stage to the test for avoidance will have to be worked out by the Courts over time but there is no escaping the conclusion that the Lords themselves recognised that a tougher line on the cynical avoidance of policies, and on an exclusive reliance on paid expert's testimony, is now appropriate. Reg Brown, in responding to my last article commented, bitingly, that he had to believe that there are still some prudent underwriters left. The fact that the London market is still with us after two such traumatic years justifies that belief. Those who are still left and still underwriting have little to fear from this decision. Those responsible for running-off risks written by those who have since departed may now, quite literally, have to think twice before trying to avoid the consequences of that underwriting. As for the prudent underwriter, he has neither been deposed or relegated, just deprived of his ability to act as a free agent, without heed to the facts of the original underwriting. That is no bad thing.

UP DATE ON ENVIRONMENTAL INSURANCE LAW
by Michael Mendolowitz, Barlow, Lyde & Gilbert

INTRODUCTORY NOTE:

This article, which was based on my presentation to the BILA Annual Conference in September 1993, was prepared in December 1993 for the January issue of the Journal. Lack of space has, however, led to the articles being held over until this issue. In the interim, events have moved on. Three points, in particular, are worthy of mention. Perhaps the most significant development is the House of Lords' decision in *Cambridge Water Company v Eastern Counties Leather Plc,* which is referred to very briefly in the main body of the article. Many case notes, commentaries and longer articles have already appeared about this case and no doubt it merits an article to itself, but this is not the place for that article.

Secondly, a consultation paper from the Department of the Environment and the Welsh office, entitled "Paying for our Past the Arrangements for Controlling Contaminated Land and Meeting the Costs of Remedying the Damage to the Environment" was published in March 1994. The consultation paper is the first product of the "wide-ranging review" of the question of contaminated land announced by Michael Howard in March 1993 (see paragraph A.2 in the main body of the article.) Insurers and their lawyers will be interested in one of the preliminary

conclusions of the consultation paper concerning the source of funds for remedying environmental damage. The authors of the consultation paper write:

> *"The outcome of this review is intended to make it more likely that the insurance market will be ready to insure businesses against contamination and, in doing so, will encourage risk assessment and preventative measures. There should be scope for individual sectors to build their own, voluntary funding arrangements to spread liabilities, whether for existing or future damage, in ways which keep the extent of liability and the control of the funds within their own spheres of accountability and responsibility. The case for compulsory general Environmental Impairment Liability insurance has yet to be made, and there would seem to be little point in imposing a requirement which, in relation to historic pollution, no-one seems likely to underwrite."*

Thirdly and finally, my prediction at the end of the article that EMF litigation would be an area for insurance lawyers to monitor closely in the future seems likely to be borne out even sooner than I expected. On 28th March 1994, the High Court granted an application for leave to bring judicial review proceedings against Michael Hesseltine, President of the Board of Trade, in respect of his alleged failure to regulate properly the installation of high voltage underground electricity cables in areas of North East London and Essex. Mr. Justice Schiemann directed that the case should be heard as quickly as possible. Transmission of current through the cables was due to commence this summer. The hearing of the judicial reviews proceedings took place during the last week of July. At the time of writing, the decision of the trial is still awaited. It is likely therefore, that there will, in the near future, be a decision by an English court on whether the epidemiological evidence showing a possible link between electromagnetic field radiation and an increased risk of leukemia and other cancers in children is sufficiently strong to warrant the government's being obliged to make regulations to ensure that the strength of electromagnetic fields generated by power lines do not exceed levels which current research indicates are safe.

A. United Kingdom

1. Cambridge Water Company v Eastern Counties Leather plc

The Court of Appeal held that the defendants' conduct in polluting an aquifer amounted to a nuisance for which it was liable in damages, notwithstanding

the absence of foreseeability of damage. A further appeal to the House of Lords will be heard on 11th October, at which the House of Lords will have the opportunity to clarify the rule in *Rylands v Fletcher:* does it apply to pollution and does it require foreseeability of harm? (The House of Lords subsequently delivered judgment on 9th December and answered both questions in the affirmative).

The case has attracted a great deal of comment concerning its potential impact on liability insurers, particularly under older policies which do not contain any pollution exclusion. It should be pointed out that society is faced with hard choices: are we going to take seriously matters such as cleaning up toxic waste sites, contaminated groundwater and polluted rivers and seas? If so, there is a cost attached, and someone will have to pay it.

Perhaps a more interesting issue which arises from the case is just how clean do we need to make the environment? The Sawston Mill borehole was taken out of production in 1983 after it was discovered that levels of certain organochlorines exceeded those permitted by a 1980 EC directive. The level in question was one part of tetrachloroethene per 100 million. At the time such low levels were not capable of scientific detection. Even today, when detection is possible, it is very doubtful whether even substantially higher levels are injurious to human health. It is, of course, better to be safe than sorry, but a balance has to be struck between what society would like and what society can afford.

2. Contaminated Land Registers

Section 143 of the Environmental Protection Act 1990 requires the Secretary of State for the Environment to promulgate regulations detailing the methodology and timing for local authorities to compile and maintain publicly-available registers of potentially contaminated land. On 24th March 1993, the then Environment Secretary, Michael Howard, announced in a written reply to a question in the House of Commons that the government was conducting a "wide-ranging review" of the registers and that the registers would not appear in the format proposed by the Department of the Environment in 1992. The 1992 proposal had already reduced the area of land to be covered by the registers by about 85% from the DoE's original 1991 proposal, by reducing the list of contaminative uses which qualified land for the register from 42 to 8.

The government's review will consider whether local authorities have sufficient powers and financial resources in relation to contaminated land, including questions such as whether local authorities can recover the cost of remedying contamination; what the role of the proposed Environment Agency (see below) should be; and what further studies and statutory changes are needed. Whether the review will lead to the compilation of any type of register at all is unknown, but regardless of whether registers eventually appear, the DoE's proposals and the publicity which has been generated thereby have raised the public's awareness of pollution and its potentially harmful effects on human health and the environment. Land which is polluted may be refused planning permission unless it is cleaned up: developers are therefore increasingly likely to investigate whether such pollution exists.

A survey conducted by Friends of the Earth during 1993 revealed that one-third of local authorities in England and Wales had no information on contaminated land, and most of those that did had obtained it from a single limited source, namely planning files or records of old waste disposal sites, which would give only partial information on potentially contaminated sites.

3. Environment Agency

In its 1992 election manifesto, the government stated its intention to introduce legislation to establish an Environment Agency for England and Wales. The proposed agency would combine the duties and powers of Her Majesty's Inspectorate of Pollution (HMIP), the National Rivers Authority (NRA) and the waste regulation functions of local authorities. In May 1993, however, the government announced that the necessary bill would not be introduced during the current parliamentary session. The deletion of this bill from the legislative programme announced in the Queen' Speech in November 1993 was said to have been caused by an increased legislative agenda and should not be taken as an indication of the government's withdrawal from its commitment to establish an environment agency. The bill is expected to be introduced at some time in the future.

B. European Community

In 1991, the Commission of the European Community had published a proposal for a directive on civil liability for damage caused by waste. If

that directive had been enacted, it would have imposed strict liability on any producer of waste which caused damage to the environment; it would have established a fund for compensating plaintiffs when the persons liable for damage could not be identified or when they were incapable of fully compensating plaintiffs; and would have required producers of waste to obtain insurance or some other type of financial security. By 1993, it had become apparent that the draft directive was unlikely ever to come into force. Instead, it may be replaced by a new directive arising out of a Green (i.e. consultation) Paper adopted by the European Commission on 17th March 1993. The Green Paper contains a comprehensive examination of environmental liability issues, without however reaching any conclusions. A consultation period commenced after publication and expired on 1st October 1993.

Although the Green Paper makes no positive recommendations, it appears to favour combining a strict liability scheme for prospective cases of pollution with a joint compensation scheme to pay for the remediation of environmental damage caused by past pollution. A retroactive extension of liability would be countenanced only if the polluter was proved to have acted unlawfully.

C. Council of Europe

In addition to the publication of its Green Paper on remediation of environmental damage (see previous paragraph) the European Commission has participated in the development, by the Council of Europe of a convention on civil liability for damage resulting from activities dangerous to the environment. The convention was opened for signature on 21st June 1993, and will come into force when it is ratified by three member states. The United Kingdom has indicated that it will not sign the convention at this stage unless certain alterations are made to its provisions. Germany has also indicated some unhappiness with the current text. At the date of the presentation of this up-date, the Netherlands, Finland, Greece, Italy, Luxembourg, Lichtenstein and Cyprus have signed the convention, but none of them have yet ratified it. The convention imposes strict, joint and several liability, subject to specified defences, on "operators", that is "person(s) who exercise the control of a dangerous activity". Liability will be imposed for loss or

damage caused by impairment of the environment. "Environment" is defined to include natural resources, whether living or not, such as air, water, soil, fauna and flora, as well as property forming part of a country's "cultural heritage" and "characteristic aspects of the landscape". The convention is intended to apply prospectively only.

D. United States

1. Rocky Mountain Arsenal Case

In January 1993, the California Court of Appeals, in *Shell Oil Company v Winterthur Swiss Insurance Company* (more commonly known as the "Rocky Mountain Arsenal" case), affirmed a trial court's ruling that Shell was not entitled to coverage from post-1969 insurance policies containing a pollution exclusion. The Rocky Mountain Arsenal site covers about 28 square miles near Denver, Colorado. In 1952, Shell leased part of the site from the US Army and for the next 31 years, manufactured pesticides and other chemicals there. Shell disposed of waste from its operations on site by various methods which contaminated soil and water within the Arsenal. In 1983, the Federal Government and the State of Colorado sued Shell for the cost of cleaning up the site and damages; at that stage, the sum involved was US$ 1.8 billion. In 1988, Shell agreed upon an open-ended settlement with the US. Meanwhile, Shell had filed an action for declaratory judgment against its insurers under about 800 policies, seeking defence and indemnity costs. A number of the policies excluded liability for seepage, pollution or contamination unless it was "caused by a sudden, unintended and unexpected happening." The Court of Appeals concluded that "sudden" had a temporal element, and that the polluting events at the Arsenal were "long, continuous and gradual" and not sudden. The court therefore upheld the jury's verdict that Shell had no coverage under policies containing pollution exclusion.

The Court of Appeals overruled the trial court, however, on the question whether the words "unintended and unexpected" should be construed subjectively or objectively. The Court of Appeals held that subjective expectation or intention was necessary, and ruled that the trial court's instructions to the jury that "expect" means "should have known" as well as "actually knew or believed" were erroneous. The Court of Appeals remanded the case back to the trial court for the jury to make further findings after proper instruction.

A further appeal was brought before the California Supreme Court, but that court declined to review the Court of Appeals' decision. The Rocky Mountain Arsenal case has not, however, reached the end of the road: apart from the issue of the proper construction of "expected", a lengthy trial will still be required on policies written in 1969 and prior years which did not contain pollution exclusions.

2. Conflicting Interpretations of "Sudden and Accidental"

Exception to Pollution Exclusion

During the latter part of 1992, and continuing in 1993, a number of State Supreme Courts reached contradictory conclusions on the effect of the "sudden and accidental" exception to the pollution exclusion. These decisions are significant because each of them was delivered by the highest court of the jurisdiction concerned, and it has been held that insurance is a matter to be regulated by the law of each state rather than by federal law. (The United States Supreme Court has consistently refused to hear appeals on matters such as the proper construction of insurance contracts.)

Two courts (in New Jersey and Illinois) held that gradual pollution is covered, notwithstanding the pollution exclusion clause's limitation of coverage to pollution which is "sudden and accidental"; by contrast, the highest courts in Florida and Ohio held that the exclusion means exactly what it says and that gradual pollution is not covered.

In *Morton International Inc. v General Accident Insurance Company* of America, the New Jersey Supreme Court held unanimously on 21st July 1993 that the pollution exclusion clause did not bar coverage for gradual pollution caused by unintentional discharges. The court refused to apply the pollution exclusion clause as written because it found that the insurance industry deliberately misled state regulators when the clause was approved in the early 1970's. The insured in this case was actually denied coverage because the court found on the facts that the pollution was caused by intentional discharges. Nevertheless, the decision has potentially expensive implications for insurers involved in other cases in New Jersey.

On 1st July 1993, in *Dimmitt Chevrolet Inc. v South Eastern Fidelity*

Insurance Corporation, the Florida Supreme Court reversed a previous decision reached only ten months earlier, and held by a four to three majority that the pollution exclusion did bar coverage for the cost of cleaning up gradual pollution, and that the "sudden and accidental" exception to the exclusion did not write back such cover. The judge who changed his vote stated that, "Try as I will, I cannot wrench the words 'sudden and accidental' to mean 'gradual and accidental', which must be done in order to provide coverage."

On 4th December 1992, the Illinois Supreme Court held, in *Outboard Marine Corporation v Liberty Mutual Insurance Company,* that the term "sudden and accidental" in the pollution exclusion clause was synonymous simply with "unexpected and unintended".

In *Hybud Equipment Corporation v Sphere Drake Insurance Company,* the Ohio Supreme Court held that a London market insurer was not required to cover the insured for clean-up costs and claims for personal injuries and property damage arising from contamination by hazardous waste at two industrial landfills. The court held that the term "sudden" was not ambiguous, that it had a temporal element, and that it was not synonymous with the term "unexpected".

The only conclusions which can be drawn from these cases are, first, that a previously discernible trend of interpretation of the "sudden and accidental" exception in insurers' favour seems to have come to an end, and state courts in the US are now roughly evenly balanced on this issue; secondly, London market insurers will need to consider, wherever possible, whether applications should be made to US courts in which they are sued to remove the case to a more favourable jurisdiction from insurers' point of view, or, at the very least, to have the law of a different state applied to the construction of the contract in issue.

3. Hartford Fire Insurance Company v California et al

This is the case in the Supreme Court in which the attorneys-general of various states have brought antitrust proceedings against, inter alia, Lloyd's underwriters and London market companies. The case is principally about the McCarran-Ferguson Act which exempts insurers from certain provisions of

US antitrust legislation. It is included, however, in this review of environmental insurance law because it was alleged by the attorneys-general that London market insurers and reinsurers had conspired with US insurers in the mid-1980's to withdraw occurrence-based coverage from certain categories of liability business and to replace it with claims-made coverage. There is no doubt that parts of the market did, in about 1985 or 1986, withdraw from writing liability business (not only in the US, but elsewhere) on an occurrence basis. One of the reasons for this was the very wide triggers of coverage which US courts had been applying in products liability cases (especially asbestos) together with a well-grounded fear that the same triggers might be applied to pollution liability. One of the more outrageous forms of relief claimed by the attorneys-general in the case is damages calculated on the basis that all post-1985 claims-made policies should operate as occurrence policies. The claim is most unlikely to succeed, but must nevertheless be worrying for anyone who wrote liability business in the second half of the 1980's, particularly if their policies do not contain pollution exclusions.

4. Superfund Act Reauthorisation

The "Superfund", that is the fund established to clean up polluted sites in the United States, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act 1980 (CERCLA), is due to be reauthorised and replenished during 1994. The process of reauthorisation began during 1993, including the programme of tax legislation which will be required to provide the necessary monies. Congressional committees appear to be listening to the views of insurers and industry as well as to environmental groups. On this occasion, insurers and industry have apparently been able to find greater common ground than has been the case on the two previous occasions on which Superfund has been reauthorised. Whether congress will act on the views of insureds and insurers at the end of the day is, however, uncertain. On the one hand,, congress may come to the conclusion that legislation which is designed to obtain funds for clean-up, but has singularly failed in that purpose, requires radical change. (A study by the Rand Institute for Civil Justice, published in 1992, estimated that 88% of the amounts paid by insurers for Superfund claims went not on cleaning up sites but on transaction costs, including legal fees.) On the other hand, the United States Environmental Protection Agency (EPA) appears to be firmly against any chain to the liability regime established by CERCLA, and the EPA stance is

likely to have a significant influence on any decision ultimately made by congress.

E. International Developments in "Electro-magnetic Pollution"

Claims for diseases allegedly caused by electro-magnetic field (EMF) radiation have been a feature of the legal scene in the United States for some years now, and aggressive plaintiffs' bars in other countries (notably Australia) have, more recently, been starting to assert such claims. US plaintiffs suffered a set-back during 1993, when two cases were decided in favour of defendants. In *Zuidema v San Diego Gas & Electric Company,* a jury rejected claims that a rare form of kidney cancer had been caused or contributed to by exposure to EMF from overhead power lines. In *Alexander v Pacific Gas & Electric Company,* the dependents of the deceased formally abandoned their claim for damages in respect of an alleged EMF-induced brain tumour, and the claim was consequently dismissed.

Future claims can, however, be expected in the light of epidemiological studies conducted in the United States and Scandinavia. A five year epidemiological research programme has recently been initiated in this country to measure electro-magnetic field levels in schools and in the homes of children who are suffering from cancer, to determine whether there is a link between EMF and certain cancers. During August 1993, Legal Aid was granted to the family of Simon Studholme, who had died of leukemia. His family have sued the North Western Electricity Board (NORWEB), alleging that Simon's death was caused by his exposure to "electro-magnetic pollution" in the form of EMF radiation from an electricity meter situated outside his bedroom. EMF litigation is clearly an area which insurance lawyers should monitor closely in the future.