage to property damage occurring during the policy period.[60] Moreover, the superior court stated that the dumping of the wastes constituted an occurrence within the meaning of the policy because the insured did not intend for the contracted company illegally to dump the wastes.[61] The court noted that the language of the policy defined an occurrence as an unintended event from the standpoint of the insured.[62] Accordingly, the *CPS* court found that the policy covered the city government's claim against the insured and ordered the defendant to defend and, if necessary, to indemnify the plaintiff against the city's claim for clean up costs.[63]

In a case involving facts similar to *CPS*, the Court of Appeals of Ohio also adopted the exposure rule to determine when property damage takes place from hazardous waste exposure.[64] In *Buckeye Union Insurance v. Liberty Solvents and Chemicals Co.*[65] an insurance company issued a policy

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56. *Id.*

57. *Id.* In *CPS* the City of Philadelphia sought reimbursement from the plaintiff company of the costs the city incurred in cleaning up the hazardous wastes, as well as consequential damages and penalties. *Id.* The city filed the suit pursuant to CERCLA and certain state codes and statutes. *Id.*

58. *CPS*, 199 N.J. Super. at 558, 489 A.2d at 1267.

59. *Id.* at 565-66, 489 A.2d at 1269.

60. *See supra* note 54 and accompanying text (explaining definition of occurrence in *CPS* policies).

61. *CPS*, at 564, 489 A.2d at 1269.

62. *Id.*

63. *Id.* In *CPS* the New Jersey court acknowledged that its holding was based on the City of Philadelphia's allegations in the city's complaint against the plaintiff company. *Id.* Thus, the court stated that since the city's complaint alleged an occurrence under the company's insurance policy, the insurer had a duty to defend the company in the city's action against the company. *Id.* However, even though the court concluded upon its review of the city's complaint that the complaint alleged an occurrence, the court noted that the court hearing the city's action against the company would ultimately determine the factual accuracy of the complaint. *Id.* at 566 n.1, 489 A.2d at 1269 n.1.

64. Buckeye Union Ins. v. Liberty Solvents & Chems. Co., 17 Ohio App. 3d 127, ____, 477 N.E.2d 1227, 1233 (1984).

65. 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984).

that insured the company against all property damage caused by an occurrence.[66] The company stored hazardous substances in drums that leaked and polluted the water and soil.[67] The United States filed suit against the company under CERCLA for the costs of cleaning up the hazardous wastes.[68] The insurance company subsequently filed a declaratory judgment action to determine whether the insurer had a duty to defend and indemnify the company against the claims alleged by the government.[69]

In holding that the insurer had a duty to defend and possibly indemnify the company against the government's claims, the court in *Buckeye* adopted the exposure rule and held that the release of hazardous wastes resulting in property damage constituted an occurrence within the meaning of the policy.[70] The court interpreted broadly the term occurrence to include not only an event that simultaneously results in damage, but an event that continuously causes damage over time.[71] The court reasoned that the release of hazardous wastes, causing slow and degenerative damage constituted an occurrence.[72] Furthermore, the court found that while the company meant to dump the wastes, the company did not realize the drums would release the hazardous wastes and cause the property damage.[73] Therefore, the court

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66. *Id.* at ____, 477 N.E.2d at 1232. In *Buckeye* the insurance policy defined an occurrence as "an accident, including continuous or repeated exposure to conditions, which results in . . . property damage neither expected nor intended from the standpoint of the insured." *Id.*

67. *Id.* at ____, 477 N.E.2d at 1229. In *Buckeye* the State of Ohio originally filed a declaratory action against the defendant company and thirty seven other individuals in connection with the clean up of Chem-Dyne's facility. *Id.* The defendant company was a generator of hazardous wastes. *Id.* The defendant contracted with another company, Chem-Dyne Corp., to remove and dispose the defendant's hazardous wastes. *Id.* Chem-Dyne operated a hazardous waste facility. *Id.* After removing the hazardous wastes from the defendant company's facility, Chem-Dyne brought the wastes to Chem-Dyne's facility and stored the wastes in drums. *Id.* Exposed to the weather, many of the drums began to deteriorate. *Id.* at ____, 477 N.E.2d at 1231. In addition, the complaint alleged that Chem-Dyne had stacked the drums on top of each other and many of the drums had ruptured. *Id.* As a result, the drums released hazardous wastes into the environment causing the alleged property damage. *Id.* at ____, 477 N.E.2d at 1229.

68. *Id.* In *Buckeye* the action arose from another suit in which the state and federal government sought reimbursement for the costs of cleaning up a hazardous waste site. *Id.* The defendant company notified the insurance company of the pending suits after the United States and the State of Ohio filed suit against the company. *Id.* The company requested the insurer to defend the company against the suits filed by the state and federal government under the terms of the insurance policy. *Id.* at ____, 477 N.E.2d at 1229-30. The insurer responded by filing a declaratory judgment action to determine the insurance company's duty under the insurance policy. *Id.* at ____, 477 N.E.2d at 1230. The trial court reviewed summary judgment motions filed by both parties and ruled that the insurance company had no duty to defend because the state and federal government's complaints failed to allege an occurrence within the meaning of the policy. *Id.* Accordingly, the company appealed the ruling to the Court of Appeals of Ohio. *Id.*

69. *Id.* at ____, 477 N.E.2d at 1230.

70. *Id.* at ____, 477 N.E.2d at 1232-33.

71. *Id.*

72. *Id.* at ____, 477 N.E.2d at 1233.

73. *Id.*

held that the insurance company had a duty to defend and possibly to indemnify the company against the government's claims.[74]

The majority of courts construing an occurrence within the meaning of an insurance policy have done so in cases that involve property damage from causes other than hazardous waste exposure.[75] These courts have generally adopted the injury in fact rule to determine when an occurrence takes place.[76] For example, in *United States Fidelity and Guaranty Co. v. American Insurance Co. (USF&G)*,[77] the Second District Court of Appeals of Indiana applied the injury in fact rule to determine when an occurrence takes place.[78] In *USF&G* several insurance companies had issued liability policies for consecutive periods of time to cover bricks manufactured by the insured.[79] United States Fidelity and Guaranty Company (the Initial Insurer) covered the insured during the first of the three policy periods; Employers Commercial Union Insurance Company of America and American Insurance Company covered the insured during the two policy periods following the expiration of the Initial Insurer's policy.[80] Thus, the insurance policies covered the insured for consecutive policy periods from 1971 to 1974.[81] The insured's bricks spalled or deteriorated and slowly damaged the structure of a third party's building.[82] Accordingly, the insured sought a

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74. *Id.*

75. *See* Chesler, Rodburg & Smith, *supra* note 6, at 54 (noting that few courts have considered when property damage occurs from hazardous waste exposure); *Insurers' Liability Under CERCLA*, *supra* note 6, at 275 (noting that few courts have decided which rule to apply when deciding when property damage occurs in suits involving CERCLA litigation).

76. *See, e.g.*, Bartholomew v. Appalachian Ins. Co., 655 F.2d 27, 28 (1st Cir. 1981) (stating that time of occurrence is time complaining party was in fact injured); Millers Mut. Fire Ins. Co. of Texas v. Ed Bailey, Inc., 103 Idaho 377, 379, 647 P.2d 1249, 1251 (1982) (stating that Louisiana is only jurisdiction that does not apply injury in fact rule to determine time of occurrence within the meaning of liability indemnity policy); Continental Casualty Co. v. Gilbane Bldg. Co., 391 Mass. 143, 152, 461 N.E.2d 209, 215 (1984) (stating that time of occurrence is time event causes damage to complaining party).

77. 169 Ind. App. 1, 345 N.E.2d 267 (1976).

78. United States Fidelity and Guar. Co. v. American Ins. Co., 169 Ind. App. 1, ____, 345 N.E.2d 267, 270 (1976).

79. *Id.* at ____, 345 N.E.2d at 267-68. In *USF&G* United States Fidelity and Guaranty Company (the Initial Insurer) insured the plaintiff insured during the first of the three policy periods against property damage occurring during the policy period. *Id.* Employers Commercial Union Insurance Company of America (Employers) and American Insurance Company (American) (hereinafter collectively referred to as the Subsequent Insurers), covered the plaintiff during the two policy periods following the expiration of the Initial Insurer's policy. *Id.* at _ , 345 N.E.2d at 268. Accordingly, the policies covered the insured for consecutive policy periods from 1971 to 1974, and the policies contained nearly identical provisions. *Id.* Essentially, the policies covered the plaintiff insured against property damage caused by an occurrence. *Id.* The policy defined an occurrence as "an accident . . . which results, during the policy period, in . . . property damage neither expected nor intended from the standpoint of the insured." *Id.*

80. *Id.*

81. *Id.*

82. *Id.* In *USF&G* the plaintiff's bricks spalled or flaked throughout each of the three policy periods. *Id.* As a result the bricks caused damage to the structure of a homeowner's home. *Id.*

declaratory judgment that the insurers had a duty to indemnify the insured against the third party's claim for property damage to the building.[83] The Initial Insurer argued that the damage to the property could be classified into discrete injuries over time and maintained that each insurer's liability was proportional to the amount of structural damage to the building occurring during the applicable policy period.[84]

Rejecting the Initial Insurer's argument that the damage to the property could be classified into discrete injuries over time, the *USF&G* court found that the Initial Insurer was the only insurer liable for the property damage to the building.[85] In so holding, the Indiana Court of Appeals adopted the injury in fact rule to determine at what time the spalling bricks damaged the building.[86] The Indiana Court of Appeals reasoned that the initial spalling of the bricks indicated that the overall structure of the building was defective.[87] Moreover, the court reasoned that spalling of bricks is a slow process and, therefore, the complainant might need years before being able to determine the scope of damage to the building's structure.[88] Accordingly, the *USF&G* court found that the injury in fact rule facilitated the court's analysis in deciding which insurer was liable for the property

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83. *Id.* In *USF&G* the plaintiff insured filed suit in the Superior Court of Marion County, Indiana against the insurance companies. *Id.*

84. *Id.* at ____, 345 N.E.2d at 270. In *USF&G* the Initial Insurer unsuccessfully argued that a certain number of bricks spalled during each policy period. *Id.* at ____, 345 N.E.2d at 272. Under the Initial Insurer's reasoning, a separate and distinct injury to the building occurred during each policy period. *Id.* Accordingly, the Initial Insurer contended that its liability under the policy extended only to the number of bricks that had spalled during the policy period. *Id.* The Subsequent Insurers contended, however, that the Initial Insurer was liable for the entire damage to the structure caused by the spalling bricks. *Id.* at ____, 345 N.E.2d at 270. Under the Subsequent Insurers' theory, the complainant homeowner's discovery of the spalling bricks was indicative of the amount of damage that would accrue to the entire structure. *Id.* Thus, the Subsequent Insurers reasoned that the building fully depreciated in value upon the complainant's discovery of the spalling bricks even though the building had not undergone as much damage as the building underwent after the initial discovery of the spalling bricks. *Id.* Accordingly, the Subsequent Insurers argued that the Initial Insurer should pay for the entire damage to the structure. *Id.*

85. *Id.*

86. *Id.* at ____, 345 N.E.2d at 270. In *USF&G* the Indiana Court of Appeals stated that under the Initial Insurer's theory, a multiplicity of actions would arise from the distinct injuries occurring in each policy period. *Id.* at ____, 345 N.E.2d at 272; *see supra* note 84 (describing Initial Insurer's theory of liability). The court noted the difficulty of determining the actual extent of damage since the assessment could take years. *USF&G*, 169 Ind. App. 1, ____, 345 N.E.2d 267, 272. The court rejected the Initial Insurer's theory that a distinct injury occurred during each policy period. *Id.* at ____, 345 N.E.2d at 272. The court of appeals reasoned that even though physical damage was initially slight, the initial property damage substantially depreciated the property's value. *Id.* Therefore, the Indiana Court of Appeals adopted the injury in fact rule and held that the Initial Insurer was liable for all of the damage to the structure of the building. *Id.* In so holding, the court noted that the actual damage to the building initially took place when the Initial Insurer's policy was in effect. *Id.*

87. *Id.*

88. *Id.*

damage.[89] Thus, the court found the Initial Insurer liable for the property damage upon the insured's showing that part of the damage had actually occurred during the policy period.[90]

Other courts deciding whether an insurance company must defend and indemnify an insured in cases involving degenerative injury have adopted combinations of the manifestation and exposure rule.[91] For example, in *Keene Corp. v. Insurance Co. of North America*,[92] the United States Court of Appeals for the District of Columbia Circuit adopted both the manifestation rule and exposure rule (the triple trigger rule) to determine when bodily injury from asbestos exposure occurs.[93] In *Keene* the company manufactured certain products containing asbestos from 1948 to 1972.[94] Insurance companies had issued general liability insurance policies covering the company against any bodily injury to a person caused by an occurrence during the policy period.[95] After numerous parties had filed suits against the company for asbestos related injuries, the company sought a declaratory judgment to determine whether any of the insurance companies had a duty to defend or indemnify the company against claims for asbestos injury.[96]

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89. *Id.* at ____, 345 N.E.2d at 271-72.

90. *Id.* at ____, 345 N.E.2d at 272.

91. *See, e.g.*, Lac d'Amiante du Quebec, Ltd. v. American Home Assurance Co., 613 F. Supp. 1549, 1561 (D.N.J. 1985) (adopting triple trigger rule and holding insurers liable for property damage resulting from asbestos exposure); Transamerica Ins. Co. v. Bellefonte Ins. Co., 490 F. Supp. 935, 939 (E.D. Pa. 1980) (adopting double trigger rule and holding, therefore, that insurer covering insured at time of exposure and insurer covering insured when complainant discovered injury were liable under respective policies); Gruol Construction Co. v. Insurance Co. of N. Am., 11 Wash. App. 632, 635-37, 524 P.2d 427, 430-31 (1974) (adopting triple trigger rule and holding, therefore, that insurance covered claims for damages to building caused by dry rot).

92. 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 445 U.S. 1007 (1982).

93. Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1047 (D.C. Cir. 1981), *cert denied*, 445 U.S. 1007 (1982).

94. *Id.* at 1038-39. In *Keene* Insurance Company of North America (INA), Liberty Mutual Insurance Company (Liberty), Aetna Casualty and Surety Company (Aetna) and Hartford Accident and Indemnity Company (Hartford) (hereinafter referred to collectively as the defendants) insured the company against liability arising during CGL insurance policies issued consecutively from December 31, 1961 until 1980. *Id.* at 1038. Prior to and during the CGL policy periods, the company manufactured thermal insulation products. *Id.* The company's products contained asbestos and the products allegedly caused injury to persons exposed to the products. *Id.* As a result, the injured parties or their survivors filed suits against the company. *Id.* Accordingly, the company filed a declaratory judgment action against the defendants to determine the defendants' rights and obligations to defend and possibly indemnify the company against the injured parties' claims for bodily injury. *Id.*

95. *Id.* at 1039. In *Keene* the CGL policies defined an occurrence as "an accident, including injurious exposure to conditions, which results, during the policy period, in *bodily injury* . . . neither expected nor intended from the standpoint of the *insured*." *Id.*

96. *Id.* at 1038. In *Keene* thousands of injured persons filed suits against the plaintiff company. *Id.* The complaints typically alleged that the complainant suffered personal injury or wrongful death as a result of exposure or inhalation of asbestos from the company's products. *Id.* In the *Keene* action, therefore, the company sought a declaratory judgment to determine the extent of coverage of the respective policies issued by the defendants. *Id.* In

Holding that the insurance companies had a duty to defend and possibly indemnify the company against the asbestos related claims, the United States Court of Appeals for the District of Columbia Circuit adopted the triple trigger rule.[97] Under the triple trigger rule, any insurance company that covered the company against claims during the time of the complainant's exposure to asbestos, the time of the complainant's discovery of the injury, or at any time in between the exposure and discovery periods was liable for the claims.[98] The *Keene* court found that exposure to asbestos did not cause an immediate injury, but resulted in continuous and degenerative bodily injury which might take years before manifesting as an asbestos related disease.[99] The court stated that if the policy covered only those claims the complainant discovered during the policy period, the insurance coverage would restrain the insurer's reasonable expectation of coverage.[100]

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response to the allegations in the company's complaint, the defendants argued different theories to support their argument that the insurers had no duty to indemnify the company under the issued policies. *See id.* at 1039 (describing defendants' respective arguments of non-liability). Aetna, INA and Liberty argued that the court should adopt the manifestation rule to determine the time of bodily injury under the defendants' respective policies. *Id.* at 1042-43. Aetna, INA and Liberty had issued the policies covering the company during the first three policy periods. *Id.* at 1038-39. Under the manifestation rule, Aetna, INA and Liberty would not be liable for the claims alleged against the company because the asbestos related disease did not appear until after the policy periods had expired. *Id.* at 1042-43.

Hartford argued that a person's exposure to asbestos triggers insurance coverage. *Id.* at 1042. In advocating the court's adoption of the exposure rule, Hartford contended, however, that each of the defendants' respective liability under the policies was proportional to the length of time the policy covered the company during the time the injured parties were exposed to the asbestos products. *Id.* at 1042 & n.15. Alternatively, the insured company contended that the court should adopt the triple trigger rule. *Id.* at 1042. The company argued that the triple trigger rule was the appropriate rule to apply because damage from asbestos begins at the time a person is exposed to asbestos and continues until the time the disease manifests itself. *Id.* Thus, the company contended that the policies covered the claims since the asbestos exposure and subsequent gradual progression of injury occurred during the course of the policy periods. *Id.* The company offered evidence to show that a person's body suffers injury at the time the person inhales asbestos. *Id.* The asbestos fiber lodges immediately in the person's lungs and the body reacts to the fiber, precipitating injury to the body. *Id.* Because asbestos causes injury to a person from the time of the person's initial exposure to asbestos until some future date, the company argued that the triple trigger rule was the most realistic rule to determine when bodily injury takes place. *Id.*

97. *Id.* at 1046.

98. *Id.* at 1042.

99. *Id.* at 1040. In *Keene* the court distinguished the majority of injury cases from an injury resulting from asbestos. *Id.* The court stated that in most cases, the injury occurs simultaneously with the occurrence resulting in the injury. *Id.* However, the court noted that injury from asbestos exposure might take years before the injured party discovered the injury. *Id.* Moreover, the *Keene* court conceded that no one knows the extent of exposure necessary to cause asbestoses. *Id.*

100. *Id.* at 1045. In *Keene* the court reasoned that the purpose of insurance is to provide certainty for the insured in the future. *Id.* Accordingly, the court reasoned that adopting the manifestation rule would circumvent the insured company's reasonable expectation of coverage if the court forced the insured to bear the risk of a latent disease. *Id.* In addition, the *Keene* court looked to the reasonable expectations of the insured when the insurer issued the policies

As a result, the Court of Appeals reasoned that the insured constantly would remain uncertain of the insured's liability after the policy expires because under the manifestation rule the insurer would only provide coverage for the fraction of the injury appearing during the policy period.[101] Supporting its holding on the basis of the insured's expectation of insurance coverage, the court in *Keene* held that an occurrence takes place from the time of exposure until the complainant discovers the injury.[102]

In litigation arising from insurance claims for damage caused by exposure to hazardous wastes as well as other substances, courts have reached different results in deciding the time of an occurrence.[103] In construing the time of an occurrence courts look to different factors to determine when damage takes place.[104] First, courts consider the nature of the event or substance causing the damage.[105] Therefore, a court determines whether the damage takes place simultaneously with the event causing the damage or whether the damage is degenerative and takes place over time.[106] Second,

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and stated that an insured purchases insurance to substitute certain premium payments for uncertain future liability. *Id.* at 1046. Thus, the court construed the ambiguity of the insurance policy's definition of occurrence against the insurer. *See id.* at 1041-42 & n.12. Moreover, the court in *Keene* noted that once science discovered the dangers of asbestos exposure, insurance companies stopped providing sufficient coverage against injury resulting from asbestos exposure. *Id.* at 1045. The court stated that unless the court adopted the manifestation rule in conjunction with the exposure rule, the company would have no coverage for injuries discovered after 1976. *Id.* The court noted that in 1976 insurers became aware of asbestos related disease and discontinued coverage against asbestos related injuries. *Id.*

101. *Id.*

102. *Id.* at 1046. The *Keene* court supported the decision to adopt both the manifestation and exposure rules on the basis that the manifestation of the asbestos disease resulted from an injurious process. *Id.* The court ruled that to terminate the insurers' liability while the damage was materializing was inconsistent with the purpose of insurance. *Id.* The court maintained that once exposure to asbestos takes place, the asbestos fibers lodge in a person's lungs and sets in motion the injurious process. *Id.*

103. *See supra* notes 14-18 and accompanying text (describing courts' use of various rules to determine time of an occurrence involving insurance claim for damage and listing cases which have adopted various rules).

104. *See infra* notes 105-110 and accompanying text (describing courts' analysis of certain factors in interpreting time of occurrence in litigation involving insurance coverage for property damage or bodily injury).

105. *See, e.g.*, Continental Ins. Cos. v. Northeastern Pharmaceutical and Chem. Co., 811 F.2d 1180, 1190-91 (8th Cir.) (considering nature of property damage caused by hazardous waste exposure and comparing damage from hazardous wastes to damage from asbestos), *reh'g granted*, 815 F.2d 51 (1987); *Keene*, 667 F.2d at 1038 n.3 (considering nature of damage resulting from asbestos exposure and finding that bodily injury occurs over time); United States Fidelity and Guar. Co. v. American Ins. Co., 169 Ind. App. 1, ____, 345 N.E.2d 267, 271-72 (1976) (considering nature of damage to building from defective bricks) (USF&G).

106. *See* Continental Ins. Cos. v. Northeastern Pharmaceutical and Chem. Co., 811 F.2d 1180, 1190-91 (8th Cir. 1987) (stating that damage resulting from hazardous waste exposure results in continuous damage and distinguishing hazardous waste damage from injury from negligent act), *reh'g granted*, 815 F.2d 51 (1987); *Keene*, 667 F.2d at 1047 (stating that asbestos results in continuous injury rather than distinct injury); United States Fidelity and Guar. Co. v. American Ins. Co., 169 Ind. App. 1, ____, 345 N.E.2d 267, 272 (1976) (stating that spalling bricks result in continuous property damage, and rejecting theory that yearly damage to building could be categorized as distinct injury during policy period).

courts look to the language of the specific policy to determine when an occurrence takes place within the meaning of the insurance policy.[107] Specifically, courts look at the policy's definitions of property damage and occurrence.[108] Third, courts attempt to adopt a rule that is consistent with the insured's reasonable expectation of insurance coverage.[109] Accordingly, courts generally adopt the rule that provides insurance coverage for the insured's claim.[110]

The first factor that courts examine to determine when property damage has occurred is the nature of the substance causing the property damage.[111] As other courts have considered the nature of the substance causing damage, the Fourth Circuit in *Mraz* correctly noted that unlike most property damage or bodily injury covered under an insurance policy, damage resulting from hazardous waste exposure is degenerative and often latent for many years before appearing as an injury.[112] Thus, the *Mraz* court rejected the injury in fact rule because of the difficulty an injured party encounters in determining when latent damage begins to occur.[113] Courts would find the injury in fact rule nearly impossible to apply because parties handling hazardous wastes generally bury the toxic substances underground; therefore, damage to the property may begin underground at an undeterminable date and long before the damage appears above ground.[114] Accordingly, the Fourth Circuit correctly chose the manifestation rule to determine when hazardous waste

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107. *See* Continental Ins. Co. v. Northeastern Pharmaceutical and Chem. Co., 811 F.2d 1180, 1188-89 (8th Cir.) (reviewing language of insurance policy to determine meaning of policy), *reh'g granted*, 815 F.2d 51 (1987); Buckeye Union Ins. Co. v. Liberty Solvents and Chems. Co., 17 Ohio App. 127, ____, 477 N.E.2d 1227, 1232-33 (1984) (reviewing language of insurance policy to determine whether policy covered claim).

108. *See supra* note 107 and accompanying text (indicating courts' consideration of policy language in interpreting time of occurrence).

109. *See* Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1042 n.12 (D.C. Cir. 1981) (considering insured's reasonable expectation of insurance coverage in determining time of occurrence), *cert denied*, 455 U.S. 1007 (1982); Buckeye Union Ins. Co. v. Liberty Solvents and Chems. Co., 17 Ohio App. 127, ____, 477 N.E.2d 1227, 1233 (1984) (ascertaining lay person's interpretation of occurrence within meaning of insurance policy).

110. *See* Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1047 (D.C. Cir. 1981) (adopting triple trigger rule which provided maximum insurance coverage for insured's claims), *cert denied*, 455 U.S. 1007 (1982); Buckeye Union Ins. Co. v. Liberty Solvents and Chems. Co., 17 Ohio App. 127, ____, 477 N.E.2d 1227, 1233 (1984) (adopting exposure rule which provided insurance coverage for insured's claims).

111. Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1328 (4th Cir. 1986).

112. *See id.* (stating that property damage from hazardous waste exposure was continuous and degenerative); *supra* note 71 and accompanying text (stating that property damage resulting from hazardous waste exposure was continuous in *Buckeye*).

113. *Mraz*, 804 F.2d at 1328.

114. *Compare supra* note 43 and accompanying text (discussing difficulty of applying exposure rule or injury in fact rule in cases involving hazardous wastes in *Mraz*); *with supra* note 86-88 and accompanying text (discussing difficulty of determining the extent of damage caused by spalling bricks in *USF&G*) *and supra* notes 99-102 (discussing *Keene* court's reasons for rejecting manifestation rule in favor of triple trigger rule).

damage occurs.[115] The manifestation rule is the better rule for courts to apply in cases involving hazardous waste damage because the rule is objective and avoids courts speculating when latent property damage occurred.[116]

The second factor that courts examine to determine when property damage has occurred within the meaning of an insurance policy is the language of the insurance policy.[117] The insurance policy's language also supports the Fourth Circuit's decision in *Mraz* to adopt the manifestation rule.[118] The Fourth Circuit in *Mraz* correctly analyzed the ambiguous language of the policy which defined an occurrence as exposure to conditions during the policy period which results in property damage.[119] Accordingly, the court found that the policy limited coverage to property damage occurring during the policy period.[120] Even though courts tend to construe ambiguous provisions of an insurance policy against the insurer, the Fourth Circuit correctly construed the *Mraz* policy against the insured plaintiffs by finding that the policy did not cover the government's claim for property damage.[121] Unlike most parties to an insurance contract, both the plaintiffs and the defendant had equal bargaining power in negotiating the terms of the insurance policy.[122]

The third factor that courts consider in determining when property damage takes place within the meaning of an insurance policy is the insured's reasonable expectation of coverage.[123] As the *Keene* court noted, parties obtain insurance to avoid uncertainty against future liability.[124] While an insured can not expect an insurance company to remain liable for claims arising years after a policy has expired, the latent and degenerative nature

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115. *See supra* notes 111-16 and accompanying text (discussing benefits of applying the manifestation rule in cases involving hazardous wastes).

116. *See supra* notes 111-16 and accompanying text (discussing benefits of applying the manifestation rule in cases involving hazardous waste).

117. *See supra* notes 107-08 and accompanying text (stating that courts look to language of policy to determine time of occurrence).

118. *See supra* note 22 and accompanying text (discussing language of insurance policies in *Mraz*).

119. *See Mraz*, 804 F.2d at 1327 (analyzing ambiguous language in policy); *supra* notes 46-49 and accompanying text (analyzing language in *Mraz* insurance policy).

120. *See supra* notes 46-49 and accompanying text (describing *Mraz* court's analysis of insurance policy provisions).

121. *See Mraz*, 804 F.2d at 1326 (describing parties to suit as corporate officers and insurance company); *supra* note 100 and accompanying text (stating that courts construe ambiguous terms in insurance policy against insurer).

122. *See* Arness & Eliason, *supra* note 7, at 950 (stating that when companies purchase insurance, courts should not read insurance policy as contract of adhesion but as ordinary contract).

123. *See supra* notes 109-10 and accompanying text (describing courts' attempt to adopt rule to determine time of occurrence consistent with insured's reasonable expectation of insurance coverage).

124. *See* Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1045 (D.C. Cir. 1981) (stating that parties obtain insurance to avoid uncertainty against future liability), *cert. denied*, 455 U.S. 1007 (1982); *supra* notes 100-02 and accompanying text (discussing insured's reasonable expectation of insurance coverage).

of hazardous waste damage and the retroactive application of CERCLA makes the triple trigger rule an attractive alternative to the *Mraz* holding.[125] The triple trigger rule holds insurers liable for any claims for property damage as long as the policy was effective when the property was exposed to the hazardous substances, the complainant discovered the damage during the policy period, or at any time in between the time of exposure and manifestation of the property damage.[126] The triple trigger rule is consistent with the insured's reasonable expectation of insurance coverage in a case arising under CERCLA's liability provisions.[127] Generally litigation concerning a party's liability under CERCLA, like the *Mraz* case, involves parties that dumped hazardous wastes before Congress enacted CERCLA and in a manner then consistent with government approved standards.[128] In *Mraz* neither the company nor the government suspected that many of the resulting claims would arise years after the company dumped the hazardous wastes.[129] As a result, the company did not foresee the necessity of continuing insurance coverage.[130] While an insured can not reasonably expect an insurer to remain infinitely liable under a policy the insurer issued, the *Mraz* court's opinion does not indicate that the Fourth Circuit considered the plaintiffs' reasonable expectation of insurance coverage.[131] Accordingly, the triple trigger rule is consistent with an insured's reasonable expectation of insurance coverage in and provides an attractive alternative to the manifestation rule in cases involving CERCLA.[132]

In *Mraz v. Canadian Universal Insurance Co.* the United States Court of Appeals for the Fourth Circuit held that under a general liability policy, an occurrence takes place at the time the complaining party discovers the property damage caused by hazardous wastes.[133] While the Fourth Circuit's

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125. *See supra* note 18 and accompanying text (describing the triple trigger rule); Arness & Eliason, *supra* note 7, at 973 (suggesting that triple trigger rule is best rule to apply in litigation involving insurance coverage for hazardous waste damage).

126. *See supra* note 18 and accompanying text (describing triple trigger rule); Arness & Eliason, *supra* note 7, at 973 (suggesting that triple trigger rule is best rule to apply in litigation involving insurance coverage for hazardous waste damage).

127. *See supra* notes 123-26 and accompanying text (discussing application of triple trigger rule in cases involving latent damage).

128. *See supra* note 21 and accompanying text (noting that plaintiffs in *Mraz* had arranged to dispose chemical wastes in cooperation with government officials).

129. *See supra* note 21 and accompanying text (indicating that plaintiffs and government officials did not expect the drums or clay lined pit to leak).

130. *See supra* note 6 (stating that most litigation under CERCLA involves government suits against parties with expired insurance policies); notes 21-25 and accompanying text (stating that plaintiffs in *Mraz* discontinued insurance coverage after plaintiffs dumped hazardous wastes).

131. Mraz v. Universal Ins. Co., 804 F.2d 1325, 1328 (4th Cir. 1986).

132. *See supra* notes 97-102 and accompanying text (discussing application of triple trigger rule to determine time of damage in *Keene*); *but see* Arness and Eliason, *supra* note 7, at 945 (discussing need for courts to adopt consistent approach to determine insurance coverage for property damage resulting from hazardous waste).

133. *Mraz*, 804 F.2d at 1328.

holding contradicts the holdings of other courts deciding CERCLA cases, courts can apply, without speculation, the manifestation rule to determine whether an insurance policy covers a claim for hazardous wastes.[134] Rather than surmising when latent property damage from hazardous waste exposure takes place, the manifestation rule enables courts objectively to determine whether an insurer is liable for property damage based on the time a third party or the insured discovers the property damage.[135] Moreover, the manifestation rule provides insurance companies with an incentive to continue providing insurance for companies handling hazardous wastes because the manifestation rule prevents insurers from remaining liable under a policy which expired years before the insured submitted a claim for property damage.[136] Faced with the liability provisions of CERCLA and the Fourth Circuit's adoption of the manifestation rule, counsel should advise clients handling hazardous wastes to continue insurance coverage regardless of the period of time that has elapsed since the client disposed the hazardous substances.[137] So long as the insured continues to maintain insurance, the Fourth Circuit's holding in *Mraz* will not jeopardize a company's future uncertainty concerning liability for hazardous waste disposal.[138]

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134. *See supra* note 50 and accompanying text (listing cases adopting exposure rule in CERCLA litigation to determine time of occurrence); *but see supra* notes 114-16 and accompanying text (indicating that *Mraz* court's adoption of manifestation rule facilitates court's determination of whether insurance covers claim for property damage).

However, the *Mraz* court's holding promises to promote the uncertainty already abounding in insurance litigation because no unifying factor reconciles the divergent rulings among courts deciding when an occurrence takes place for insurance purposes. *See* Hadzi-Antich, *supra* note 1, at 781 (stating that courts determining when property damage occurs from hazardous wastes should adopt uniform rule and eliminate confusion presently existing in insurance law concerning time of occurrence in injury from causes other than hazardous wastes).

135. *See supra* note 134 and accompanying text (discussing advantages of courts using manifestation rule to determine time property damage takes place).

136. *See* Statement of Dennis R. Connolly, Senior Counsel, American Insurance Assoc. as reported in 14 Env't Rep. (BNA) (March 30, 1984) (stating that courts' tendency to find for insured in insurance litigation will destroy solvency of insurance industry); Marcotte, *Toxic Blackacre: Unprecedented Liability for Landowners*, A.B.A. J., Nov. 1, 1987, 66, 69 (stating that The American Land Title Association excludes coverage for environmental damage from policies).

137. *See* Marcotte, *supra* note 136, at 70 (noting that defendant company in New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) filed bankruptcy after being sued for government's clean up costs).

138. *See supra* note 124-32 and accompanying text (indicating that insured's reasonable expectation of insurance coverage will be satisfied if insured continues to maintain insurance).