The Choice-of-Law Dispute in Comprehensive Environmental Coverage Litigation: Has Help Arrived from the American Law Institute Complex Litigation Project?

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Choice of law—an enduring legal challenge—evolves into high drama when the choice of legal rules is effectively case dispositive. Standard contract language is construed contemporaneously in different jurisdictions and provides a useful prism through which to view choice-of-law analysis. Because parties can predict outcome based on choice of law, they creatively argue choice-of-law issues and thus teach us about the potentialities and limits of each mode of choice-of-law analysis.

“Standardized” contracts typically are intended by the drafter not only to define clearly the rights of the parties, but also to promote the related goals of efficiency, predictability, and uniformity, and, in an ideal world, the avoidance of litigation. The extent to which a standard form achieves these goals depends on numerous factors, including, for example, whether the form comprehensively addresses possible areas of dispute. If a key point affecting the rights of the parties is not addressed or is addressed ambiguously, then the form contract may produce confusion and uncertainty—fertile conditions for unwelcome litigation.

The standard-form, pre-printed, comprehensive general liability policy (“CGL policy”) used by the U.S. insurance industry over the past half century is perhaps the most well-known and widely used standard form contract. The

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† A standardized CGL form was first available for use on an industry-wide basis in 1940. 7A John A. Appleman, Insurance Law & Practice § 4491 (Walter F. Berdal ed., 1979). In addition to the goals noted above, standardization in the insurance context affords additional potential benefits, including, for example, the reduction of transaction costs by eliminating the need for policy by policy negotiation of policy language and pricing, the creation of the opportunity for universal risk assessment by pooling loss information, the promotion of consistency within large, multi-layered insurance programs, the creation of easily identifiable and commonly understood risks for reinsurance purposes, and the creation of the opportunity for meaningful state regulation (without standardized wording, regulators would be forced to assess the adequacy of insurer reserves by reviewing individual policies). See Thomas M. Reiter et al., The Pollution Exclusion Under Ohio Law: Staying the Course, 59 U. Cin. L. Rev. 1165, 1178 n.55 (1991). Thus, historically key CGL policy provisions have not been subject to negotiation but are included in all CGL policies regardless of the size and potential negotiating leverage of an individual policyholder. See, e.g., CPS Chem. Co. v. Continental Ins. Co., 536 A.2d 311, 318 (N.J. Super. App. Div. 1988) (noting the uniformity of standardized policy wording and holding that the rule of contra proferentum—that ambiguities in policy language be construed against the insurer as drafter of the policy language—is “no less applicable merely because the insured is itself a corporate giant. The critical fact remains that the
The CGL form was drafted and periodically revised by the insurance industry through drafting committees of national rating bureaus and insurer service organizations such as the Insurance Services Office ("ISO") and its predecessors.2

The standardization of CGL policy language certainly has not eliminated coverage litigation, nor could it ever have been reasonably expected to do so. Many coverage disputes involve disagreements over how standard policy language should be applied to particular factual situations. Since variations on factual scenarios probably will never be exhausted, the standardization of policy language could not eliminate this aspect of coverage litigation, no matter how comprehensively the form addressed potential areas of dispute.

The frequency of another aspect of coverage litigation, however, could conceivably be affected by a comprehensive and unambiguous standard-form policy. Some coverage litigation concerns fundamental disagreement over the manner in which the standard policy language is to be interpreted generally—without regard necessarily to a particular fact pattern. For example, the dispute between policyholders and insurers concerning coverage for environmental property damage under historical CGL policy forms involves threshold interpretive disputes. For a variety of reasons, most insurers contend that the CGL policy form does not cover claims for environmental cleanup costs.3 One might reasonably expect that once such interpretive disputes4 were resolved in the courts, it would not be necessary to litigate the same issues over and over again.

Unfortunately, court decisions apparently resolving the disputed interpretive issues in the environmental coverage context have not eliminated or appreciably reduced environmental coverage litigation. Under our federal system of governance, questions of insurance policy construction are decided under state law, and, predictably, the manner in which states address the same interpretive

2. The development of the standardized CGL policy language has been described in numerous judicial decisions and commentaries. See, e.g., American Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F.2d 1162, 1189 (3d Cir. 1977), rev’d, 970 F.2d 1267 (1992) (also discussing the lack of deviation from standard-form policy language even in policies covering large insureds).


4. Insurance companies have attempted to minimize such "interpretive" disputes in a variety of ways, including, for example, by expressly defining certain key terms used in the insuring agreement and exclusions. For example, the term "property damage" is a defined policy term. The courts also have employed certain fundamental rules for dealing with interpretive disputes. For instance, the rule of contra proferentmin, which applies in every United States jurisdiction, provides that ambiguous policy language is construed against the drafter of the policy, i.e., the insurer. See, e.g., 2 Couch on Insurance 2d § 15:84 (rev. ed. 1984).
issue can vary widely from state to state.\(^5\) Certainty and predictability cannot be achieved with respect to interpretive issues by looking to decisional law unless the question is answered, which state's decisional law controls? No express direction on this point is available by reference to the standard CGL policy form.\(^6\) The drafters' failure to include a choice-of-law provision is a key omission in the form resulting in contractual silence on an issue that dramatically affects the rights of the parties to the contract. Moreover, the omission renders virtually unattainable the goals of efficiency, predictability, and uniformity inherent in the use of standardized forms.

The consequences of this omission have been felt most acutely in the context of environmental insurance coverage litigation involving large policyholders with a nationwide presence and underlying liabilities arising in more than one state.

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5. Compare Just, 456 N.W.2d 570 (holding that the standard-form qualified pollution exclusion does not bar coverage if pollution damage was unexpected or unintended by the policyholder) with Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392 (Mich. 1991) (holding that the same standard provision bars coverage for all pollution damage that occurred gradually, even if the damage was unexpected and unintended).

6. Some standardized general liability policy forms developed outside of the United States—for example, by Underwriters at Lloyds of London and Certain London Market Companies—do contain provisions relating to the applicable law. For example, standard London Market policies include a provision entitled the “Service of Suit” clause which provides:

> It is agreed that in the event of the failure of Underwriters herein to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

(emphasis added). Some courts have found that this is a choice-of-law provision dictating that the insurer agrees to be bound by the law of the forum chosen by the insured. Capital Bank & Trust Co. v. Associated Int'l Ins. Co., 576 F. Supp. 1522, 1525 (M.D. La. 1984); M.J. Fishing Corp. v. John Plumer & Partners Ltd., No. 85-127-S(M) (S.D. Cal. Mar. 26, 1990) (transcript of decision), vacated due to settlement; Lexington Ins. Co. v. Union Am. Ins. Co., No. 85 Civ. 9181, slip op. (S.D.N.Y. May 28, 1987); GAF Corp. v. Certain Underwriters at Lloyds, No. C 620 997, slip op. (Cal. Super. Ct. Oct. 11, 1989). This view would appear to be consistent with the intent of the drafters of the clause. See, e.g., Letter from Duncan & Mount (counsel for Underwriters of Lloyds, London) (May 8, 1944) (introducing and quoting the above provision and characterizing it as a choice-of-law provision by stating that the old version “has been amended to provide specifically for the application of American law”).

Other courts have held that the “Service of Suit” clause merely affords the policyholder the right to select the forum and is not a substantive choice-of-law provision. Chesapeake Utils. Corp. v. American Home Assurance Co., 704 F. Supp. 551 (D. Del. 1989); Monsanto Co. v. Aetna Casualty & Sur. Co., No. 88C-JA-118, slip op. (Del. Super. Ct. Jan. 19, 1990); W.R. Grace & Co. v. Hartford Accident & Indem. Co., 555 N.E.2d 214 (Mass. 1990). These courts held that the “law and practice” portion of the clause was a consent to the application of the forum’s procedures (including choice-of-law practice) but not a substantive provision. This interpretation is unpersuasive. A construction of the language as excluding the application of the substantive law of the forum would render that language surplusage since the court always will apply its own procedural law and choice-of-law principles to all actions before it. Moreover, the provision plainly states that “all matters” arising under the contract will be governed by the forum court’s law.
As described below, the choice-of-law issue is of crucial, potentially dispositive, importance in these cases. The far-flung features of so-called “comprehensive” coverage cases7 and the important public policy considerations these cases involve—derived both from the concerned states’ interest in the underlying environmental liabilities and in the contractual issues—make this genre of litigation particularly complex and the choice-of-law questions especially difficult.

Neither the traditional choice-of-law rules8 nor the still emerging modern approaches to conflict questions9 appear to provide a wholly satisfactory analytical framework for addressing the conflict issues in the environmental coverage context.10 The American Law Institute, in its recent Complex

7. A description of “comprehensive” environmental coverage litigation generally is set forth infra at text accompanying notes 11 to 31.

8. The traditional manner of addressing conflict-of-law issues in contract cases involved a straightforward application of the lex loci contractus rule, i.e., the law of the state in which the contract at issue was made governs. Restatement of Conflict of Laws § 311 (1934) [hereinafter the First Restatement]. More specifically, the First Restatement provided that the interpretation of contracts is to be accomplished pursuant to the law of the state in which the contract was made while issues concerning the performance of the contract were to be governed by the law of the state in which performance was to occur. Id. §§ 311, 332, 358.

The traditional analogue to this rule in tort cases was lex loci delectus, providing that the law of the state in which the underlying tort occurred should control. Id. § 378. In the event that conduct in one state resulted in injury in another state, the First Restatement provided that the place of the wrong should be considered the place where the last event necessary to make the actor liable occurred. Id. § 377.

9. Over the years, numerous alternatives to the traditional lex loci contractus and lex loci delectus rules have emerged. Most prominently, the American Law Institute adopted the “most significant relationship test” in the Restatement (Second) of Conflict of Laws (1971) [hereinafter Second Restatement]. This test requires that a court apply the law of the state with the most significant relationship to the parties and issues, taking into consideration various principles such as (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result; and, (g) ease in the determination and application of the law to be applied. Id. § 6. These general principles are to be considered in light of more specific factors depending on the appropriate context. Id. §§ 188, 193 (concerning insurance contracts), § 145 (concerning torts generally). For examples of the purported application of the most significant relationship test in the insurance context, see Calvert Fire Ins. Co. v. Unigard Mut. Ins. Co., 526 F. Supp. 623 (D. Neb. 1980); Gilbert Spruance Co. v. Pennsylvania Mfrs. Ass’n Ins. Co., 629 A.2d 885 (N.J. 1993).

Some jurisdictions, including California and New York, have adopted a so-called “governmental interest” approach to choice-of-law issues. See, e.g., Offshore Rental Co. v. Continental Oil Co., 583 P.2d 721 (Cal. 1978); Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 684 (N.Y. 1985). Under this approach, the court first must determine on an issue-by-issue basis whether there is a conflict between the potentially applicable state laws. If so, the court must determine whether each state has a real interest in having its law applied. Finally, if such a true conflict exists, the court should apply the law of the state whose interests would be more impaired if its law were not applied.

10. Rigid application of the lex loci rules can be unsatisfactory in the environmental coverage context for all of the same reasons they are sometimes considered unsatisfactory in other contexts.
Litigation Project ("the Project"), proposes some approaches to choice-of-law problems in complex litigation generally, all of which are designed to enhance efficiency, predictability, and certainty, and some of which may be transferable to complex environmental coverage litigation.

This article will describe the unique features of comprehensive environmental coverage actions and the treatment of the conflicts issue in this area to date. Next, the article will survey the Project's choice-of-law proposals and consider the potential applicability of the proposals to comprehensive environmental coverage actions. Finally, this article will analyze the importance to the choice-of-law question of the forum state's interest in complex environmental coverage actions, and the impact on the issue of the insurers' failure to include a choice-of-law provision in the standard form policy.

I. COMPREHENSIVE ENVIRONMENTAL COVERAGE LITIGATION GENERALLY

By the mid-1980s, many corporate policyholders, particularly in the manufacturing community, were beginning to experience the financial implications of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") and its state progeny. As enforced by the U.S. Environmental Protection Agency ("EPA") and applied by the courts, CERCLA imposed liability for environmental cleanup costs on a strict, joint and several, and retroactive basis. The number of affected sites and the...
aggregate amount of these liabilities has increased steadily, and estimates for industry's total cleanup bill have ranged from $150 billion to over $700 billion. This cleanup bill, whatever it turns out to be, may ultimately represent only a fraction of the cost to industry associated with the contaminated sites. For example, third-party claims alleging bodily injury or property damage arising out of the contamination could add substantially to the final tab. Because of the strict liability nature of CERCLA, many of these liabilities are imposed without regard to fault and are based on waste disposal activities that met or exceeded laws and regulations in effect when they occurred.

Historically, the manufacturing community absorbed the risk of claims alleging bodily injury and property damage through the insurance mechanism, primarily the standard-form CGL policy. The CGL policy was drafted and marketed by the insurance industry as a wholesale externalization of risk of third-party claims alleging bodily injury and property damage. Rather than covering only specific named perils or casualties, the CGL policy was designed to cover the policyholder with respect to all forms of accidental bodily injury or property damage, unless specifically and expressly excluded by the policy.

Prior to 1986, assuming an otherwise covered claim, the standard CGL policy virtually always was "triggered"—obligated to respond—based on when the underlying property damage or bodily injury occurred. Accordingly, since the pollution damage triggering CERCLA liabilities often occurred on a continuing basis starting decades ago, corporate policyholders naturally turned to their historical CGL insurers for defense and indemnity coverage.

In some cases, insurers have agreed to cover their policyholders for environmental liabilities imposed upon their insureds. Much more frequently, however, insurers have refused to honor pollution claims on the grounds that such claims simply are not covered on a threshold level. A variety of defenses to coverage emerged, including, for example, arguments that cleanup costs are not "damages" covered by the CGL policy; the EPA's initiation of an

Congress' Office of Technology estimated 10,000. Reiter et al., supra note 1, at 1170-71.

16. Id. at 1171 n.30.
17. Id.
19. Appleman, supra note 1, §§ 4491.01, 4492.
20. Starting in 1986, so-called "claims-made" general liability policies were offered by the insurance industry on a standard, ISO-produced form. These policies were "triggered" by reference to when the "claim" against the policyholder was first made, rather than by when the underlying injury occurred. Thus, generally speaking, a claims-made policy would respond only if a covered "claim" was made against the insured during the policy period. The pre-1986 CGL policy forms responded if the alleged property damage or bodily injury occurred during the policy period, without regard to when the "claim" was made.
21. The standard CGL policy obligates the insurer to indemnify its insured for amounts the policyholder becomes legally obligated to pay "as damages" because of "bodily injury" or "property
administrative proceeding under CERCLA is not a "suit" requiring a defense under the CGL policy; a qualified "pollution exclusion" inserted in standard CGL policies starting in 1970 bars coverage for virtually all pollution damage that did not occur in an abrupt accident, i.e., an explosion or the like; and

damage" caused by a covered "occurrence." Many insurers have adopted the argument that government-mandated cleanup costs are not "damages" because such costs are incurred by the policyholder in response to claims for "equitable," as opposed to "legal," relief. According to these insurers, the term "damages" is a limitation of coverage that provides that the insurer is obligated to respond only if the claim against the policyholder is for money damages and is not akin to a request for injunctive relief. The vast majority of state supreme courts that have addressed this issue has rejected the insurer position. See AIU Ins. Co. v. Superior Court (FMC Corp.), 799 P.2d 1253 (Cal. 1990); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1214-16 (Ill. 1992); A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am., 475 N.W.2d 607 (Iowa 1991); Bausch & Lomb Inc. v. Utica Mut. Ins. Co., 625 A.2d 1021 (Md. App. 1993); Hazen Paper Co. v. United States Fidelity & Guar. Co., 555 N.E.2d 576, 583 (Mass. 1990); Minnesota Mining & Mfg. Co. v. Travelers Indem. Co., 457 N.W.2d 175, 179-84 (Minn. 1990); Cookley v. Maine Bonding & Casualty Co., 618 A.2d 777, 782-85 (N.H. 1992); Morton Int’l Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831 (N.J. 1993); C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng’g Co., 388 S.E.2d 557, 568-69 (N.C. 1990); Boeing Co. v. Aetna Casualty & Sur. Co., 784 P.2d 507, 515-16 (Wash. 1990); Compass Ins. Co. v. Cravens, Dargent & Co., 748 P.2d 724, 729-30 (Wyo. 1988). The one contrary state court of last resort is the Supreme Judicial Court of Maine. See Lido Co. of New England v. Fireman’s Fund Ins. Co., 574 A.2d 299 (Me. 1990); Patrons Oxford Mut. Ins. Co. v. Marois, 573 A.2d 16 (Me. 1990).

22. The standard CGL policy form obligates the insurer to defend the policyholder against "suits" alleging liability within the coverage of the policy. The courts have long held that the duty to defend is activated if the underlying suit alleges any facts that may potentially bring the claim within the coverage of the policy. Ohio Casualty Ins. Co. v. Flanugin, 210 A.2d 221 (N.J. 1965); Grand River Lime Co. v. Ohio Casualty Ins. Co., 289 N.E.2d 360 (Ohio Ct. App. 1972); Employers’ Fire Ins. Co. v. Beals, 240 A.2d 397, 402 (R.I. 1968). Under CERCLA and related state statutory schemes, the government’s claim and the administrative record typically begin not with a formal complaint filed in a court of law, but with a "potentially responsible party" letter ("prp letter") or similar administrative action. Although policyholders facing environmental liabilities typically must commence their defense upon receipt of such a prp letter, many insurers argue that such claims are not "suits," and therefore there is no duty to defend such a claim under the CGL policy. Most courts have rejected the insurer position. See, e.g., Aetna Casualty & Sur. Co. v. Pintlar Corp., 948 F.2d 1507 (9th Cir. 1991); Outboard Marine, 607 N.E.2d 1204; A.Y. McDonald Indus., 475 N.W.2d 607; Hazen Paper, 555 N.E.2d 576; C.D. Spangler Constr., 388 S.E.2d 557. But see Ray Indus., Inc. v. Liberty Mut. Ins. Co., 974 F.2d 754 (6th Cir. 1992); Becker Metals Corp. v. Transportation Ins. Co., 802 F. Supp. 235 (E.D. Mo. 1992).

23. From 1970 through 1985, the standard form CGL policy included a qualified pollution exclusion that provided:

This insurance does not apply to:

- bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalies, toxic chemicals, liquids or gasses, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Insurers contend that this provision precludes all coverage for claims arising out of pollution damage unless the discharge of pollutants was unexpected and temporally abrupt. Policyholders, relying on, inter alia, (1) the rule that ambiguous policy language must be construed in favor of the insured, (2)
continual pollution damage should be deemed to have occurred only when the property damage becomes "manifest," typically after a so-called absolute pollution exclusion began appearing in the standard CGL policy form in 1986. Accompanying these threshold legal disputes are defenses based on the particular facts of the case, including, for example, the intentionality of the property damage. The result of these disputes has been an explosion of insurance coverage litigation. The response of the courts to the insurers' defenses to environmental coverage claims has been mixed. Some jurisdictions have emerged as hospitable forums for policyholders seeking to enforce their policies; other jurisdictions favor the insurers' positions. More typically, the individual jurisdictions have not lined up uniformly on one side or the other, but have reached pro-policyholder results on some key issues and pro-insurer results on others.

The case law existing prior to 1970 interpreting the term "sudden" to mean essentially "unexpected" in the insurance context, (3) dictionary definitions defining the term "sudden" as simply "unexpected," (4) the documented drafting history of the provision, and (5) the insurance industry's 1970 representations to state insurance commissioners that the provision only clarifies that intentional pollution is not covered, argue that the qualified pollution exclusion has no applicability to unintentional pollution damage. The case law addressing the issue is split. Compare Morton Int'l, 629 A.2d 831; Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990); Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W. Va. 1992); Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686 (Ga. 1989); Outboard Marine, 607 N.E.2d 1204 (adopting policyholder position), with Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392 (Mich. 1991); Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374 (N.C. 1986) (adopting insurer position).

24. The standard CGL policies in effect prior to 1986 responded only if covered property damage or bodily injury resulted "during the policy period." In cases involving pollution damage that occurred over several years and spanning multiple policy periods, the question arises as to when the property damage happened. Some insurers take the position that property damage happens in this context only when it is "discovered" or becomes "manifest." Others argue that property damage results when the insured property was directly exposed to the alleged pollutant or, in the case of a landfill, when the policyholder sent waste to the landfill. Not surprisingly, the insurer positions typically are designed to limit the coverage responsibilities to as few policies as possible. Policyholders typically argue that in the case of continuing, gradual property damage, all policies on the risk from the date of initial exposure to discovery of the damage are triggered. The courts have not addressed the issue in a uniform way. Compare New Castle County v. Continental Casualty Co., 725 F. Supp. 800, 809-13 (D. Del. 1989) (adopting a pro-policyholder position) with Mraz v. Canadian Univ. Ins. Co., 804 F.2d 1325 (4th Cir. 1986) (adopting a form of discovery trigger).

25. Over the years, the standard-form CGL policy has provided that it covers only injuries that were unexpected and unintended by the insured. In the environmental coverage context, insurers often argue that the pollution damage at issue was caused intentionally and thus is not covered either under the terms of the policy or for public policy reasons. This fundamental fact issue is accompanied by a number of related legal issues, including for example, whether the policyholder's intent should be measured by an objective or subjective standard, which party bears the burden of proof, and whether the intent of lower-level employees may be imputed to the corporate policyholder. See generally City of Johnstown v. Bankers Standard Ins. Co., 877 F.2d 1146 (2d Cir. 1989); Morton Int'l, 629 A.2d 831; Shell Oil Co. v. Winterthur Swiss Ins. Co., 15 Cal. Rptr. 2d 815, 840-42 (Cal. App. 1st Dist. 1993).
The patchwork of state law that has evolved over the past decade or so has raised dramatically the profile of the choice-of-law issue in environmental coverage disputes. The resolution of this issue can be dispositive of whether a claim is covered, or, at a minimum, can substantially affect the value of the claim.

In relatively localized environmental coverage actions, the choice-of-law issue can be straightforward. For example, there is no difficult choice-of-law issue when the case involves a policyholder located in one state with a single environmental liability arising in the same state, and the policyholder is seeking coverage in that state's court under a single insurance policy clearly "made" in the policyholder's state and issued by an insurer based across town through the local insurance agency. This is rarely the case, however, in complex, comprehensive environmental coverage cases.26

Large corporate policyholders often have numerous environmental liabilities arising out of distinct operations located in many different states across the country. These multi-national policyholders may have had dozens of plant locations across the country that are now subject to cleanup activity. Moreover, these plants may have shipped waste to dozens of landfills across the country that are now themselves the subject of CERCLA attention. Such large policyholders typically insured themselves over the years with layers of CGL protection, often involving a primary, or initial layer of insurance issued by one insurer, and up to a dozen additional layers of insurance providing excess coverage through numerous different insurers in each layer. The insurer-participants in each layer and the brokers involved in placing the policies typically change many times over the years. It is not unusual for a comprehensive coverage action to involve well over one hundred different insurance entities.27

A common thread typically intertwining the entire insurance program is the standard-form CGL policy issued by each of the defendant-insurers and their collective position that this form does not apply to environmental property


damage claims.\textsuperscript{28} In view of this fundamental threshold dispute, which applies at the initial interpretive level without regard to the particular facts and circumstances at each site, many large policyholders have sought a declaration of their rights under their insurance program with respect to the entire array of environmental claims pending against them in a "comprehensive" environmental coverage action. Some insurers have argued that separate lawsuits should be initiated on a state-by-state basis with each case involving only coverage claims for those sites located in the forum state and the coverage issues at each site being resolved in accordance with the separate law of each forum state.\textsuperscript{29} Most courts correctly have rejected this fractionalized approach and its attendant invitation to piecemeal litigation and inconsistent results,\textsuperscript{30} and comprehensive environmental coverage actions have become relatively common.\textsuperscript{31}

II. EMERGING CHOICE OF LAW APPROACHES IN COMPREHENSIVE ENVIRONMENTAL COVERAGE ACTIONS

The choice-of-law challenges in comprehensive environmental coverage actions are apparent. The courts that have struggled with the issue in the context of comprehensive coverage actions have considered differing policy factors in their analysis. For example, some courts have considered the overriding state interest to be the interest in deciding financial responsibility for clean-up of contaminated sites located in the state.\textsuperscript{32} If applied to a comprehensive

\textsuperscript{28} For a description of certain of the interpretive-level defenses on which the insurers typically rely, see supra notes 21-24.
\textsuperscript{29} Kalis & Reiter, supra note 26, at 398-99 (describing fractionalized approach to resolving environmental insurance coverage disputes supported by certain insurers).

This kind of fractionalization is a most potent weapon in the arsenal of the litigant whose primary and subversive aim is to impose both upon the judicial system and the adversary by endlessly delaying the day upon which the entire controversy will finally come to an end and the respective rights of the litigants resolved—clearly, consistently and finally. It is only the single comprehensive action, designed to adjudicate the entire controversy between litigants, which can protect both the court and the parties from that calculated imposition. 559 A.2d at 439. See also Kalis & Reiter, supra note 26, at 398-99 (further describing flaws inherent in fractionalized approach).
\textsuperscript{31} See supra note 27.
coverage action involving sites in more than one state, of course, the mechanical application of a site-by-site approach could be inefficient. 33 Other courts have focused on the contract nature of the cases and have considered the location of the underlying claims to be a less important factor. 34 When the contracts are made in numerous states, as is often the case in comprehensive actions, this approach may also be unworkable. The only certainty is that no consensus on the issue has emerged, and the goals of efficiency, predictability, and uniformity remain elusive.

The courts in New Jersey perhaps have had the most opportunity to develop a coherent choice-of-law approach in the context of environmental coverage actions. Even in New Jersey, however, the rules are far from certain, and their application to comprehensive actions remains in doubt.

New Jersey’s first statement on the issue came in the context of Westinghouse Electric Corporation’s comprehensive coverage action. Westinghouse filed a complaint seeking, inter alia, a declaratory judgment that it had insurance coverage under CGL policies for certain environmental and toxic tort liabilities, including over eighty sites located in over twenty different states. 35 The trial court, concerned that the law of each state in which a site was located would

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May 9, 1989).


34. See, e.g., Olin Corp. v. Insurance Co. of N. Am., 743 F. Supp. 1044, 1048-49 (S.D.N.Y. 1990); Liberty Mut. Ins. Co. v. Triangle Indus., Inc., 390 S.E.2d 562 (W. Va. 1990). In Triangle Industries, the West Virginia Supreme Court held that New Jersey law must be applied to an environmental coverage action in which a New Jersey based policyholder sought coverage for environmental liabilities arising out of a landfill located in Ohio. The waste at issue was generated at the policyholder’s facility in West Virginia. The court determined that the law of the place of formation of the contract should govern, unless another state has a more significant relationship to the transaction and the parties, or the law of the other state is contrary to the public policy of West Virginia. 390 S.E.2d at 567. The court held that the law of New Jersey, where the contracts were made, governed and that although the underlying liability arose elsewhere, no other state had a more significant relationship to the transaction and parties. Id.

It is clear that West Virginia takes seriously the public policy exception to its basic choice-of-law rule. In a subsequent environmental insurance coverage action, Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W. Va. 1992), the court refused to apply Pennsylvania law to the interpretation of the qualified pollution exclusion issue because Pennsylvania law, which has adopted the insurer position on the intermediate appellate court level, would offend West Virginia public policy. The public policy basis of the court’s decision was based on representations made by the insurance industry to the West Virginia insurance commissioner when the insurers sought approval of the provision without a reduction in premium rates in 1970. The court recounted the written record compiled in 1970 by the commissioner and the insurance industry’s representations that the qualified pollution exclusion was intended merely to clarify existing coverage and that coverage was continued for “accidental” pollution. Because the commissioner’s approval of the provision was expressly based on these representations, the supreme court held that it would violate public policy for West Virginia courts to enforce the pollution exclusion pursuant to a foreign state’s law that is inconsistent with the insurers’ “studied, unambiguous, official, affirmative representations to the state, its subdivisions, or its regulatory bodies.” Id. at 497.

have to be applied to coverage issues applicable to each site (the "law-of-the-site approach") and that this task would prove unwieldy and unworkable, dismissed all non-New Jersey sites and claimants on *forum non conveniens* grounds. On appeal, the New Jersey Superior Court reversed the trial court's decision, holding that the actions should proceed comprehensively. In so doing, the court expressly rejected the law-of-the-site approach, stating:

In our view, the notion that the insured's rights under a single policy vary from state to state depending on the state in which the claim invoking the coverage arose contradicts not only the reasonable expectations of the parties but also the common understanding of the commercial community. It also seems to us anomalous, in conflict-of-law terms, to suggest that more than one body of law will apply to a single contract. The theme running through the federal mega-coverage cases is the assumption not only that state law will determine whose insurance law will govern the coverage dispute but also that it will be a single state's law, chosen in accordance with the applicable conflict principles of the forum.

The New Jersey Superior Court Appellate Division next addressed the choice-of-law issue in an environmental insurance coverage action in *Johnson Matthey Inc. v. Pennsylvania Manufacturers' Association Insurance Co.* In *Johnson Matthey*, the plaintiff sought a declaration of coverage for its liability arising out of its generation and deposit of hazardous waste at certain sites in New Jersey. The trial court ruled that the law of Pennsylvania, the place of contracting, applied. The appellate division reversed. First, the appellate division stated that the *lex loci contractus* test is inapplicable when another state has the "most significant relationship" to the parties and the transaction at issue under the principles set forth in the Restatement (Second) of Conflict of Laws sections 6 and 188 [hereinafter "Second Restatement"]). Second, under the Second Restatement section 193, dealing specifically with casualty insurance policies, the court held that it would apply the law of the state that the parties understood to be the principal location of the insured risk, unless, under the factors listed in Second Restatement section 6, another state has a more significant relationship to the parties and the transaction. Based on these rules, the court adopted a law-of-the-site approach, holding that New Jersey law would be applied to interpret insurance policies purchased to cover New Jersey risks. The court acknowl-

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36. *Id.* at 1174.
38. *Id.* at 442.
40. *Id.* at 373.
edged that its decision was "not in harmony with Westinghouse," but stated that, since, unlike Westinghouse, the insured risks in the case were all located in one state, the two cases were factually different. Nevertheless, the court noted that application of the law-of-the-site approach to an action involving sites in more than one state could result in the potential application of numerous state's law in the same action to the same insurance contracts.

The appellate division again applied a law-of-the-site approach in *Gilbert Spruance Co. v. Pennsylvania Manufacturers' Association Insurance Co.* While the policyholder in *Gilbert Spruance* generated the hazardous waste at issue in Pennsylvania, the sites at issue all were located in New Jersey. Hence, as in *Johnson Matthey*, the environmental sites at issue in *Gilbert Spruance* were all located in one state.

The New Jersey Supreme Court granted certification and affirmed the appellate division's decision in *Gilbert Spruance*. In its opinion, the supreme court appeared to reject the uniform-contract-interpretation approach in favor of a law-of-the-site approach. Turning to the Second Restatement section 193 to determine choice of law in cases involving casualty insurance policies, such as CGL policies, the court held that it should apply the law of the state that the parties understood to be the principal location of the insured risk. The court acknowledged that the importance of the location of the insured risk decreases in cases in which the insured's activities are carried out in several different states. In these cases, the court noted, the law of the state with the most significant relationship to the case under the principles stated in Second Restatement section 6 should be applied. In this case, the court determined that these factors pointed toward application of the law of New Jersey—where the landfills were located—even though the waste was generated at the policyholder's facilities in Pennsylvania. Finally, the supreme court distinguished *Westinghouse* as a case that involved sites in several states compared to the one site in one state at issue in *Gilbert Spruance*.

On the same day it decided *Gilbert Spruance*, the New Jersey Supreme Court held in another case that it would violate New Jersey public policy to

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41. Id. at 373-74.
42. Id. The court noted that the uniform interpretation of insurance contracts was not a controlling consideration because it did not have "sufficient value to overcome the significant governmental interest of the various jurisdictions where the insured risks are located, or where the insured entity predictably is going to incur legal liabilities." Id. at 371. The court's holding ignores the benefits of interpreting insurance policy language uniformly and, in so doing, partially eviscerates many of the basic goals of a standardized policy. See supra notes 1, 30, 38.
45. Id. at 888-90.
46. Id. at 891.
47. Id. at 891-92.
48. Id. at 890.
construe the qualified pollution exclusion inconsistently with the representations that the insurance industry made to the New Jersey state commissioners at the time the provision was introduced. This holding will affect the choice-of-law determination in cases in which a party seeks to apply the law of a state that has construed the qualified pollution exclusion inconsistently with the insurance industry's representations, i.e., inconsistently with New Jersey public policy as expressed in Morton.

As noted previously, the West Virginia Supreme Court has already held in the Joy Technologies case that the public policy considerations described in Morton require that West Virginia courts refuse to apply non-forum law to the qualified pollution exclusion issue if the foreign law adopts the current insurer position. Similarly, in American Telephone & Telegraph Co. v. Aetna Casualty & Surety Co., the New Jersey Superior Court, Law Division, refused to apply Pennsylvania law to the pollution exclusion issue arising out of a

49. See supra note 23.
50. Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831 (N.J. 1993). In Morton, the supreme court detailed the representations made to state insurance commissioners in 1970, when the qualified pollution exclusion was first proposed as a mandatory endorsement to standard-form CGL policies. The court noted that the insurance industry represented that the provision merely "clarified" existing coverage under the form and that pollution coverage remained intact for "accidents." Based on these representations, the provision was approved by state regulators without consideration of a standard premium adjustment. The supreme court held that it would violate New Jersey public policy to now allow the same insurance industry to argue that the qualified pollution exclusion (approved by regulators on the basis of the representations noted above) is actually a sweeping bar of all coverage for pollution damage that does not occur instantaneously.

52. See supra note 34.
54. Pennsylvania law at the intermediate appellate level favors the insurers on the qualified
Pennsylvania site because of the public policy announced by the New Jersey Supreme Court in Morton.

Accordingly, the choice-of-law issue in New Jersey does not appear to be wholly settled with respect to comprehensive environmental coverage actions. The New Jersey appellate courts have recognized the varied state interests implicated by such actions, but have not yet directly applied them to comprehensive environmental coverage actions involving sites in multiple states.

III. THE AMERICAN LAW INSTITUTE PROJECT

As demonstrated above, no consensus has emerged among the nation's courts concerning the resolution of the choice-of-law issue in comprehensive environmental insurance coverage actions. The Project's choice-of-law proposals are intended to be applicable to complex litigation generally and specifically reference comprehensive coverage litigation as an example of such litigation. Specifically, the ALI has proposed a federal code to govern the choice of law in complex cases that are consolidated in federal court. The potential applicability of the Project to comprehensive environmental insurance coverage actions is considered below. First, however, it is necessary to overview the basics of the ALI proposal.

The Project consists mainly of two separate guidelines for the determination of choice of law— one approach for handling "mass tort" cases and the second for "mass contract" cases. The stated goal of the Project is to provide a procedural solution to the choice-of-law determination that fosters the fair, just, and efficient resolution of complex cases. The Proposed Final Draft explicitly adopts "the objective of applying...a single state's law to all similar...claims being asserted against a defendant." As such, the proposals are pollution exclusion. See Lower Paxton Township v. United States Fidelity & Guar. Co., 557 A.2d 393 (Pa. Super. Ct. 1987), appeal denied, 567 A.2d 653 (Pa. 1989). Although the Pennsylvania Superior Court has to date adopted the insurer's current litigation position, it has not yet considered the public policy and regulatory estoppel issues addressed in Morton and Joy Technologies.


56. Id. §§ 6.01-6.03. In the other sections of the Proposed Final Draft concerning choice of law in complex litigation, the ALI proposes that, unless an exception applies, the court should choose the law of the state chosen under the mass tort/mass contract guidelines for the law governing the statute of limitations and the measure of monetary relief other than punitive damages. Id. §§ 6.04-6.05. The ALI further proposes a guideline for the choice of law governing the applicability and measure of punitive damages, id. § 6.06, a procedural guideline regarding the court's designation of the governing law and appeal from that decision, id. § 6.07, and a guideline for the choice of law in actions based on federal law when an intercircuit conflict exists, id. § 6.08.

57. Id. Ch. 6, Intro. Note, at 375.

58. See, e.g., id. § 6.01(a); see also id. § 6.03(a). This statement of objective appears to be a repudiation of the law-of-the-site approach whenever possible in the context of multistate comprehensive environmental insurance coverage actions.
intended to aid in the prioritization of state interests implicated by alleged tortious conduct and contract disputes. Because comprehensive environmental insurance coverage cases implicate state interests arising out of the alleged underlying torts, as well as out of the insurance policies as contracts, the proposed rules for both tort and contract cases may provide guidance and are considered below.

A. Mass Tort Cases

Under the Proposed Final Draft’s mass tort choice-of-law analysis, the court must first determine which states have a policy that would be furthered by the application of their law. This determination is based on three factors: (1) the place or places of injury; (2) the place or places of the conduct causing the injury; and (3) the primary places of business or habitual residences of the plaintiffs and defendants. These three fact-specific factors must then be evaluated in light of their importance to a given state’s regulatory objectives or policies.

While the first two factors will be easily applied in many cases, the proposal notes that a party’s primary place of business should not necessarily be considered the same as that party’s state of incorporation or the state of the party’s corporate headquarters. Instead, it describes a party’s primary place of business as the place of business that is most directly linked with the events involved in the litigation. Thus, under this approach, the primary place of business of a party may vary depending on the nature of the litigation.

If, under the above analysis, only one state has a policy that would be furthered by the application of its law, then that state’s law governs. In complex mass tort cases, however, more than one state will often have a policy that would be furthered by the application of its laws; hence, some mechanism must exist for choosing among these competing states. To make this choice, the AIL first proposes that “[i]f the place of injury and the place of the conduct causing the injury are in the same state, that state’s law governs.”

The state where the injury and conduct occurred has several potentially important interests at stake in the litigation. For instance, as the place where the injury occurred, the state has interests in compensating persons harmed there and in regulating all conduct that causes injury in the state. In addition, as the
place where the conduct causing the injury occurred, the state has interests in regulating the parties' conduct and in imposing liability on parties who engage in tortious conduct.\textsuperscript{67} According to the ALI, these interests outweigh whatever interest the states that are the primary place of business or habitual residences of the parties may have; consequently, the law of the state where the injury and the conduct causing that injury occurred should be applied.\textsuperscript{68}

If no state is both the place of injury and the place of the conduct causing that injury, then the ALI proposes that, if all of the plaintiffs and at least one defendant habitually reside or have their primary places of business in the same state, then the laws of that state should govern the plaintiffs' claims against that defendant.\textsuperscript{69} The rationale behind this rule, according to the ALI, is that it enables the state to give effect to tort policies regarding the allocation of loss among the parties.\textsuperscript{70} Moreover, the state in which both parties are located has an important interest in regulating the relationships among its citizens.\textsuperscript{71} Therefore, the law of this "common residence" state should be applied because that state has the most significant relation to the litigation in question.\textsuperscript{72}

Similarly, if the above rules do not apply, and the place of injury is a state in which all plaintiffs habitually reside or have their primary places of business, then the law of that state governs the case.\textsuperscript{73} As in the above rule, the plaintiffs "shall be considered as sharing a common habitual residence or primary place of business if they are located in states whose laws are not in material conflict."\textsuperscript{74} Hence, if the plaintiffs are injured in Ohio and all of the plaintiffs reside either in Ohio or in states with laws that do not materially conflict with Ohio's, then Ohio law will govern because of the importance of that state's interests in both compensating victims who reside in the state and regulating conduct that directly injures its residents.\textsuperscript{75}

Finally, if none of the above rules apply, the ALI proposes that the court choose the law of the state where the conduct causing the injury occurred.\textsuperscript{76} This state has an interest in regulating the defendant's conduct and potential tort liability.\textsuperscript{77} While other states, identified under Section 6.01(b), would also have interests in having their laws applied, "relying on the place of conduct appears fair and consistent with the objectives of achieving the uniform and consistent treatment

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{67} Id.
\item \textsuperscript{68} See id.
\item \textsuperscript{69} Id. § 6.01(c)(2). Note that states whose laws are not in material conflict are considered to be the same state for purposes of this section of the proposal. Id.
\item \textsuperscript{70} Id. § 6.01, cmt. a, at 403.
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Id.
\item \textsuperscript{73} Id. § 6.01(c)(3).
\item \textsuperscript{74} Id.
\item \textsuperscript{75} See id. § 6.01, cmt. a, at 403.
\item \textsuperscript{76} Id. § 6.01(c)(4).
\item \textsuperscript{77} Id. § 6.01, cmt. a, at 405.
\end{itemize}
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of claimants harmed by the defendant's conduct. If the defendant's conduct occurred in more than one state, the law of the state with the "most significant relationship to the occurrence" will be chosen. In other words, it is left to the court's discretion "to decide which conduct is most implicated in the events giving rise to the litigation in order to designate the governing law."

Thus, the Project sets forth a fairly mechanical approach to the selection of the governing state's law in mass tort cases. However, the ALI presents two further provisions in an attempt to mollify any harsh results that may be produced under this mechanical framework. First, the Proposed Final Draft states that, to avoid unfair surprise or arbitrary results in the choice-of-law determination, either the court may depart from the order of the rules described above, or it may consider the policies of states that the court has previously determined do not have policies that would be furthered by the application of their law. The ALI cautioned, however, that this provision was intended to provide a "safety valve" from arbitrary results and not an excuse to undermine the consistent application of the proposal's rules.

Second, the ALI allows the court to decide that it is inappropriate to apply a single state's law to all of the elements of the plaintiffs' claims against the defendant; in this event, the court may divide the actions into subgroups and apply different states' laws to the different subgroups. Similarly, the court can decide that only certain claims should be governed by the law chosen under the ALI mass tort framework, and that the other claims should be remanded back to the state court that transferred the case to the federal court, where the actions will be governed by the law chosen under that state's choice-of-law rules. According to the ALI, these powers are necessary to ensure that the objectives of special state policies are actually served by the application of the law chosen under the ALI rules. Moreover, these powers give the court discretion to avoid the outcome of the ALI's choice-of-law rules when the court determines that doing so is necessary to promote fairness or encourage the consolidation of the litigation.

**B. Mass Contract Cases**

Unlike tort cases, parties to contracts can agree beforehand, as evidenced by a provision in the contract, on what law will govern a dispute between the parties on that contract. If the parties have included a choice-of-law provision in their

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78. Id. § 6.01, cmt. a, at 405-06.
79. Id. § 6.01(c)(4).
80. Id. § 6.01, cmt. a, at 406.
81. Id. § 6.01(d).
82. Id. § 6.01, cmt. d, at 431.
83. Id. § 6.01(e).
84. Id.
85. Id. § 6.01, cmt. a, at 399.
86. Id.
contract, the Proposed Final Draft instructs the court to honor that provision, unless (1) the provision is invalid because of misrepresentation, duress, undue influence, or mistake; or (2) "the law chosen by the parties is in material conflict with fundamental regulatory objectives of the state law" that would be chosen under the ALI guidelines in the absence of any choice-of-law provision in the contract. By generally honoring the contracting parties' choice, the Proposed Final Draft is intended to promote predictability, facilitate the consolidated treatment of mass contract cases, and conform to the reasonable expectations of the parties.

In the absence of a contractual choice of law by the parties, the Proposed Final Draft first requires the court to identify the states that have a policy that would be furthered by the application of their law. In making this determination, the court is to consider four factors: "(1) the place or places of contracting; (2) the place or places of performance; (3) the location of the subject matter of the contract; and (4) the primary places of business or habitual residences of the plaintiffs and defendants." As under the mass tort framework, if only one state, as a result of that state's relation to the transaction or the parties, has a policy that would be furthered by the application of its laws, then that state's law should be chosen. However, in today's complex mass contract cases, more than one state will often have a regulatory interest in the litigation. To resolve the choice of law conflict between states with competing interests, the ALI chooses the law of the state in which the "common contracting party" has its primary place of business.

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87. Id. § 6.02(a)(1)-(2). If the choice-of-law provision is not honored by the court, the choice-of-law determination will be made under § 6.03 as if no provision were ever included in the contract. Id. § 6.02 cmt. a, at 446.
88. Id. § 6.02, cmt. a, at 445.
89. Id. § 6.03(b).
90. Id. § 6.03(b)(1)-(4). While admitting that the places of contracting and performance could be ambiguous depending on the circumstances, the ALI refuses to resolve the potential ambiguity, instead leaving the resolution of this problem to the courts. Id. § 6.03, cmt. a, at 462. Note also that the ALI's use here of the phrase "primary place of business" is identical to its use in the mass tort context. See, e.g., id. at 461 ("As is true when that term is used in a mass tort choice of law dispute . . . the court is expected to identify the place of business that is most directly or closely linked with the contracts at issue."); see also supra text accompanying note 4.
91. Id. § 6.03(c), cmt. a, at 460.
92. Id. § 6.03(c). An exception to this rule exists if the state law chosen "is in material conflict with the regulatory objectives of the state law in the place of performance or where the other contracting parties habitually reside." Id.
The ALI adopted this approach for two reasons. First, the state of the common contracting party's primary place of business has substantial interests in the litigation. By definition, the "primary place of business" is a state in which the common contracting party has substantial business contacts; moreover, the litigation may be directly related to that business activity. Second, in multistate contracts cases, the places of contracting and performance and the habitual residences of the other contracting parties will ordinarily be situated in several different states. Consequently, since the common contracting party's primary place of business is arguably the only remaining factor that could adequately identify the controlling state law, "the need to identify a single governing law suggests that reference to the law at the primary place of business is justified." Thus, the ALI approach attempts to identify the one state, and only the one state, that will consistently have a significant relationship to the parties and contracts at issue in the mass contract case.

An exception to the "primary place of business of the common contracting party" rule exists when the law chosen under that rule "is in material conflict with the regulatory objectives of the state law in the place of performance or where the other contracting parties habitually reside." For instance, the state of performance may have a law that specifically regulates performance under the type of contract at issue. If the law of the performance state imposes greater or lesser obligations than the law chosen under the ALI's general rule, then the laws are in conflict, and the exception to the rule should apply. If the exception applies, the court should apply the law of the performance state (or the law of the state where the other contracting parties habitually reside, if that is the law in conflict with the law chosen under the general rule) "to the contracts legitimately within [its] scope." 

Finally, like the ALI's approach to mass tort cases, the mass contract case guidelines provide that the court may divide the actions into subgroups if the application of a single state's laws to all of the claims asserted "would be inappropriate." Similarly, the court may remand claims or parties back to the state courts if it determines that they should not be governed by the law chosen under the ALI's mass contract choice-of-law framework. Little guidance is provided by the ALI for determining when such actions are appropriate; hence, these provisions allow the court to exercise its discretion in the hope that the courts will resolve the complex situations that do not fit well in the ALI framework in ways that are consistent with the overall goals of the Project.

93. Id. § 6.03, cmt. a, at 461.
94. Id.
95. Id. § 6.03(c).
96. Id. § 6.03, cmt. b, at 466.
97. Id. § 6.03(c).
98. Id. § 6.03(d).
99. Id.
IV. APPLICATION OF THE ALI PROJECT TO COMPREHENSIVE INSURANCE COVERAGE ACTIONS

With respect to many complex cases, the Project undoubtedly would bring some semblance of efficiency, predictability, and rationality to an area of law that often exhibits none of these features. The Project's overriding goals of efficiency and uniformity appear to provide considerable support for the rejection of a mechanical law-of-the-site approach in multistate comprehensive environmental coverage actions. Beyond this contribution, however, the Project may provide little or no consistent relief to the choice-of-law dilemma in comprehensive insurance coverage actions.

For instance, insurance policies differ from many of the contracts that would be in dispute under the ALI's mass contract guidelines because the key terms are not typically subject to negotiation, thus further diminishing a state's interest as the fortuitous "place of contracting." Similarly, the third-party liability insurance contracts involved in comprehensive environmental insurance coverage cases arguably implicate tort interests as much as contract interests. Hence, while the Project may be capable of resolving the choice-of-law problem in either mass tort or mass contract cases, it is not at all clear that it would tackle cases that involve both tort and contract interests.

To illustrate the potential applicability of the Project, we will attempt to apply the project's rules to the typical comprehensive insurance coverage case described above. Since insurance disputes are normally considered to be contractual disputes, we will first consider choice of law in a comprehensive insurance coverage case under the Proposed Final Draft's rules for comprehensive contract cases. Next, because insurance coverage cases of this type also implicate tort interests, we will consider the choice-of-law problem in comprehensive insurance coverage cases by applying the Proposed Final Draft's rules for mass tort cases.


First, under the ALI's mass contract approach, the initial question is whether the parties inserted a choice-of-law provision in the insurance contract, since, unless an exception applies, Section 6.02 of the Proposed Final Draft honors a choice-of-law provision included by the parties. Where, however, the insurers did not include a choice-of-law provision in the standard CGL policy, Section 6.02 will be inapplicable.100

100. But see supra note 6 (discussing "Service of Suit" clause contained in certain policies, especially policies issued by London Market insurers). The Service of Suit clause purports to allow the policyholder to choose the forum for coverage litigation, and, according to most policyholders, the law to be applied.
Assuming that no choice-of-law provision exists in the insurance contract, the Proposed Final Draft requires the court to determine first which states have a policy that would be furthered by the application of their law, based on analysis of the following: ‘‘(1) the place or places of contracting; (2) the place or places of performance; (3) the location of the subject matter of the contract; and (4) the primary places of business or habitual residences of the plaintiffs and defendants.’’

In comprehensive coverage cases, where numerous insurers have been named as defendants, the places of contracting and performance, assuming these can be determined, often are scattered throughout the country. Also, the location of the subject matter—arguably the waste sites in a comprehensive environmental insurance coverage case—will similarly be found in multiple states. Thus, when faced with a multistate contracts case, the first three factors will often point to several different states.

Similarly, despite its attempt to narrow the field of potentially interested states, the fourth factor—‘‘primary places of business . . . of the plaintiffs and defendants’’—will still include several states because of the numerous diverse parties typically involved in a comprehensive environmental insurance coverage action.

Therefore, the Proposed Final Draft’s four-factor analysis often will fail to narrow the list of states interested in applying their own law to the comprehensive insurance coverage case. Faced with a choice among several competing states’ laws, the ALI selects the law of the state in which the common contracting party has its primary place of business. An exception to this rule applies when the law chosen materially conflicts with the objectives of the state law of either the place of performance or the place where the other parties habitually reside.

Having entered into numerous insurance contracts with various insurance companies from whom it now seeks insurance coverage, the

102. The Proposed Final Draft acknowledges that the places of contracting and performance could be ambiguous depending on the circumstances. For instance, it is not clear whether the ‘‘place of contracting’’ refers ‘‘to the place of negotiation or the place of execution, and questions of how to apply the term when a contract is entered into by way of mail or telephone raise further issues.’’ Id. § 6.03, cmt. a, at 462. Nevertheless, the ALI declines to propose a resolution of those potential ambiguities, instead leaving the resolution of this problem to the courts. Id. The courts historically have not had much success with these issues, particularly as they would be applied to comprehensive environmental coverage actions. For example, in Armoek Indus., Inc. v. Employers Ins., 952 F.2d 756, 758-60 (3d Cir. 1991), and National Starch & Chem. Corp. v. Great Am. Ins. Cos., 743 F. Supp. 318, 325 (D.N.J. 1990), the courts determined that policies are ‘‘made’’ where they are ‘‘counter-signed’’ by the insurer. In a comprehensive action involving policies issued by defendants from numerous different states, the ‘‘place of contracting’’ factor could require application of dozens of states’ laws to the same action, thus defeating one of the main goals of the ALI proposals. See also Johnson Matthey Inc. v. Pennsylvania Mfrs. Ass’n Ins. Co., 593 A.2d 367, 372 (N.J. Super. Ct. App. Div. 1991) (noting difficulty of identifying place of contracting and lack of real significance of such a contact to the disputed issues in an environmental coverage action).
103. Proposed Final Draft, supra note 55, § 6.03(c). The public policy factors discussed supra at notes 32-54 likely would come into play at this point.
"common contracting party" in comprehensive insurance coverage cases will usually be the policyholder corporation. The policyholder may not have a single "primary place of business" under the ALI's definition, however, particularly if it is liable for sites scattered across numerous states, and its liability derives from divisions or subsidiary activity headquartered in multiple jurisdictions. Moreover, the "accident of corporate procedure or convenience" that is often the basis of a party's headquarters or state of incorporation will often give rise to an insignificant state interest compared to other states in which, for example, the sites are located or the conduct causing the underlying contamination occurred. Therefore, the Proposed Final Draft's main rule for resolving choice of law in mass contract cases will often fail to select a single state's law for use in comprehensive insurance coverage cases.

B. Choice of Law in Mass Insurance Coverage Cases Under the ALI's Mass Tort Approach

As noted above, the Project's proposed choice-of-law rules regarding mass tort cases may be relevant to comprehensive environmental coverage actions because of the important state interest in the remediation of the underlying sites giving rise to the insurance dispute. It appears that the ALI's proposed approach to mass tort cases also does not ensure that the choice-of-law issues in comprehensive insurance coverage actions will be determined consistently, predictably, and efficiently.

Like the ALI's proposal for mass contract cases, the rules governing mass tort cases first require the identification of states that have a policy that would be furthered by the application of their law. This identification is based on three factors: "(1) the place or places of injury; (2) the place or places of the conduct causing the injury; and (3) the primary places of business or habitual residences of the plaintiffs and defendants." Assuming that the "injury" is the environmental damage that led to the underlying liability, the places of injury in comprehensive insurance coverage cases will be, at a minimum, all of the states that contain an environmental site. Similarly, the places of the conduct causing that injury will include at least all of the states with sites, and also the states in which the conduct leading to the injury occurred. For example, a landfill located in Louisiana that is the subject of cleanup activity may have received waste from the policyholder's plants located in Mississippi and Alabama, because of decisions made at the division headquarters in Texas. Under these circumstances, it may be unclear whether the conduct causing the injury occurred in Texas, Louisiana, Alabama, Mississippi, or in each of these states. Finally, under the mass contract case rules, the primary places of business and habitual residences of the plaintiffs and defendants will be spread throughout numerous states and

105. Proposed Final Draft, supra note 55, § 6.01(b)(1)-(3).
may not give rise to compelling state interests. Therefore, the Proposed Final Draft’s three factors produce a long list of states with an interest in the application of their law to the insurance coverage litigation.

The Proposed Final Draft’s rules for choosing among these different states will often be insufficient to determine choice of law in comprehensive insurance coverage cases. For instance, the first rule proposes that “[i]f the place of injury and the place of the conduct causing the injury are in the same state, that state’s law governs.”106 In a comprehensive coverage action, however, the places of injury and the conduct causing those injuries may include at least every state that has an environmental site within it, and possibly the states where the waste was generated or relevant decisions were made. Accordingly, it is unlikely that this first rule will result in a predictable and efficient choice of law for the entire dispute.

Next, the ALI proposes that if all of the plaintiffs and at least one defendant habitually reside or have their primary places of business in the same state, then the laws of that state should govern the plaintiffs’ claims against that defendant.107 Once again, the primary places of business of a policyholder corporation with numerous environmental sites spread across several states should not be limited to a single state. Consequently, this rule also is either insufficient for the selection of a single state’s law or it is a proposal for the application of the law of the site—a proposal that would be inconsistent with the ALI’s overall goals of uniformity and efficiency.

Third, the ALI proposes that if “all of the plaintiffs habitually reside or have their primary places of business in the same state, and that state also is the place of injury, then that state’s law governs.”108 If, however, the primary places of business of the plaintiff and the places of injury include all of the states that contain an environmental site, then this rule fails to select a single state’s law to govern the case. Like the previous rules, any attempt at making this rule relevant would likely require an acceptance of the law-of-the-site approach and its attendant inefficiencies.

Finally, the Proposed Final Draft’s residual rule for mass tort cases proposes that the court choose the law of the state where the conduct causing the injury occurred; if the conduct occurred in more than one state, the law of the state with the “most significant relationship to the occurrence” should be chosen.109 Since comprehensive insurance coverage cases involve conduct occurring in more than one state, the court must decide which state has the “most significant relationship to the occurrence,” which, according to the ALI, requires the court to determine “which conduct is most implicated in the events giving rise to the

106. Id. § 6.01(c)(1).
107. Id. § 6.01(c)(2). Note that states whose laws are not in material conflict are considered to be the same state for purposes of this section of the proposal. Id.
108. Id. § 6.01(c)(3).
109. Id. § 6.01(c)(4).
litigation in order to designate the governing law. Assuming, however, that
no single state stands out as the one with the "most significant relationship"
because the "occurrence[s]" and "the events giving rise to the litigation" are
located in numerous states, then a court faced with a comprehensive insurance
coverage case has two options: (1) ignore the Project as insufficient; (2)
arbitrarily select the law of the state that allegedly has the "most significant
relationship" despite the evidence that no single state has an appreciably greater
interest than any other state; or (3) use the provision that essentially gives the
court the discretion to apply whatever law it feels is "necessary to avoid unfair
surprise or arbitrary results." Regardless of the option chosen, the Proposed
Final Draft's rules for mass tort cases typically will not provide a solution that
can predictably and efficiently be applied to comprehensive insurance coverage
cases.

V. THE FORUM'S INTEREST AND THE INSURERS' FAILURE TO INCLUDE A
CHOICE-OF-LAW PROVISION

In virtually every respect, insurance is a creature of state law. Insurers are
regulated by the states concerning solvency issues, rate-making issues, and policy
language issues, and insurance contracts are construed pursuant to state law.
Accordingly, existing choice-of-law approaches, including the ALI's proposal,
have focused on establishing a mechanism for prioritizing individual state
interests. In the context of comprehensive environmental insurance coverage
actions, however, the insurance policies at issue typically are purchased to cover
a national risk, not one that affects only a single state or handful of states. The
contractual disputes focus on underlying cleanup issues scattered across
numerous state lines that many states consider among their top priorities. Thus,
among the most compelling of the affected states' interests is a shared concern
for environmental cleanup issues, including the efficient resolution of disputes
as to ultimate financial responsibility.

Given the number of parties and underlying sites such a complex case may
involve, the adjudication of such an action and the furtherance of these shared
interests can impose a significant burden on the forum state. This burden is a
result of many factors, including the fact that the legal rules applicable to the
disputes between policyholders and their insurers—the resolution of interpretive
issues—is so uncertain. This uncertainty is compounded and perpetuated by the
current lack of predictability concerning the choice-of-law issue. Moreover, this
uncertainty exists because of the failure of the insurers to include in the standard

110. Id. § 6.01, cmt. a, at 406.
111. Id. § 6.01(d) ("When necessary to avoid unfair surprise or arbitrary results, the transferee
court may choose the applicable law on the basis of additional factors that reflect the regulatory
policies and legitimate interests of a particular state not otherwise identified under subsection (b), or
it may depart from the order of preferences for selecting the governing law prescribed by subsection
(e). ")
CGL policy any choice-of-law provision. This omission creates an ambiguity that has contributed significantly to the current plethora of environmental insurance coverage actions.112

The choice-of-law approaches to date have not given adequate weight to the ambiguity created by the insurers' failure to include a choice-of-law provision, and the resulting burden on forum states when policyholder plaintiffs must initiate coverage litigation. As demonstrated above, the individual interests of the competing states are difficult, if not impossible, to prioritize fairly and adequately. No matter what the ultimate choice-of-law approach is, all courts surely would recognize interested states' common interest in the efficient resolution of comprehensive environmental insurance coverage actions. In view of the foregoing, it is appropriate that in those cases in which the policyholder has selected the forum, and the forum has a significant interest in the outcome of the litigation, the forum state's interest should be given predominant weight, and its law should be applied.113

In view of its failure to include a choice-of-law provision in a standardized contract that purportedly was designed to promote efficiency, predictability, and certainty, the insurance industry has no legitimate complaint that this approach would unfairly penalize them.114 Moreover, there are compelling reasons to adopt such an approach. For example, pursuant to the tests described above, in many cases the state interests relating to the contracts and the underlying sites appear to nullify each other, providing little or no guidance concerning choice of law. If individual interests cancel each other, it is appropriate that the interest of the judicial system as a whole come to the fore.

Insurers may also argue that such an approach would promote forum shopping that would subject them to the law of a jurisdiction with no significant relationship to the dispute. There are many levels of protection against such a concern, however. First, the basic requirement that the forum have personal jurisdiction over the defendant ensures that an insurer will not be subject to the

112. Indeed, the failure of insurers to include a choice-of-law provision in the standard CGL policy may be considered a "latent ambiguity," which, according to the fundamental rule of contra proferentum, must be resolved in favor of the policyholder position. A "latent ambiguity" arises not upon the face of the policy based on the words selected, but "emerges in attempting to apply those words in the manner directed" in the policy. Ohio Casualty Group of Ins. Cos. v. Gray, 746 F.2d 381, 383 (7th Cir. 1984).


114. For this reason, the emphasis on the forum state's interest is less appropriate in those circumstances in which an insurer preemptively sues its policyholder in a jurisdiction of the insurer's choosing.
law of a forum with which it does not have some connection. Second, there are constitutional limits addressing the circumstances under which a forum can apply its own law; these ensure that any court applying forum law has a significant interest in the dispute. Finally, the doctrine of *forum non conveniens* is available to discourage forum shopping and to ensure that an action without a sufficient nexus to the forum state is dismissed.

Application of a single state’s law to comprehensive environmental insurance coverage cases typically will further the virtues of efficiency, certainty, and predictability that standard-form contracts—such as the CGL policy—are intended to promote. State law is appropriately selected pursuant to the prevailing choice-of-law rules of the forum state, and in many cases the ALI’s proposal may provide additional guidance. Nevertheless, comprehensive environmental insurance coverage actions are particularly suited to a choice-of-law analysis that emphasizes the interest of judicial efficiency and the consequences of the ambiguity created by the insurers’ failure to include a choice-of-law provision in the standard CGL policy.

115. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965 (1985). In *Phillips Petroleum*, the Supreme Court refused to allow Kansas, as the forum state, to apply its own law to a nationwide class action suit involving over 7,000 individual gas leases. Only a few of the leases were actually in the state of Kansas. The court held that a forum may not constitutionally apply its own law unless it has significant contacts with the dispute. *Id.* at 821-22, 105 S. Ct. at 2979. For cases addressing the constitutionality of a forum state’s application of its own law in the insurance context, see Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13, 101 S. Ct. 633, 639-40 (1981) (Brennan, J., plurality opinion); Clay v. Sun Ins. Office, 377 U.S. 179, 84 S. Ct. 1197 (1964); Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 75 S. Ct. 166 (1954); New York Life Ins. Co. v. Dodge, 246 U.S. 357, 38 S. Ct. 337 (1918).