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## Insureds versus Insurers: Litigating Comprehensive General Liability Policy Coverage in the CERCLA Arena - A Losing Battle for Both Sides

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## COMMENT

# INSUREDS VERSUS INSURERS: LITIGATING COMPREHENSIVE GENERAL LIABILITY POLICY COVERAGE IN THE CERCLA ARENA—A LOSING BATTLE FOR BOTH SIDES

by *Debi L. Davis*

**A**N enormous problem facing corporations and society today involves who will foot the bill for the ever-increasing costs of ridding the environment of toxic wastes.<sup>1</sup> Congress, concerned with expediting the cleanup of hazardous materials, implemented the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).<sup>2</sup> Congress intended that CERCLA provide both a statutory means for speedy cleanup and a basis for establishing liability.<sup>3</sup> CERCLA makes certain par-

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1. The American Bar Journal published an article in 1987 that estimated that at least 26,000 hazardous waste sites existed in the United States. Marcotte, *Toxic Blackacre: Unprecedented Liability for Landowners*, 73 A.B.A. J. 67 (Nov. 1987). The Marcotte article also noted an estimate given by the General Accounting Office indicating that the number could increase to as many as 368,000 sites in the foreseeable future. *Id.* at 67. As an example of the enormous cost of cleaning up hazardous waste sites, see *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1067, 1085 (D. Colo. 1985). In that case the EPA sued Shell for 1.8 billion dollars in cleanup costs for approximately 27 square miles of land polluted with hazardous waste.

2. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)). This Act creates what has become known as the Superfund, which is funded by a surtax on certain chemicals. The EPA uses the Superfund to clean up hazardous waste sites when the responsible party is insolvent or cannot be located.

3. S. REP. NO. 848, 96th Cong., 2d Sess. 3 (1980).

ties<sup>4</sup> liable to federal and state governments for response and remedial costs<sup>5</sup> incurred by both the EPA and the states in the cleanup of hazardous waste sites.<sup>6</sup> CERCLA, however, fails to address the issue of whether these costs are covered by insurance policies.<sup>7</sup>

In an effort to avoid paying for costly cleanups, PRPs<sup>8</sup> have looked to their insurance carriers for defense and indemnification under comprehensive general liability (CGL) policies.<sup>9</sup> Insurance companies, not wanting to bear the expense of these cleanups, have uniformly denied coverage of CERCLA-related costs.<sup>10</sup> This conflict regarding coverage under CGL policies

4. 42 U.S.C. § 9607 (1988). CERCLA defines potentially responsible parties (PRPs) as:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .

*Id.* § 9607(a). For a definition of a hazardous waste facility, see *id.* § 9601(9).

5. CERCLA defines "response" costs as costs incurred in "removal . . . and remedial action[s] . . . [including] enforcement activities related thereto." *Id.* § 9601(25). CERCLA defines "remedy" to include "storage confinement . . . [or] cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes . . . and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment." *Id.* § 9601(24). The EPA's broad power includes the right to recover costs for investigating, testing, evaluating, removing, maintaining, and monitoring hazardous waste sites. *Id.* § 9604(b). According to CERCLA, removal actions include "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances . . ." *Id.* § 9601(23).

6. *Id.* § 9607(a)(4)(A). CERCLA also makes PRPs liable to private persons for response costs incurred in cleaning up hazardous waste sites. *Id.* § 9607(a)(4)(B). See *supra* note 5 for a definition of response costs. CERCLA specifically holds the statutorily defined responsible parties liable for "any other necessary costs of response incurred by any other person consistent with a national contingency plan." *Id.*; see *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 893 (9th Cir. 1986) (CERCLA expressly creates cause of action for recovery of response costs incurred by private parties).

7. See 42 U.S.C. §§ 9601-9657 (1988). The CERCLA statutory scheme does not mention insurance coverage of costs incurred pursuant to CERCLA.

8. Responsible party status means that the EPA has determined that the party has liability for the cleanup costs of a hazardous waste site. *Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co.*, 17 Ohio App. 3d 127, 130, 477 N.E.2d 1227, 1232 (1984).

9. See, e.g., *Chesapeake Util. Corp. v. American Co.*, 704 F. Supp. 551, 553 (D. Del. 1989) (declaratory action brought by insured seeking coverage for CERCLA costs under CGL policy); *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1172 (N.D. Cal. 1988) (litigation brought by insured for declaration that insurer was liable under CGL policy for cleanup costs incurred); *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 163 (W.D. Mo. 1986) (insureds brought action against insurers for CGL coverage of cleanup costs).

10. Insurance carriers typically deny CGL coverage under one or more of the following theories:

1. The pollution does not constitute an "occurrence" under the meaning of the policy;
2. There was no occurrence during the policy period;

has resulted in major litigation.<sup>11</sup> Spending millions of dollars in this coverage-related litigation,<sup>12</sup> both the insurer and the insured waste assets and time, creating an ordeal that ultimately produces no winners.

This Comment focuses on the different interpretation courts are giving CGL policies with respect to whether a judgment rendered pursuant to CERCLA constitutes damages within the context of CGL policies.<sup>13</sup> The Comment examines some of the problems created by the interaction between CERCLA and CGL policies and the untenable situation the resulting conflicts pose to insureds and insurers. This Comment concludes that no one wins in the current climate and accordingly suggests some solutions, including the potential solution of requiring insurance carriers and their insureds to fund cleanup of hazardous waste sites cooperatively.

3. Pollution damage does not constitute property damage within the meaning of the policy;

4. The pollution exclusion clause in the policy precludes coverage;

5. The completed operations exclusion in the policy precludes coverage; and

6. No coverage exists because cleanup costs are not damages within the meaning of a CGL policy.

Note, *CERCLA Cost Recovery Suits: A Suit Against an Insured for Damages Under a Comprehensive General Liability Policy*, 14 WM. MITCHELL L. REV. 829, 832-33 (1988).

11. See, e.g., *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987) (litigation over policy coverage instigated in early 1985 extended through 1987); *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO I)*, 811 F.2d 1180, 1195 (8th Cir. 1987), *rev'd on rehearing en banc*, 842 F.2d 977 (8th Cir. 1988) (litigation over policy coverage spanned from 1984 through 1988); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 702 F. Supp. 1317 (E.D. Mich. 1988) (trial court litigation alone, over policy coverage, has already consumed three years).

12. The case of *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 158-63 (W.D. Mo. 1986) involved a lengthy trial before a special master with at least nine law firms representing twelve insurance carriers and ten different insured corporations. *Id.* The cost of legal counsel, alone, must have been staggering.

13. This Comment will not address the ramifications of the new Commercial General Liability Policy that came out in 1986. The new CGL policy attempts to unequivocally exclude all damages that might possibly arise from the cleanup of a hazardous waste site. See COMMERCIAL GENERAL LIABILITY POLICY § I.A.2.f (1986). The 1986 CGL policy provides:

This insurance does not apply to: . . .

f. (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

(a) At or from premises you own, rent or occupy;

(b) At or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or

(d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:

(i) if the pollutants are brought on or to the site or location in connection with such operations; or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

(2) Any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

*Id.* This Comment will only deal with litigation arising under CGL policies issued prior to 1986.

## I. BACKGROUND: ORIGINS OF INSURER VERSUS INSURED CONFLICT

A. *The CERCLA Statutory Scheme*

CERCLA provides for the establishment of a federal fund to finance cleanup of hazardous waste sites when no responsible parties can be found.<sup>14</sup> CERCLA grants the President and the EPA broad power to establish priorities in the toxic waste cleanup process.<sup>15</sup> CERCLA also grants the EPA the power to demand cleanup of hazardous sites dangerous to the public.<sup>16</sup> Additionally, the EPA has the power to undertake cleanup operations itself and institute a subsequent action to recover its own costs.<sup>17</sup> The CERCLA statutory scheme provides for injunctive relief by permitting the EPA to issue an order to compel cleanup or to obtain a court order compelling cleanup of a hazardous waste facility.<sup>18</sup> CERCLA also allows for restitutional relief by authorizing the EPA to expend funds from the federal Superfund to clean up toxic waste sites and subsequently to institute cost recovery actions against

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14. See 42 U.S.C. §§ 9601-9657 (1988).

15. CERCLA grants the EPA the authority to develop the National Contingency Plan (NCP), establishing the procedures for cleaning up hazardous waste sites. *Id.* § 9605. All costs incurred in cleanup must be consistent with the NCP in order to be recoverable in subsequent cost recovery litigation. See 40 C.F.R. §§ 300.61-.71 (1988); 42 U.S.C. § 9607(a) (1988). The EPA also has the responsibility for prioritizing sites by establishing the National Priority List (NPL). 40 C.F.R. § 300.68 (1988). CERCLA, moreover, imposes strict liability on PRPs. 42 U.S.C. § 9607(b)(1)-(4) (1988). CERCLA limits defenses to those statutorily enumerated. *Id.* The defenses to CERCLA strict liability include:

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

*Id.*

16. CERCLA empowers both the President and the EPA to institute actions or to issue administrative orders to compel action by private parties in the event of an "imminent and substantial endangerment to the public health or welfare of the environment" due to the release or threatened release of a hazardous substance. 42 U.S.C. § 9606(a) (1988). To ensure compliance with a § 9606(a) order, the EPA may either commence an action to enforce the order under § 9607(b)(1) or perform the remedial work itself and then commence an action to recover its costs under § 9607(c)(3). Significantly, CERCLA does not permit a party to challenge the merits or basis of any order to compel. See *Solid State Circuits, Inc. v U.S. E.P.A.*, 812 F.2d 383, 386 (8th Cir. 1987); *Dickerson v. Administrator*, 834 F.2d 974, 977-78 (11th Cir. 1987). The Superfund Amendment and Reauthorization Act of 1986 (SARA) provides, with exceptions for actions brought by the EPA or by a private party seeking reimbursement that "[n]o Federal Court shall have jurisdiction . . . to review any order issued under section 9606(a)." 42 U.S.C. § 9613(h) (1988).

17. See 42 U.S.C. § 9607 (1988).

18. See *id.* § 9606. Pursuant to § 9606(a), the President or the EPA can institute an action to compel cleanup of a hazardous waste site. *Id.*

responsible parties.<sup>19</sup> Finally, CERCLA allows the EPA to institute an action against responsible parties for monetary damages to compensate for damaged public resources.<sup>20</sup> The CERCLA scheme can thus be categorized as a mixture of equitable and legal remedies.<sup>21</sup> Some courts have characterized response costs incurred under CERCLA as equitable in nature and have denied insurance coverage based upon the traditional distinction between legal and equitable damages.<sup>22</sup> Consequently, the type of action that the EPA or the state brings and the way that a particular court characterizes the action comes to the forefront of the debate as to whether costs incurred in complying with CERCLA judgments constitute damages that are covered under a CGL policy.

### B. Comprehensive General Liability Policies

As with any contract, the language of an insurance policy is the focal point in determining coverage under the policy. An insurance policy represents a contract between the insured and the insurer, and coverage exists only if assumed under the terms of the policy.<sup>23</sup> The scope of a CGL policy is at the heart of hazardous waste litigation.

The CGL is a third-party policy, whereby the insurer promises to indemnify the insured against claims by third parties who are injured or who have property that is injured through the acts or omissions of the insured.<sup>24</sup> Although the standard CGL policy first arose in 1940,<sup>25</sup> policy revisions in 1966 and 1973 spawned most of the environmental litigation to date.<sup>26</sup> Coverage under CGL policies has evolved through court decisions focusing on the difficulties of dealing with personal injuries and property damage associated with gradual processes.<sup>27</sup>

Prior to 1966 the CGL policies applied an accident-oriented focus with an intent to cover sudden and unexpected events.<sup>28</sup> After 1966, CGL policies

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19. *Id.* § 9607(a)(4)(C).

20. *See id.*, which holds PRPs liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." *Id.*

21. *See id.* §§ 9601-9657. State legislatures have enacted legislation similar to CERCLA. *See, e.g.*, COLO. REV. STAT. §§ 25-16-101 to -201 (1982 & Supp. 1988); IOWA CODE ANN. §§ 455B.381-399, 455B.423-432 (West Supp. 1989); KAN. STAT. ANN. § 65-3430 to -3458 (1985); MINN. STAT. §§ 115B.01-.35 (1988).

22. *See cases cited infra* notes 85-132 and accompanying text.

23. *Aetna Casualty & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955).

24. *See Note, Taking the Insurers to the Dumps: Interpreting "Damages"—Is There Coverage for Hazardous Waste Cleanup Costs Under Comprehensive General Liability Insurance*, 13 J. CORP. L. 1101, 1107 (1988) [hereinafter *Taking the Insurers*].

25. *See Arness & Ellison, Insurance Coverage for "Property Damage" in Asbestos and Other Toxic Tort Cases*, 72 VA. L. REV. 943, 946 (1986).

26. *See Taking the Insurers, supra* note 24, at 1109 (citing *Tinker, Comprehensive General Liability Insurance—Perspective and Overview*, 25 FED. INS. COUNS. Q. 217, 221 (1975)). The CGL policy was revised again in 1986 and drastically altered the scope of pollution coverage. *See supra* note 13.

27. *See American Home Prod. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1500-01 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984).

28. *Id.*

utilized an occurrence approach, which focused on damages that occurred gradually, over an extended period of time.<sup>29</sup> The 1966 and 1973 CGL policies were standardized<sup>30</sup> and contained the same language in the coverage clause at issue.<sup>31</sup> The standard CGL policy language at issue in toxic tort litigation provides that "[t]he [insurer] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of property damage."<sup>32</sup> The insurer thereby agrees to indemnify the insured by paying all sums that the insured must pay to third parties as damages because of an occurrence causing property damage.<sup>33</sup>

The uncertainty of the scope of three key terms in CGL policies, namely "occurrence," "property damage," and "damages," has resulted in much controversy and litigation in the environmental arena.<sup>34</sup> "Occurrence," under 1966 and 1973 CGL policies, includes continuous or repeated exposure to conditions that are unexpected and unintended from the standpoint of the insured.<sup>35</sup> Court decisions generally focus on the issue of whether or not the insured expected or intended the happening of the occurrence in determining CGL policy coverage.<sup>36</sup> Once a party establishes an occurrence, the triggering of the policy coverage becomes an issue. The courts have formulated at least five different "trigger theories" to determine when an occurrence triggers insurance policy coverage.<sup>37</sup>

29. See Note, *Liability Coverage for "Damages Because of Property Damage" Under the Comprehensive General Liability Policy*, 68 MINN. L. REV. 795, 799 n.18 (1984) (1966 format change as response to severe criticism of earlier forms of CGL policy).

30. Comment, *Insurance Coverage of CERCLA Response Costs: The Limits of "Damages" in Comprehensive General Liability Policies*, 16 ECOLOGY L.Q. 755, 758 n.30 (1989) (citing Bardenwerper, *Foreword to GENERAL LIABILITY INSURANCE—1973 REVISIONS 3* (F. Bardenwerper & D. Hirsch eds. 1974) [hereinafter *Insurance Coverage*]).

31. *Id.* at 759.

32. See *Taking the Insurers*, *supra* note 24, at 1110.

33. *Id.*

34. For discussion of the distinction between property damage and economic loss, see Note, *CERCLA Cleanup Costs Under Comprehensive General Liability Insurance Policies: Property Damage or Economic Damage*, 56 FORDHAM L. REV. 1169 (1988) [hereinafter *CERCLA Cleanup*].

35. See *Taking the Insurers*, *supra* note 24, at 1110.

36. See *City of Carter Lake v. Aetna Casualty & Sur. Co.*, 604 F.2d 1052, 1058-59 (8th Cir. 1979). The court noted that,

For the purposes of an exclusionary clause in an insurance policy the word "expected" denotes that the actor knew or should have known that there was a substantial probability that certain consequences [would] result from his actions. If the insured knew or should have known that there was a substantial probability that certain results would follow his acts or omissions then there has not been an occurrence or accident as defined in [a CGL] policy . . . .

*Id.* (footnote omitted). An insured need not, however, know with certainty that a particular result will follow from its acts or omissions for the result to be expected. *Id.* But see *State Farm Fire & Casualty Co. v. Muth*, 190 Neb. 272, 207 N.W.2d 364, 366-68 (1973) ("expected" means insured acted with specific intent to cause harm).

37. These theories are (1) the actual injury theory; see *Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co.*, 654 F. Supp. 1334, 1357-58 (D.D.C. 1986) (policies triggered when injury actually occurs, even if injury not discoverable); (2) the manifestation theory; see *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986) (coverage is triggered when the damage first "manifests" or is discovered); (3) the exposure theory; see *Techalloy Co. v. Reliance Ins. Co.*, 338 Pa. Super. 1, 487 A.2d 820, 825 (1984) (injury occurs when exposure to that which ultimately causes injury occurs regardless of when discovered); (4) the

A finding of property damage is a second element required to trigger CGL coverage.<sup>38</sup> "Property damage" is defined under the 1966 CGL policy as "injury to or destruction of tangible property."<sup>39</sup> The 1973 policies expanded the definition of property damage to include injuries to real property caused by an occurrence during the policy period.<sup>40</sup> The primary point of dispute in the property damage area is whether a loss constitutes actual property damage or mere economic loss.<sup>41</sup>

The definition of "damages" represents the third element at issue in the interpretation of a CGL policy in the context of CERCLA. The standard CGL policy covers "all sums which the insured shall become legally obligated to pay as damages because of bodily injury, or property damage."<sup>42</sup> The definition of damages has been crucial to the determination of whether CGL policies cover costs incurred or awarded under CERCLA.<sup>43</sup>

### C. The Ambiguity Rule

In construing insurance policies, courts rely on certain rules of interpretation.<sup>44</sup> Under the law of most states, if the meaning of a policy provision is ambiguous or susceptible to different constructions, courts construe the policy against the insurer.<sup>45</sup> Ordinarily, the rationale for the "ambiguity rule"

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double trigger theory; see *Transamerica Ins. Co. v. Bellefont Ins. Co.*, 490 F. Supp. 935, 935 (E.D. Pa. 1980); *Industrial Steel Container Co. v. Firemen's Fund Ins. Co.*, 399 N.W.2d 156, 159 (Minn. Ct. App. 1987) ("injury occurs at the time of exposure and at the time when the injury becomes apparent"); and (5) the continuous exposure theory; see *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1046 (D.C. Cir. 1981), *cert. denied*, 445 U.S. 1007 (1982) (injury occurs at time of first exposure and throughout progression until manifestation). For a general survey of occurrence theories, see *Industrial Steel Container Co.*, 399 N.W.2d at 159.

38. See *Taking the Insurers*, *supra* note 24, at 1115.

39. *Id.* at 1110 (citing 3 R. LONG, THE LAW OF LIABILITY INSURANCE app. C at 60 (1987)).

40. *Id.*

41. As a general rule, economic losses do not constitute the type of property damage covered by a CGL policy. *Mraz*, 804 F.2d at 1329. For a discussion of property damage as contrasted with economic loss, see *CERCLA Cleanup*, *supra* note 34, at 1169. See also *Mraz*, 804 F.2d at 1329 (response costs incurred under CERCLA are economic losses and do not constitute property damage under insurance policy). But see *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1366 (D. Del. 1987) (action to remedy property damage is covered because terms of policy only required insured to show that he must "pay damages because of . . . property damage" (emphasis in original)).

42. See *Taking the Insurers*, *supra* note 24, at 1108.

43. See, e.g., cases cited *infra* note 170. Each of these cases involved an interpretation of the term "damages" as a basis for determining CGL coverage of cleanup costs. *Id.*

44. See *Insurance Coverage*, *supra* note 30, at 790. In this Comment the author notes that the five basic tenets of insurance contract interpretation are: (1) courts should resolve ambiguities in the policy language in favor of the insured; (2) courts should give policy language its ordinary, usual meaning; (3) courts should interpret coverage clauses broadly and exclusion clauses narrowly; (4) the contract should give effect to the reasonable expectations of the parties; and (5) courts should consider the intention of the parties. *Id.*; see also *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1181 (N.D. Cal. 1988) (specifically applying California rules of construction to insurance policy).

45. Maryland is the only state that does not follow the ambiguity rule because Maryland courts do not consider insurance policies to be contracts of adhesion. See *Insurance Coverage*, *supra* note 30, at 790-91 n.265 (citing *Travelers Corp. v. Boyer*, 301 F. Supp. 1396, 1406 (D. Md. 1969), and *Pennsylvania Threshermen & Farmers Mut. Casualty Ins. Co. v. Shirer*, 224 Md. 530, 168 A.2d 525, 528 (1961)). All other jurisdictions that have addressed the issue



centers around a public policy argument premised upon the notion that insurance is an adhesion contract and the unwary and unsophisticated purchaser needs protection. Under this rationale, courts adopt the construction of the provision most favorable to the insured.<sup>46</sup> Courts construing the damages clause in CGL policies have seized upon the ambiguity rule to facilitate finding CERCLA costs recoverable under CGL policies.<sup>47</sup>

Courts have rejected the ambiguity rule's application, however, to parties of equal bargaining power, a situation found in many of the environmental cleanup cases.<sup>48</sup> This alternate treatment is based on the presumption that the commercial insured is sophisticated and represented by competent legal counsel and is therefore undeserving of such a strong presumption in its favor.<sup>49</sup> The choice a particular court makes in either adopting the ambiguity rule or finding a lack of ambiguity in an insurance clause generally determines the outcome in CERCLA coverage disputes.<sup>50</sup>

#### D. Legal Damages Versus Equitable Relief

To a layperson, the CGL provision obligating the insurer to pay amounts designated as damages conjures up images of the insurer compensating for all of the financial consequences a loser faces in a litigated dispute.<sup>51</sup> *Black's*

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follow some form of an ambiguity rule. *See, e.g., Eagle Leasing Corp. v. Hartford Fire Ins. Co.*, 540 F.2d 1257, 1261 (5th Cir. 1976), *cert. denied*, 431 U.S. 967 (1977) ("if the meaning of a policy provision is doubtful and the language used is susceptible of different constructions, the one most favorable to the insured is adopted"); *Baltimore Bank & Trust Co. v. United States Fidelity & Guar. Co.*, 436 F.2d 743, 746 (8th Cir. 1971) (Missouri state courts adopt the construction most favorable to insured when interpreting ambiguous insurance policy provision); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 702 F. Supp. 1317, 1323 (E.D. Mich. 1988) (under Michigan law, ambiguities construed in favor of insured); *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1182 (N.D. Cal. 1988) (insurance policies strictly construed against insurers under California law); *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1365 (D. Del. 1987) (Delaware law requires ambiguous provisions to be interpreted against insurer); *CPS Chem. Co. v. Continental Ins. Co.*, 199 N.J. Super. 558, 489 A.2d 1265, 1270 (Super. Ct. Law Div. 1984) (ambiguities in insurance policies resolved against insurers under New Jersey law). *But see First State Underwriters v. Travelers Ins. Co.*, 803 F.2d 1308, 1314 n.5 (3d Cir. 1986) (stating in dicta that ambiguity principle does not apply when sophisticated parties negotiated coverage terms); *Aetna Casualty & Sur. Co. v. Gulf Resources & Chem. Corp.*, 709 F. Supp. 958, 960 (D. Id. 1989) (rejecting reasonable expectations doctrine under Idaho law in favor of plain meaning rule). For a more complete survey of the ambiguity rule in American jurisdictions, see 13 J. APPLEMAN, *INSURANCE LAW & PRACTICE* §§ 7401, 7403 (rev. ed. 1976 & Supp. 1988).

46. *See Eagle Leasing*, 540 F.2d at 1261.

47. *See, e.g., United Fidelity & Guar. Corp. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1156, 1168 (W.D. Mich. 1988) (from viewpoint of insured, cleanup costs are damages); *New Castle County*, 673 F. Supp. at 1365-67 (construing ambiguous policy in favor of insured and holding that CERCLA cleanup costs constitute damages under CGL policy); *Gloucester v. Maryland Casualty Co.*, 668 F. Supp. 394, 399-400 (D.N.J. 1987) (cleanup costs constitute damages).

48. *See First State Underwriters Corp. v. Travelers Ins. Co.*, 803 F.2d 1308, 1314 n.5 (3d Cir. 1986) (noting that ambiguity principle should not automatically apply where sophisticated parties negotiate an insurance policy); *cf. Eagle Leasing*, 540 F.2d at 1260-61 (refusing to automatically construe ambiguity against insurer, noting that in commercial insurance field insureds are managed by sophisticated businessmen represented by legal counsel).

49. *See cases cited supra* note 48.

50. *See cases cited supra* notes 47-48.

51. Webster's dictionary defines damages as "the estimated reparation in money for detri-

*Law Dictionary* contains a much more limited definition of damages.<sup>52</sup> Old insurance case law, moreover, narrows the definition of damages even further by utilizing the historical distinction between equitable relief and damages when interpreting CGL policies.<sup>53</sup> These early cases interpreting damages as distinct from any type of equitable relief form the backbone of one of the modern positions concerning CGL policies, the position that CERCLA costs are not damages under CGL policies.<sup>54</sup>

### 1. *Desrochers and Hanna: Background for Equity Damages Distinction*

The Supreme Court of New Hampshire in *Desrochers v. New York Casualty Co.*<sup>55</sup> considered the interpretation of damages in a CGL policy. *Desrochers* involved an appeal following an action for declaratory judgment to determine the rights and obligations of the parties to the CGL policy, which contained the standard policy provision obligating the insurer to pay damages incurred by the insured as a result of third-party property damage. The *Desrochers* court held that the expense of complying with a court order requiring the insured to remove an obstruction to a culvert that caused adjacent property to flood was not recoverable under the CGL policy.<sup>56</sup> The court found that a reasonable man in the position of the insured would not have believed that the cost of compliance with an injunction would constitute damages.<sup>57</sup> The court reasoned that the term "damages" denotes a legal, technical meaning in the insurance context, and, as such, courts must distinguish equitable types of relief from legal damages.<sup>58</sup>

In 1955, in *Aetna Casualty & Surety Co. v. Hanna*,<sup>59</sup> the Fifth Circuit Court of Appeals adopted the *Desrochers* distinction between legal damages and equitable relief in terms of CGL policy coverage.<sup>60</sup> The Hannas brought

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ment or injury sustained: compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 571 (3d ed. 1965). An insured seeking a definition of the word "damages" would not find the equity-legal distinction in Webster's.

52. BLACK'S LAW DICTIONARY 352 (5th ed. 1979) defines "damages" as:

a pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another. A sum of money awarded to a person injured by the tort of another.

In defining the word "damage," however, *Black's Law Dictionary* notes that "[damage] is to be distinguished from its plural damages, which means a compensation in money for a loss or damage." *Id.* at 351.

53. See *Aetna Casualty & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955); *Desrochers v. New York Casualty Co.*, 99 N.H. 129, 106 A.2d 196, 198-99 (1954).

54. See *Continental Ins. Co. v. Northwestern Pharmaceutical & Chem. Co. (NEPACCO II)*, 842 F.2d 977, 985 (8th Cir.) (CERCLA recovery costs were equitable in nature and not covered under CGL policy), *cert. denied*, 109 S. Ct. 66, 102 L. Ed. 2d 43 (1988); *accord Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352-53 (4th Cir. 1987) (CERCLA costs not recoverable under CGL policy because such costs are not "damages," but equitable relief), *cert. denied*, 489 U.S. 1008 (1988).

55. 99 N.H. 129, 106 A.2d 196, 199 (1954).

56. *Id.*

57. *Id.* at 198-99.

58. *Id.*

59. 224 F.2d 499, 503 (5th Cir. 1955).

60. See *id.* at 503-04.

an action against their insurance company for recovery of costs and expenses stemming from state court litigation that resulted in the issuance of an injunction against the Hannas.<sup>61</sup> The injunction ordered the Hannas to remove boulders and fill material that storms and high water had carried from their property and deposited on the adjoining property.<sup>62</sup> The mandatory injunction also required the Hannas to construct and maintain a bulkhead to prevent future encroachment upon the adjoining property.<sup>63</sup> The Hannas' CGL insurance carrier refused to defend the suit on behalf of the Hannas and advised that the action was not covered within the policy term "damages."<sup>64</sup>

Applying Florida law,<sup>65</sup> the Fifth Circuit expressly adopted the *Desrocher* reasoning,<sup>66</sup> concluding that the CGL policy covers only those costs the insured must pay to third persons because they have a legal claim for damages.<sup>67</sup> Applying the technical interpretation of the word "damages," the *Hanna* court emphasized the difference between equitable, injunctive relief and legal damages and denied CGL policy coverage of the expenses that the Hannas had incurred in complying with the mandatory injunction ordering cleanup of the debris.<sup>68</sup> While the Fourth Circuit has subsequently adopted the Fifth Circuit's narrow, technical definition of damages when analyzing the right to recovery of CERCLA-type costs under CGL policies,<sup>69</sup> other courts have expressly rejected the restrictive definition.<sup>70</sup>

## 2. U.S. *Aviex v. Traveler's: Background for Refusing to Distinguish Between Equity and Damages*

In 1983, the Michigan Court of Appeals in *United States Aviex v. Travelers Insurance Co.*<sup>71</sup> expressly rejected the *Desrochers* and *Hanna* distinction between equitable relief and damages in the context of CGL policy coverage of environmental damage.<sup>72</sup> *U.S. Aviex* was the first case to hold that the term damages in CGL policies included costs incurred in state-ordered environmental cleanups.<sup>73</sup> The case involved an appeal from a declaratory judgment ordering Traveler's Insurance to reimburse U.S. *Aviex* for costs incurred in investigating, monitoring, and correcting contamination of the groundwater underneath U.S. *Aviex's* property due to an accidental toxic

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61. *Id.* at 500-01.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 503.

66. The *Hanna* court noted that *Desrochers v. New York Casualty Co.*, 99 N.H. 129, 106 A.2d 196 (1954), "is on all fours with the case at bar, and the policy provisions . . . are identical . . . [W]e cite with approval [the *Desrochers* court's] reasoning and the result reached." *Id.* at 503-04.

67. *Id.*

68. *Id.*

69. See *infra* note 98 and accompanying text.

70. See *infra* note 72 and accompanying text.

71. 25 Mich. App. 579, 336 N.W.2d 838, 842-43 (1983).

72. *Id.*

73. See *Insurance Coverage, supra* note 30, at 767.

chemical seepage that occurred while containing a fire on the premises.<sup>74</sup> The court in *U.S. Aviex* rejected the argument that costs incurred in remedying property damage in response to equitable or injunctive orders were not covered under CGL policies because such costs were not damages.<sup>75</sup> The court instead interpreted damages to include monetary relief the insured must pay because of legal liability.<sup>76</sup> The court stated that the more encompassing definition accords with the ordinary insured's understanding of the term "damages."<sup>77</sup>

Referring to the state's interest in its natural resources,<sup>78</sup> the court noted that whether a state government chooses to sue for reimbursement or for monetary damages to natural resources is merely fortuitous from the standpoint of either the insured or the insurer.<sup>79</sup> The court, consequently, found the insurance carrier liable for the defense and the indemnification of U.S. *Aviex* with respect to the state's injunctive action seeking cleanup of the toxic contamination.<sup>80</sup>

*U.S. Aviex* initiated the present controversy over whether the equitable nature of suits seeking to recover environmental statutory cleanup costs conclusively determines insurance coverage and also instigated the judicial debate over whether insurance companies actually owe a duty under CGL policies to defend or to indemnify insureds in such proceedings. By rejecting the equity-damage distinction in old insurance case law,<sup>81</sup> *U.S. Aviex* set a modern precedent for other courts to follow and is the leading authority for the proposition that environmental cleanup costs are damages covered under a CGL policy despite the apparent equitable character of the remedy.<sup>82</sup>

## II. CURRENT LEGAL STATUS: TURMOIL IN THE COURTS

The question of whether CERCLA response costs constitute recoverable damages under a CGL policy created a sharp difference of opinion among the courts. Three circuits courts have addressed the issue on the merits, rendering only four decisions.<sup>83</sup> A number of district courts, however, have

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74. *U.S. Aviex*, 336 N.W.2d at 840.

75. *Id.* at 843.

76. *Id.* at 842-43.

77. *See id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *See Aetna Casualty & Sur. Co. v. Hanna*, 224 F.2d 499, 499 (5th Cir. 1955); *Desrochers v. New York Casualty Co.*, 99 N.H. 129, 106 A.2d 196, 196 (1954).

82. *See, e.g., Chesapeake Util. Corp. v. American Home Assurance Co.*, 704 F. Supp. 551, 560-61 (D. Del. 1989); *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1366 (D. Del. 1987); *Gloucester v. Maryland Casualty Co.*, 668 F. Supp. 394, 399 (D.N.J. 1987); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 75 (E.D. Mich. 1987), *reh'g granted*, 702 F. Supp. 1317 (E.D. Mich. 1988) (cases citing *U.S. Aviex* for proposition that cleanup costs constitute damages under CGL policy).

83. *See Avondale Indus. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989); *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO II)*, 842 F.2d 977, 983-90 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 66, 102 L. Ed. 2d 43 (1988); *Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979, 980-81 (4th Cir. 1988); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1351-55 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

addressed the issue.<sup>84</sup>

### A. Cleanup Costs Do Not Constitute "Damages"

#### 1. Maryland Casualty Co. v. Armco

The Fourth Circuit Court of Appeals, in *Maryland Casualty Co. v. Armco*,<sup>85</sup> was the first federal circuit to address the issue of coverage under CGL policies for CERCLA response costs.<sup>86</sup> *Armco* arose as an offshoot from *United States v. Conservation Chemical Co.*<sup>87</sup> The *Conservation Chemical* case lends insight into the context surrounding the *Armco* decision.

In *Conservation Chemical* Armco was one of several "deep pocket" defendants against which the United States instituted a CERCLA action as hazardous waste generators that had allegedly disposed of hazardous waste at a certain facility.<sup>88</sup> The government sought to compel Armco and other PRPs to implement a comprehensive remedial action and sought to recover costs already incurred in cleaning up the facility. Armco and the other waste generator defendants filed an amended third-party complaint against Maryland Casualty, in addition to the site operator's other insurance carriers, alleging that Armco and the other waste generator defendants constituted third-party beneficiaries of the site operator's CGL insurance policies. The defendants sought indemnification and defense from the operator's insurers. The district judge signed an order adopting a special master's recommendations, including a finding that the CERCLA response costs constituted damages within the meaning of CGL policies.<sup>89</sup> Immediately thereafter, Maryland Casualty entered into a settlement agreement with Armco and the other defendants, and the district judge vacated his order nunc pro tunc.<sup>90</sup> Following the settlement of *Conservation Chemical* and after the extensive litigation involved in that case, Maryland Casualty filed suit against Armco seeking a declaratory judgment as to its liability under Armco's CGL policy.<sup>91</sup>

The trial court in *Armco* determined that the term "damages" was not

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84. See *Chesapeake Util. Corp.*, 704 F. Supp. at 558-61; *Intel Corp. v. Hartford Accident & Idem. Co.*, 692 F. Supp. 1171, 1189-93 (N.D. Cal. 1988); *Hayes v. Maryland Casualty Co.*, 688 F. Supp. 1513, 1514-15 (N.D. Fla. 1988); *Travelers Ins. Co. v. Ross Elec. of Washington, Inc.*, 685 F. Supp. 742, 743-45 (W.D. Wash. 1988).

85. 822 F.2d 1348 (4th Cir. 1987).

86. See *id.* at 1351-55.

87. 653 F. Supp. 152 (W.D. Mo. 1986). The *Conservation Chemical* litigation involved several Fortune 500 companies, including IBM & AT&T Technologies. *Id.* at 159.

88. *Id.* at 159, 167-70.

89. See *Armco*, 822 F.2d at 1351.

90. *Id.*

91. The language contained in the Maryland Casualty—Armco policy, at issue in the *Conservation Chemical* case, was nearly identical to that contained in the Maryland Casualty policy that was the subject of the *Armco* case. *Id.* The trial court in the *Armco* case, however, found that the action taken by the Missouri district court in *Conservation Chemical* was not res judicata as to the *Armco* case and did not give rise to collateral estoppel of the policy coverage issue because the judge vacated the order following the parties' settlement agreement. *Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. 430, 432-33 (D. Md. 1986).

ambiguous in the insurance context<sup>92</sup> because insurance law distinguishes between legal and equitable relief, and held that claims for equitable relief do not constitute claims for damages under CGL policies.<sup>93</sup> The *Armco* court bolstered its equity distinction by analogizing to constitutional seventh amendment judicial analysis of right to trial by jury, noting that courts addressing the issue in CERCLA cases unanimously denied jury trials based upon CERCLA's inherent equitable nature.<sup>94</sup> Rejecting authority that held to the contrary and quoting specific portions of the special master's report in *Conservation Chemical*, the *Armco* trial court sarcastically noted that by adopting the *U.S. Aviex* court's reasoning, a court would essentially adopt no reasoning.<sup>95</sup>

The Fourth Circuit upheld the trial court's decision on appeal, holding that Maryland Casualty had no duty to defend or to indemnify Armco in the CERCLA action brought by the EPA.<sup>96</sup> After noting that courts should give terms of an insurance policy provision the meaning that a reasonable person would give,<sup>97</sup> the Fourth Circuit interpreted the term "damages" by affording it the technical meaning set forth in *Hanna*.<sup>98</sup> The *Armco* court then analyzed the nature of the relief the government sought in the CERCLA action and held that since the action involved reimbursement of costs incurred in connection with the cleanup of the site, combined with injunctive relief compelling remedial action, the relief sought did not constitute legal damages and instead was a form of equity.<sup>99</sup>

The Fourth Circuit court went on to formulate a test for defining damages.<sup>100</sup> The court instructed that the test should involve a determination of the form of relief sought rather than a determination of the nature of the action.<sup>101</sup> The *Armco* court, moreover, rejected as "faulty" Armco's argument that the measure of damages to the environment is simply the cost of restoration, regardless of whether a plaintiff sues for damages.<sup>102</sup> In rejecting this argument, the Fourth Circuit cited *Peevyhouse v. Garland Coal &*

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92. *Armco*, 643 F. Supp. at 432.

93. *Id.* (citing *Haines v. St. Paul Fire & Marine Ins. Co.*, 428 F. Supp. 435 (D. Md. 1977); *Aetna Casualty & Sur. Co. v. Hanna*, 224 F.2d 499 (5th Cir. 1955); and *Desrochers v. New York Casualty Co.*, 99 N.H. 129, 106 A.2d 196 (1954)).

94. *Id.* For other cases discussing the seventh amendment analysis in conjunction with CERCLA cases, see *United States v. Dickerson*, 640 F. Supp. 448, 453 (D. Md. 1986), and *United States v. Mottolo*, 605 F. Supp. 898, 913 (D.N.H. 1985).

95. *Armco*, 643 F. Supp. at 433.

96. *Armco*, 822 F.2d at 1354.

97. *Id.* at 1352.

98. *Id.* This technical definition distinguishes damages from claims for equitable (i.e., injunctive or restitutionary) relief, and, according to the Fifth Circuit in *Hanna*, includes "only payments to third persons when those persons have a legal claim for damages . . ." *Aetna Casualty & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955); see *supra* notes 55-70 and accompanying text.

99. *Armco*, 822 F.2d at 1352-54.

100. *Id.* at 1355.

101. *Id.* at 1352.

102. *Id.* at 1353. Armco's argument relied on *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (1983), a decision that the Fourth Circuit dismissed as unpersuasive. *Id.*; see *supra* notes 70-82 and accompanying text.

*Mining Co.*<sup>103</sup> in support of the proposition that the method used to calculate a damages remedy differs from that used to calculate restitution.<sup>104</sup> The *Armco* court also noted that, from a prudential standpoint, public policy requires that insureds pay for preventative measures themselves because of both the potential for abuse and the tendency for the insured to overspend the insurance carrier's money on safety precautions.<sup>105</sup>

Looking at the damages issue from the vantage point of an insurance company, the court went even further in terming the CERCLA costs "prophylactic," while noting that the case at bar did not involve harm to humans or to the environment, but instead merely involved preventing such harm.<sup>106</sup> By coming down squarely in the corner of insurers, the *Armco* decision created precedent that fueled the fire in the battle between insurers and insureds over CGL policy interpretation in the CERCLA arena.

## 2. NEPACCO I and II

The next CERCLA case involving the interpretation of the damages provision in a CGL policy by a federal circuit court was *Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co.*,<sup>107</sup> known as "*NEPACCO I*," and its counterpart "*NEPACCO II*."<sup>108</sup> The insurer instigated the NEPACCO litigation, seeking a declaratory judgment holding that the insurer was not obligated under its CGL policy to defend or to indemnify the insured chemical producers for liability arising out of CERCLA actions. Northeastern Pharmaceutical & Chemical Company (NEPACCO) produced the chemical hexachlorophene, of which the hazardous chemical dioxin is a byproduct. NEPACCO hired a company to dispose of the dioxin; however, without NEPACCO's knowledge the company illegally dumped the dioxin on roadways.<sup>109</sup> Initially, in *NEPACCO I*, the Eighth Circuit in a two-to-one panel decision adopted the view that cleanup costs under CERCLA do constitute damages within the meaning of CGL policies.<sup>110</sup>

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103. 382 P.2d 109 (Okla. 1962), *cert. denied*, 375 U.S. 906 (1963). The *Armco* court cited *Peevyhouse* as support for the general proposition that the cost of restoration is not simply the measure of damages to the environment. *Armco*, 822 F.2d at 1353; *see supra* note 104 for a discussion of *Peevyhouse*.

104. *Armco*, 822 F.2d at 1353. In *Peevyhouse* the court applied a diminution in value approach to measure damages rather than the cost of repairing strip-mined land. *Peevyhouse*, 382 P.2d at 112-14. The *Peevyhouses* had specifically bargained for and included a clause in the strip-mining agreement that required Garland Coal to restore the land after mining. The Oklahoma Supreme Court refused to enforce this clause, noting that the cost of repairing the strip-mined land to its original condition was more than four times its fair market value in the restored condition. *Id.* at 111.

105. *Armco*, 822 F.2d at 1353-54.

106. *Id.*

107. 811 F.2d 1180 (8th Cir. 1987), *rev'd on rehearing en banc*, 842 F.2d 977 (8th Cir. 1988).

108. *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir.), *cert. denied*, 109 S. Ct. 66, 102 L. Ed. 2d 43 (1988).

109. Some of the toxic dioxin was spread on the roads of Times Beach, Missouri, forcing the government to purchase the entire town, expending \$33.7 million dollars from the Superfund. *NEPACCO I*, 811 F.2d at 1182.

110. *Id.* at 1189.

The Eighth Circuit subsequently granted a rehearing en banc, known as *NEPACCO II*, and reviewed the entire case.<sup>111</sup> The second time around, in a five-to-three en banc decision, the court reversed the panel decision, adopting the reasoning of the Fourth Circuit in *Armco* and determining that CERCLA cleanup costs were outside the scope of the definition of damages in CGL policies.<sup>112</sup> Stretching to address the damages issue on the merits, the Eighth Circuit determined that the issue was properly before the court, despite the fact that neither party raised the issue, since the American Insurance Association raised the argument in its amicus brief and the State of Missouri responded to the argument in its reply brief.<sup>113</sup>

Noting that the case law divided sharply on the issue of the interpretation of damages in CGL policies, the Eighth Circuit nevertheless held that the term "damages" was not ambiguous when defined within the narrow confines of the insurance context.<sup>114</sup> Adopting the Fourth Circuit logic almost verbatim, the *NEPACCO II* court held that Missouri law required the court to construe insurance provisions in terms of an ordinary layperson's understanding.<sup>115</sup> The court went on to state that based upon a lay insured's understanding, damages could reasonably include all claims presented in a court of law for monetary damages.<sup>116</sup> Nonetheless, the Eighth Circuit found the term "damages" unambiguous and held that the term "damages" in CGL policies refers only to legal damages, and not to cleanup costs.<sup>117</sup> Relying on the old distinction between equity and law and virtually tracking the Fourth Circuit's arguments in the *Armco* case, the majority in *NEPACCO II* simply reiterated and adopted the strict interpretation of damages covered by CGL policies.<sup>118</sup>

### 3. *Cincinnati Insurance Co. v. Milliken*

Following the *NEPACCO II* decision by the Eighth Circuit, the Fourth Circuit cemented its position in *Cincinnati Insurance Co. v. Milliken*.<sup>119</sup> The *Milliken* case landed before the court on an appeal from a judgment relieving Cincinnati Insurance Company from liability to defend or to indemnify the insured in an action brought by the government seeking recovery of costs

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111. See *NEPACCO II*, 842 F.2d at 977.

112. *Id.* at 987.

113. *Id.* at 984. The *NEPACCO II* majority noted the appropriateness of addressing the damages issue because "the broad issue of the availability of liability coverage under standard-form CGL policies for the costs of cleaning up hazardous waste sites is a question of substantial importance not only to liability insurers and their insureds, but to the public as well." *Id.* at 985.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* For an indication of the strong split in authority on this issue, see *id.* at 977, 987-90 (Heaney, J., dissenting). In his dissenting opinion Judge Heaney accused the majority of completely disregarding established Missouri law by interpreting "damages" in terms of its technical, legalistic connotation. *Id.*

119. 857 F.2d 979 (4th Cir. 1988).



pursuant to CERCLA.<sup>120</sup> Noting that the CERCLA provision relied upon was identical to the one relied upon in the *Armco* case, the Fourth Circuit construed, as a matter of law, the CERCLA provisions as a form of equitable relief, namely restitution.<sup>121</sup> Conclusively characterizing the term "damages" as unambiguous, the Fourth Circuit summarily held that, under South Carolina law, damages means legal damages and that CGL policies absolutely do not cover CERCLA-related cleanup costs.<sup>122</sup>

#### 4. District Court Cases.

Several recent district courts sided with the view that damages under CGL policies do not include CERCLA-type relief.<sup>123</sup> The most recent case addressing the issue, *Travelers Indemnity Co. v. Allied-Signal, Inc.*,<sup>124</sup> heightened the uncertainty in the area of interpretation of damages. Noting that it was bound by the Fourth Circuit precedents in *Armco* and *Milliken*, the Maryland federal district court stated, nonetheless, that if it were not bound, the court would certify the question to the Maryland Court of Appeals based on the principle of federalism because the issue concerned state law and states have an overriding interest in the resolution of the conflict.<sup>125</sup> The district court, moreover, urged the Fourth Circuit to certify the issue when the case came up on appeal.<sup>126</sup>

The *Travelers* court gave two reasons for the appropriateness of certification to the state appellate court that depict the depth of the controversy over the issue.<sup>127</sup> First, the court noted that basic public policy issues formed the foundation of the legal questions presented.<sup>128</sup> In light of such pressing public policy issues, the state whose policy was affected by the decisions should resolve the issue.<sup>129</sup> The district court then focused on one of the problems associated with such a lack of uniformity in this area: the problem of forum shopping.<sup>130</sup> The court hinted that the insurance company in the case had instigated the action partly in order to obtain the benefit of favorable Fourth

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120. The government based its prayer for relief upon CERCLA, 42 U.S.C. § 9607(a)(4)(A) (1988), which allows the government to maintain an action for "all costs of removal or remedial action incurred by the United States." *Id.*

121. *Milliken*, 857 F.2d at 980.

122. *Id.* at 981.

123. See, e.g., *Travelers Indem. Co. v. Allied-Signal, Inc.*, 718 F. Supp. 1252, 1255-56 (D. Md. 1989) (following Fourth Circuit precedent, environmental cleanup costs do not constitute damages within the meaning of CGL policy language); *Hayes v. Maryland Casualty Co.*, 688 F. Supp. 1513, 1515 (N.D. Fla. 1988) (reimbursement of expenses incurred by Department of Environmental Regulation and cleanup costs incurred at the direction of said agency are not expenses recoverable under CGL policy as damages); *Verlan, Ltd. v. Armitage & Co.*, 688 F. Supp. 950, 954-55 (N.D. Ill. 1988) (based on clear language of policy, CERCLA cleanup costs nonrecoverable); *Travelers Ins. Co. v. Ross Elec. of Washington, Inc.*, 685 F. Supp. 742, 744-45 (W.D. Wash. 1988) (CERCLA response costs not considered "damages" under CGL policy and not covered by terms of the policy).

124. 718 F. Supp. 1252 (D. Md. 1989).

125. *Id.* at 1256.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

Circuit law.<sup>131</sup> Even though the *Travelers* court held that CERCLA costs were not damages, the court apparently did so reluctantly, emphasizing the on-going legal struggle between legal scholars, insureds and insurers.<sup>132</sup>

*B. The Other Side of the Debate: Cleanup Costs are "Damages"*

*1. Avondale Industries v. Travelers Indemnity*

The Second Circuit, in *Avondale Industries v. Travelers Indemnity Co.*,<sup>133</sup> recently became the first federal circuit to hold that cleanup costs are "damages" giving rise to an insurer's duty to defend under CGL policies.<sup>134</sup> *Avondale* involved an appeal from the district court judgment granting partial summary judgment in an action for declaratory relief instituted by Avondale Industries. The judgment held that Travelers had a duty to defend Avondale in litigation instituted by the State of Louisiana seeking cleanup of a site contaminated, in part, by Avondale's disposal of hazardous waste products.<sup>135</sup>

Applying New York law, the Second Circuit held that the term "damages" in a CGL policy included remedial damages incurred in hazardous waste cleanup.<sup>136</sup> The *Avondale* court expressly rejected the Fourth and Eighth Circuits' reasoning in *Armco* and *NEPACCO*, respectively,<sup>137</sup> and also rejected Travelers' argument that New York law did not allow recovery of cleanup costs under CGL policies.<sup>138</sup> The court noted that the CGL policy at issue did not include a definition of "damages" and concluded that without a limiting definition of the term, the policy should be construed to cover equitable cleanup costs.<sup>139</sup> Although the *Avondale* case did not specifically address the insurer's duty to indemnify, and the holding is limited to a duty to defend situation,<sup>140</sup> the case nevertheless establishes a persuasive

131. *Id.*

132. *Id.*

133. 887 F.2d 1200 (2d Cir. 1989).

134. *Id.* at 1205-07.

135. *Id.* at 1202-03.

136. *Id.* at 1206-07.

137. *Id.*; see *NEPACCO II*, 842 F.2d 977, 985-87 (8th Cir.) (cleanup costs do not constitute damages), *cert. denied*, 109 S. Ct. 66, 102 L. Ed. 2d 43 (1988); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352-54 (4th Cir. 1987) (cleanup costs not covered under CGL policy). For a discussion of *NEPACCO II* and *Armco*, see *supra* notes 85-118.

138. *Avondale*, 887 F.2d at 1207.

139. *Id.* The *Avondale* court noted that "viewed from the insured's perspective, we think an ordinary businessman reading this [CGL] policy would have believed himself covered for the demands and potential damage claims now being asserted . . . particularly absent any specific exclusionary language in the policy." *Id.*

140. The *Avondale* court noted that "[a]n insurer's duty to defend and to indemnify [under a CGL policy] are separate and distinct, and the former duty is broader than the latter." *Id.* at 1204 (citing *Technicon Elec. Corp. v. American Home Assurance Co.*, 141 A.D.2d 124, 533 N.Y.S.2d 91, 95 (1988), *aff'd*, 74 N.Y.2d 66, 73, 542 N.E.2d 1048, 1050, 544 N.Y.S.2d 531, 533 (1989); *Servidone Constr. Corp. v. Security Ins. Co.*, 64 N.Y.2d 419, 424, 477 N.E.2d 441, 444, 488 N.Y.S.2d 139, 142 (1985); and *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 310, 476 N.E.2d 272, 274-75, 486 N.Y.S.2d 873, 875-76 (1984)). The *Avondale* court further noted that:

The duty to defend rests solely on whether the complaint in the underlying action contains any allegations that arguably or potentially bring the action within

precedent analytically compatible with the indemnification context.

## 2. Chesapeake Utilities v. American Home Assurance

Another recent case holding in favor of insureds is *Chesapeake Utilities Corp. v. American Home Assurance Co.*<sup>141</sup> Although the Federal District Court for the District of Maryland interpreted Maryland law, the court expressly refused to follow the Fourth Circuit precedent in *Armco*, claiming that the Fourth Circuit, in rendering an interpretation of damages, misinterpreted Maryland law.<sup>142</sup> The *Chesapeake* case involved two hazardous waste sites, one in Maryland and one in Delaware.<sup>143</sup> The insured, Chesapeake, operated a coal gas manufacturing facility at each site, which produced coal tar as a byproduct of the manufacturing process. The State of Maryland listed the Maryland facility as a potential hazardous waste site and demanded that Chesapeake test the soil and groundwater at the site for contamination. Chesapeake incurred costs for these tests as well as certain costs for cleanup directed by the State of Maryland.<sup>144</sup>

The State of Delaware incurred its own expenses cleaning up and monitoring the Delaware site. Interestingly, neither Delaware nor Maryland brought a lawsuit against Chesapeake,<sup>145</sup> although Delaware apparently asserted claims against Chesapeake alleging liability under CERCLA and comparable state statutes.<sup>146</sup> The EPA also got involved at the Delaware site and threatened to hold Chesapeake liable for cleanup costs.<sup>147</sup>

After Chesapeake's insurers refused to defend and indemnify Chesapeake on the claims, Chesapeake brought an action seeking declaratory relief and damages for costs incurred in the cleanup of the two facilities. The insurers moved for summary judgment using the familiar argument that cleanup activities are equitable remedies, not legal damages as contemplated by CGL policies.<sup>148</sup>

Declining to accept the insurers invitation to follow *Armco*,<sup>149</sup> the *Chesapeake* court held that, under Maryland law, language in an insurance provision is ambiguous when a reasonable layperson would view the word as

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the protection purchased [in a CGL policy]. So long as the claims alleged against the insured rationally may be said to fall within the policy coverage, the insurer must come forward and defend.

*Id.* at 1204 (citing *Technicon*, 74 N.Y.2d at 73, 542 N.E.2d at 1050, 544 N.Y.S.2d at 533).

141. 704 F. Supp. 551 (D. Del. 1989).

142. *Id.* at 558. In a footnote, the *Chesapeake* court noted that a federal appellate court's interpretation of state law is merely persuasive authority. *Id.* at 558 n.18.

143. The case also raised an interesting choice of law problem for the federal district court sitting in Delaware. The *Chesapeake* court determined that Maryland law governed the interpretation of the insurance policy for the Maryland site and Delaware law governed the Delaware site's policy. *Id.* at 555-58.

144. *Id.* at 554.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 555.

149. *Id.* at 558.

susceptible to more than one interpretation.<sup>150</sup> Determining that the outcome of the motions for summary judgment depended upon whether the court construed the term "damages" as ambiguous, and noting that the CGL policies failed to define the term, the court held that a definition of damages such as the one the insurer's had offered—a definition based upon the traditional legal distinction between equity and law—would not be in accord with the understanding of a reasonable lay person.<sup>151</sup>

Concluding that the insured's definition of damages encompassing equitable and legal relief was at least one reasonable interpretation of the word, the *Chesapeake* court resoundingly rejected the insurer's legalistic, technical definition of damages.<sup>152</sup> With respect to the Delaware site, the *Chesapeake* court followed its own recent precedent in *New Castle County v. Hartford Accident & Indemnity Co.*<sup>153</sup> In the year preceding the *Chesapeake* case, the court in *New Castle* held that under Delaware law the term "damages" included cleanup costs and equitable-type remedies unless the insurance policy itself specifically defined the term to the contrary.<sup>154</sup> While acknowledging the divided authority among the courts on this issue, the *Chesapeake* court recognized that a trend in case law was emerging that rejected *Armco's* reasoning.<sup>155</sup>

### 3. Intel v. Hartford

The San Jose division of the Northern District of California recently joined the trend towards rejecting the *Armco* reasoning in *Intel Corp. v. Hartford Accident & Indemnity Co.*<sup>156</sup> Intel Corporation, a manufacturer of semiconductors, stored certain hazardous substances utilized in its manufacturing processes in an underground storage tank on the site of its manufacturing facility. After moving to a larger facility, Intel conducted soil sampling and testing of the old site, apparently at the request of a potential tenant. The tests indicated that the site was contaminated by toxic substances in the soil and groundwater. Upon verifying the results of the tests, Intel undertook cleanup efforts and subsequently entered into a Consent De-

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150. *Id.* at 559.

151. *Id.* at 560 (citing *Pacific Indem. Co. v. Interstate Fire & Casualty Co.*, 302 Md. 383, 488 A.2d 486, 488 (1985)).

152. *Id.* The *Chesapeake* court expounded on the dichotomy of the Fourth Circuit's analysis in *Armco*, which noted that on the one hand that the standard under Maryland law is that terms of insurance policies should be given the meaning a "reasonably prudent layperson would infer," while on the other hand, a "legal, technical meaning" should be given to the term "damages." *Id.*; see *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352, 1354 (4th Cir. 1987).

153. 673 F. Supp. 1359 (D. Del. 1987). The *Chesapeake* court also quoted from *American Motorists Ins. Co. v. Levelor Lorentzen, Inc.*, No. 88-1994, slip op. (D.N.J. Oct. 14, 1988) (WESTLAW, 1988 WL 112142), in which the court stated, "[t]he average person would not engage in a complex comparison of legal and equitable remedies in order to define 'as damages', but would conclude based on the plain meaning of the words that the cleanup costs imposed on [the insured] under CERCLA would constitute an obligation to pay damages." *Chesapeake*, 704 F. Supp. at 560-61.

154. *Chesapeake*, 704 F. Supp. at 561.

155. *Id.* at 560.

156. 692 F. Supp. 1171 (N.D. Cal. 1988).

cree<sup>157</sup> with the EPA and other PRPs.<sup>158</sup> Intel's insurance carrier denied coverage, and Intel filed suit against the insurer alleging a myriad of claims.<sup>159</sup> The sole issue presented in *Intel* however, was whether the cleanup costs Intel incurred were within the scope of coverage under its CGL policy,<sup>160</sup> a matter of first impression for a court applying California law.<sup>161</sup>

After determining that a "case and controversy" existed,<sup>162</sup> the *Intel* court went on to review California law regarding the interpretation of insurance policies.<sup>163</sup> In its analysis of California rules of construction, the court noted that California courts would construe an insurance policy against the drafter of the document.<sup>164</sup> After determining that "property damage" to a third party had occurred,<sup>165</sup> the court analyzed the meaning of damages within the framework of Intel's CGL policy.<sup>166</sup> Recognizing the Fourth Circuit's holding in *Armco*, the *Intel* court criticized the Fourth Circuit's reliance on *Hanna*<sup>167</sup> for a definition of damages, questioning why the court would chose to follow a definition from the 1950s in a Fifth Circuit opinion that

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157. CERCLA, as modified by the Superfund Amendment and Reauthorization Act of 1986 (SARA), permits potentially responsible parties to enter into consent decrees with the EPA whereby the parties agree upon a plan to cleanup a hazardous waste site. 42 U.S.C. § 9617 (1988). SARA added a notice requirement to CERCLA, providing that the EPA must publish a notice of a remedial plan prior to its adoption. *Id.* The publication must allow for a reasonable opportunity for public commentary. *Id.* After the adoption of a consent decree, the EPA again must make the plan available to the public. *Id.*

158. In the Consent Decree, the EPA stipulated that the cleanup work was performed consistent with the NCP and that "all costs reasonably incurred for such work are necessary costs of response." *Intel*, 692 F. Supp. at 1174. The Decree also noted that the purpose of the work being done was to "further evaluate, prevent or minimize the release or . . . threatened release . . . of hazardous substances to the environment and to protect the public health and welfare and the environment." *Id.* (quoting Consent Decree between EPA and Intel).

159. The complaint included allegations of "fraud, deceit, intentional and negligent misrepresentation, breach of contract, breach of fiduciary duty, tortious breach of implied covenant of good faith and fair dealing, breach of insurer's statutory duties, civil conspiracy, and, of course, violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO") . . . ." *Id.* at 1175.

160. *Id.*

161. *Id.* at 1172.

162. *Id.* at 1175-76.

163. *Id.* at 1181-82.

164. *Id.* The court thoroughly analyzed the California rules of insurance policy interpretation. *Id.* at 1181-82. For a discussion of the basic tenets of insurance contract interpretation, see *supra* note 44.

165. The *Intel* court conducted a thorough analysis of an exclusionary clause in the CGL policy, which read "this insurance does not apply . . . (k) to property damage (1) to property owned or occupied or rented to the insured . . . ." *Intel*, 692 F. Supp. at 1181-85. The court rejected Hartford's argument that the CGL policy did not apply because the property damage in question related to Intel's own property and did not involve third party property damage as required by the exclusionary clause. *Id.* The *Intel* court held that, "by polluting the ground water, Intel has damaged the property of all Californians." *Id.* at 1183. For a further analysis of pollution exclusion clauses in insurance policies, see Tyler & Wilcox, *Pollution Exclusion Clauses: Problems in Interpretation and Application Under the Comprehensive General Liability Policy*, 17 IDAHO L. REV. 497 (1981).

166. See *Intel*, 692 F. Supp. at 1186.

167. *Aetna Casualty & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955) (defining damages as "payments to third parties when those persons have a legal claim for damages").

severely constricted the scope of insurance coverage.<sup>168</sup>

The *Intel* court then held that in a diversity case a federal court should apply the law of the forum regarding the definition of damages.<sup>169</sup> Citing a long line of authority and noting a sharp contrast between case law on the issue of the interpretation of damages, *Intel* noted that the clear trend of judicial authority was in accord with the view that cleanup costs were damages within the scope of a CGL policy.<sup>170</sup>

The *Intel* court interjected a significant new argument into the analysis of cleanup costs as damages under CGL policies. The court argued that cleanup costs actually equate with mitigation of damages.<sup>171</sup> In a thorough analysis of the principle of mitigation of damages in California, the court specifically pointed to the fact that the California Water Code<sup>172</sup> explicitly contains a mitigation of damages provision.<sup>173</sup> The court went on to analyze

168. *Intel*, 692 F. Supp. at 1187. The *Intel* court criticized the *Hanna* damages definition as "a tautology defining damages as payments to a person who 'has a legal claim' for damages." *Id.* at 1187 n.21 (citing *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987)).

169. *Id.* at 1187-88.

170. *Id.* at 1187. As authority supporting the *Intel* court's conclusion that the bulk of the case law finds coverage for cleanup costs, the court cited the following cases: *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1194 (9th Cir. 1986) (suggesting that Oregon would follow "reasonable, enlightened view" that discharge of pollution into water causes damages to tangible property and "hence cleanup costs are recoverable under a property damage liability clause"); *Centennial Ins. Co. v. Lumbermans Mut. Casualty Co.*, 677 F. Supp. 342 (E.D. Pa. 1987); *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359 (D. Del. 1987); *Gloucester v. Maryland Casualty Co.*, 668 F. Supp. 394 (D.N.J. 1987); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987); *Independent Petrochem. Corp. v. Aetna Casualty & Sur. Co.*, 654 F. Supp. 1334 (D.D.C.), *aff'd*, 784 F.2d 1131 (D.C. Cir. 1986); *Consolidated Rail Corp. v. Certain Underwriter's at Lloyds*, No. 84-2609, slip op. (E.D. Pa. June 5, 1986) (unreported decision available on WESTLAW, 1986 WL 6547); *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (1983); *Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76 (Super. Ct. App. Div. 1987); *Landsco, Inc. v. Department of Envtl. Protection*, 38 N.J. Super. 275, 350 A.2d 520 (Super. Ct. Ch. Div.), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (Super. Ct. App. Div. 1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977); *Solvents Recovery Serv. v. Midland Ins. Co.*, No. L-25610-83, slip op. (N.J. Super. Ct. Nov. 17, 1987); *Kutscher's Country Club Corp. v. Lincoln Ins. Co.*, 119 Misc. 2d 889, 465 N.Y.S.2d 136 (Sup. Ct. 1983). *Intel*, 692 F. Supp. at 1188 n.24. As authority for the contrary position, the *Intel* court cited the following cases: *NEPACCO II*, 842 F.2d 977 (8th Cir. 1988); *Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. 430 (D. Md. 1986), *aff'd*, 822 F.2d 1348 (4th Cir. 1987); *Ladd Constr. Co. v. Insurance Co. of N. Am.*, 73 Ill. App. 3d 43, 391 N.E.2d 568 (1979); *Garden Sanctuary, Inc. v. Insurance Co. of N. Am.*, 292 So. 2d 75 (Fla. Dist. Ct. App. 1974). *Intel*, 692 F. Supp. at 1188 n.24. *See also* *Thief River Falls v. United Fire & Casualty Co.*, 336 N.W.2d 274 (Minn. 1983) (term "damages" does not include compliance with writs of mandamus). *But see* *New York v. Armo Realty*, 697 F. Supp. 99, 102 n.5 (N.D.N.Y. 1988) (in dicta court agreed with insured's definition of damages in CGL policies as including cleanup costs) (citing *Powers Chemco, Inc. v. Federal Ins. Co.*, 122 A.D.2d 203, 504 N.Y.S.2d 738, 739 (1986)); *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich. 1988) (governmental action seeking reimbursement of cleanup costs incurred pursuant to CERCLA stated claim for "damages" within CGL policy, and thus, insurer required to defend insured); *Dayton Indep. School Dist. v. National Gypsum*, 682 F. Supp. 1403, 1411 n.24 (E.D. Tex. 1988) (stating in dicta that better reasoned opinions hold that cleanup costs incurred in compliance with governmental directives constitute damages).

171. *Intel*, 692 F. Supp. at 1190.

172. *See* CAL. WATER CODE § 13350 (West 1971).

173. *Intel*, 692 F. Supp. at 1189. According to the *Intel* court, CAL. WATER CODE

the mitigation principle in the context of California insurance law.<sup>174</sup>

Analogizing to a California case in which a California appellate court allowed an insured to recover under a CGL policy expenses incurred in preventing the spread of a fire,<sup>175</sup> the *Intel* court reasoned that a mitigation of damages analysis was applicable in the context of hazardous waste cleanup.<sup>176</sup> Accordingly, the *Intel* court reasoned that the California Supreme Court would consider the costs incurred by an insured in cleaning up and monitoring hazardous waste that is contaminating public resources as constituting damages covered by the terms of a CGL policy.<sup>177</sup>

### III. ANALYSIS: NO WINNERS

#### A. *The Historical Context: Why Neither Party Should Shoulder the Burden Alone*

When interpreting insurance contracts, courts attempt to uphold the parties' intentions and give the parties the benefit of their bargain.<sup>178</sup> Courts

§§ 13000-13999 (West 1971 & Supp. 1989) concerns regulating and protecting the water quality of California. 692 F. Supp. at 1189. The *Intel* court pointed to § 13350 of the Water Code as exemplifying the embodiment of the principle of mitigation of damages. *Id.* at 1191. The court noted that § 13350(g) allows the California Attorney General to consider "corrective action, if any, taken by the discharger" when assessing civil liability for violating the Code. *Id.*

174. *Intel*, 692 F. Supp. at 1191.

175. See *Globe Indem. Co. v. People*, 43 Cal. App. 3d 745, 118 Cal. Rptr. 75 (1974). Significantly, the disputed CGL provision in the *Globe* case was identical to the policy provision in the *Intel* case. *Intel*, 692 F. Supp. at 1192.

176. *Intel*, 692 F. Supp. at 1192. The *Intel* court quoted with approval the following portion of the *Globe* case, which pointed out the logic in the position that cleanup costs are "damages" within CGL policies:

When an insured takes out an indemnity policy, as in this case, it is . . . reasonable to suppose that he expects to be protected by his insurance in any situation wherein he becomes liable for damage to tangible property. It would seem strangely incongruous to him, as it does to us, that his policy would cover him for damages to tangible property destroyed through his negligence in allowing a fire to escape but not for the sums incurred in mitigating such damages by suppressing the fire. We cannot conceive as reasonable a rule of law which would encourage an insured property owner not to report that neighboring property was being destroyed by reason of his negligence in permitting a fire to escape from his property because his insurance would cover him for the property damage but not for the fire suppression costs. We do not believe the facts of this case direct us to reach such an unreasonable and potentially stultifying conclusion. A rule, reasonable [sic] applied, permitting expenses incurred in the mitigation of damages to tangible property to be recoverable under policies insuring against liability incurred because of damages to tangible property would seem to require universal application as it encourages a most salutary course of conduct. Such a rule is statutorily recognized in a limited context in subdivision (b) of section 531 of the Insurance Code; this subdivision holds that an insurer is liable "[i]f a loss is caused by efforts to rescue the thing insured from a peril insured against."

*Id.* at 1191-92 (quoting *Globe*, 43 Cal. App. 3d at 751-52, 118 Cal. Rptr. at 79-80).

177. The *Intel* court justified its decision, in part, with a public policy argument focusing on the fact that the Superfund did not contain enough money to cover all cleanups. *Id.* at 1193. The court reasoned that if CGL coverage was not allowed to mitigate cleanup costs, then insureds would not be encouraged to pursue remedial solutions. *Id.* The court predicted that insureds, in order to obtain favorable treatment under their insurance policies, might wait until extensive damage occurred and the government itself cleaned the site. *Id.*

178. See *supra* note 43 for a discussion of the rules of insurance policy interpretation.

run into difficulty when attempting to apply this concept to CGL coverage of CERCLA-mandated environmental cleanup costs because neither the insurer nor the insured bargained for the policy with hazardous waste cleanup in mind.<sup>179</sup> Environmental legislation like CERCLA, passed only in 1980, had no similar counterpart in the 1960s and 1970s. At the time most of these CGL policies were issued, hazardous substance technology was in its infancy and environmental law was not yet a legal specialty.<sup>180</sup> Since the CGL policies at issue do not contain a definition of damages that restricts policy coverage to damages at law,<sup>181</sup> the courts should not, in fairness, impose a retroactive, highly technical meaning of the term "damages" that in no way comports with the ordinarily understood meaning of the word.<sup>182</sup> According to the understanding of an ordinary insured, CGL policies should cover cleanup costs as damages.<sup>183</sup>

On the other hand, insurance carriers analyzed and calculated risks in the same historical context and were as unaware and unable to predict the advent of hazardous waste cleanup expenses as the insureds.<sup>184</sup> Even had the insurance carriers foreseen the emergence of these environmental problems, the gravity of cleanup actions today was at the time unimaginable.<sup>185</sup> Insurance carriers presumed that they had calculated necessary risks and charged sufficient premiums under the policies they issued.<sup>186</sup> The carriers did not take the debilitating financial costs of hazardous waste cleanup into consideration in arriving at these figures.<sup>187</sup> The insurers did not calculate the

179. See *infra* notes 184-191 and accompanying text.

180. The CGL policies at issue in most environmental litigation were issued prior to 1980. See, e.g., *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977, 979 (8th Cir.) (policies at issue were three standard CGL policies issued from 1970 to 1972), *cert. denied*, 109 S. Ct. 66, 102 L. Ed. 2d 43 (1988); *Eagle Leasing Corp. v. Hartford Fire Ins. Co.*, 540 F.2d 1257, 1258 (5th Cir. 1976) (CGL policy issued in 1967), *cert. denied*, 431 U.S. 967 (1977); *Aetna Casualty & Sur. Co. v. Gulf Resources & Chem. Corp.*, 709 F. Supp. 958, 959 (D. Idaho 1989) (CGL policy coverage spanned from 1967 to 1972); *Verlan, Ltd. v. John L. Armitage & Co.*, 695 F. Supp. 950, 951 (N.D. Ill. 1988) (standard CGL policy issued in 1979); *Technicon Elec. Corp. v. American Home Assurance Co.*, 141 A.D.2d 124, 533 N.Y.S.2d 91, 93 (1988) (policy issued in 1971). The 1980s, however, have been a time of environmental awakening in the United States as people have become increasingly aware of the need to control hazardous waste. See Note, *CERCLA Cleanup Costs Under Comprehensive General Liability Insurance Policies: Property Damage or Economic Damage?*, 56 *FORDHAM L. REV.* 1169 (1988).

181. See *supra* note 43.

182. See *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838, 842-43 (2983) (ordinary insured considers all damages from lawsuit involving property damage covered under CGL policy).

183. *Id.*

184. See *Cheek, Site Owners or Liability Insurers: Who Should Pay for Cleaning up Hazardous Waste*, 8 *VA. J. NAT. RESOURCES L.* 75, 81 (1988).

185. See *id.* at 87.

186. *Id.* at 87-88.

187. *Id.* *Cheek* explains that:

Insurers of general liability contracts written in the decades prior to CERCLA could not have foreseen the statute's 1980 enactment and its attendant economic consequences; thus, they did not factor these costs into their prices and reserve calculations. Rather, until recently, insurers had no experience whatsoever with waste cleanup costs, and thus had no reserves for CERCLA liabilities established under any policy written prior to its enactment.



risks, nor charge premiums, with this enormously expensive problem in mind.<sup>188</sup>

Both parties historically took steps they considered sufficient to protect themselves in the market place. Insured corporations bought liability insurance to protect themselves from liability stemming from their own negligence in causing third-party property damage.<sup>189</sup> Now, facing the crisis of liability in the environmental arena, both sides face potential financial destruction as a result of environmental liability.<sup>190</sup> With responsible parties facing bankruptcy,<sup>191</sup> as a practical matter some hazardous waste facilities will go unremedied. The current state of affairs with insureds and insurers fighting it out in the courtroom creates additional problems, including masking the true problem: How can the system clean up all of the toxic sites while keeping businesses and insurance carriers solvent?

### *B. Problems Created by the Current System*

#### *1. A Flood of Litigation: Burdens on the Legal System*

Although cleanup is essential to counter imminent threats to the environment, no one seems to agree on who should pay for these enormous remedial actions. In a climate of self-preservation, neither insureds nor insurers admit responsibility. Thus, litigation is permeating the courtroom, pitting insured against insurer.<sup>192</sup> Obviously the litigation covering the duty to defend and to indemnify is a costly exercise for both insurers and insureds.<sup>193</sup> Just as important, the litigation impacts taxpayers, as these complex cases consume ever-increasing amounts of judicial resources. With respect to the duty to defend cases in particular, it seems ludicrous to expend such a large amount of money in complex litigation merely to determine who foots the bill for the next round of costly complex litigation.<sup>194</sup> These massive expenditures reduce the amount of resources available to remedy environmental problems.

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*Id.*

188. *Id.* Cheek notes:

The normal practice in the insurance industry is to build anticipated reserve requirements into the premiums charged in a given line of insurance. Actual reserves are then established on a case-by-case basis, with the amounts involved taxed against premiums collected during the year in which the accident giving rise to the case occurred. In this manner, the industry is usually able to determine, within a reasonable period of time, whether its original anticipated reserve requirements were accurately calculated.

*Id.*

189. See *Taking the Insurers*, *supra* note 24, at 1110 (CGL policies were designed to cover third-party property damage resulting from negligent acts or omissions of insured).

190. The average cost of complying with EPA-ordered cleanup stands at \$9.2 million dollars per CERCLA site. See Cheek, *supra* note 184, at 81. This estimate may exceed \$10 million when legal fees and transactional costs are included. *Id.* at 81 n.25.

191. See *infra* note 216 and accompanying text.

192. See cases cited *supra* note 170.

193. See Cheek, *supra* note 184, at 81 n.25 (legal fees and transactional costs involved in CERCLA litigation often exceed \$1 million dollars per site).

194. For an example of complex, protracted environmental litigation, see *United States v. Conservation Chem. Co.*, 653 F. Supp. 152 (W.D. Mo. 1986), which spawned related litigation in *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987).

Not only is this never-ending cycle of litigation outrageously expensive, but it also consumes time that, in many cases, delays cleanup of toxic substances and increases the likelihood and severity of an environmental disaster.<sup>195</sup> This increased likelihood of disaster, in turn, exposes both the insured and the insurer to an increasing risk that personal injury will result from the contamination, exposing both to more liability.<sup>196</sup>

## 2. *A Load of Complications: Burdens on Commercial Transactions*

The unpredictability and the lack of uniformity in the legal arena spills over into the arena of business transactions. In the mergers and acquisitions context, environmental due diligence reviews have become commonplace.<sup>197</sup> In addition, environmental assessments are necessary in the commercial lending context.<sup>198</sup> Possible liability for cleanup costs is a serious problem facing a lending institution when it accepts as collateral property that could be contaminated.<sup>199</sup> A bank's minimal participation in the management of a company can render it liable as an "owner or operator" PRP under CERCLA.<sup>200</sup> Because of the threat of future liability, lenders often deny loans when an environmental analysis reveals even small amounts of contamination on property offered as collateral.<sup>201</sup> On the other side of the real estate transaction, prospective purchasers of land must, as a practical matter, conduct an exhaustive environmental analysis to avoid potential CERCLA liability as a result of prior contamination.<sup>202</sup> A good environmental audit requires both a team of experts to examine records, interview employees, and

195. See Cheek, *supra* note 184, at 95 ("The faster these threats to public health and the environment are removed or neutralized, the fewer the claims that will have to be paid for exposure to these sites.")

196. *Id.*

197. See Bernstein, *Environmental Due Diligence Review in the Merger and Acquisition Context*, 322 PRAC. L. INST., THE IMPACT OF ENVIRONMENTAL REGULATIONS ON BUSINESS TRANSACTIONS 177, 178 (1988).

198. See Brown, *Superfunds & Superleins: Super Problems for Secured Lenders*, 322 PRAC. L. INST., THE IMPACT OF ENVIRONMENTAL REGULATIONS ON BUSINESS TRANSACTIONS 447, 461 (1988).

199. See Barr, *An Overview of Federal and State Environmental Provisions That May Affect Business Transactions*, 322 PRAC. L. INST., THE IMPACT OF ENVIRONMENTAL REGULATIONS ON BUSINESS TRANSACTIONS 85, 89 (1988).

200. See 42 U.S.C. § 9607 (1988). A lender would not usually be a PRP unless classified as an "owner or operator." See *infra* note 199, at 89. CERCLA contains a specific exception that protects lenders during the life of a loan because "[t]he term 'owner or operator' . . . does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 U.S.C. § 9601(20)(A) (1988).

One case, however, has found a lender liable for cleanup costs as an "owner or operator" under CERCLA. See *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579 (D. Md. 1986) (bank was owner or operator despite lender exception in CERCLA when bank foreclosed on garbage dump and purchased property at foreclosure sale).

201. Finkelstein, Hansen, & Steel, *Buying Contaminated Property: How to Avoid Toxic Surprise*, 322 PRAC. L. INST., THE IMPACT OF ENVIRONMENTAL REGULATIONS ON BUSINESS TRANSACTIONS 127, 127 (1988).

202. See Leifer & Reich, *Effect of CERCLA on Property Transfers*, 322 PRAC. L. INST., THE IMPACT OF ENVIRONMENTAL REGULATIONS ON BUSINESS TRANSACTIONS 199, 206 (1988). Leifer and Reich state that prospective purchasers should take the following steps to minimize the likelihood of CERCLA liability: "(1) conduct a thorough review of the history of

inspect the facility, and competent legal counsel to analyze the implications of the findings.<sup>203</sup> This practical requirement greatly increases the cost of business transactions.

The toxic tort litigation creates an even more tenuous situation for insurance carriers. Due to both the crisis situation in the insurance industry resulting from multimillion dollar judgments for liability in the toxic tort area<sup>204</sup> and the uncertainty of the environmental arena, businessmen are increasingly unable to obtain insurance to cover environmental risks.<sup>205</sup> Until the legal issues involved in the hazardous waste litigation are resolved, insurance carriers will be unable to predict risks and will be forced either to stop selling environmental insurance or to sell it at premiums well above the rate businessmen and city governments can afford to pay.<sup>206</sup> These high premiums will eventually price businesses out of the pollution insurance market altogether.<sup>207</sup>

### 3. *A Race to the Courthouse: Forum Shopping and Preemptive Filings*

In addition to burdening commercial transactions, the environmental litigation over insurance coverage of cleanup costs has severe negative effects on the legal system. The lack of uniformity in court decisions fosters forum shopping and preemptive filings.<sup>208</sup> With the courts so sharply divided, both insured and insurer are making a mad dash to the courthouse to file an action in a jurisdiction that will render a favorable result.<sup>209</sup> Since CERCLA actions involve federal statutes, and many of the businesses and insurance companies conduct affairs in numerous states, making diversity a basis for

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the site; (2) review Federal, state and local governmental records concerning the site; and (3) based on these inquiries, conduct an environmental investigation of the property." *Id.* at 206.

203. See Brown, *Keeping Clean: Avoiding Hazardous Waste Liability*, 322 PRAC. L. INST., THE IMPACT OF ENVIRONMENTAL REGULATIONS ON BUSINESS TRANSACTIONS 209, 216 (1988).

204. See Barr, *supra* note 199, at 87-89.

205. See *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1174 (W.D. Mich. 1988). In *Thomas Solvent* Judge Enslin aptly noted the extent of this crisis stating:

What is also evident is that if so-called "environmental insurance" is ever going to be available to businesses on a large-scale basis, the issues raised in this case . . . must be clarified so that business and local governments which engage in toxic-related enterprises can secure adequate insurance that will permit them to remain solvent and, at the same time, to put in place effective pollution safeguards. On the other hand, until these and other related legal issues are clearly defined, insurance companies will not have enough confidence in their ability to predict risk and, consequently, will continue to sell environmental insurance at premiums which no business or local government can afford to pay.

*Id.* The new CGL policy that came out in 1986 attempts to unequivocally exclude pollution coverage altogether. See *supra* note 13.

206. *Id.*

207. *Id.*

208. See *Travelers Indem. Co. v. Allied-Signal, Inc.*, 718 F. Supp. 1152, 1156 (D. Md. 1989) (information pointed to fact that insurance company instigated action to receive benefit of favorable Fourth Circuit law).

209. *Id.*; see also Cheek, *supra* note 184, at 92 ("Both PRPs and insurers dogmatically insist on an all-or-nothing resolution of the cleanup coverage issue, as evidenced most vividly by the dozens of preemptive mega-suits now in progress.")

jurisdiction, federal courts frequently become the forums adjudicating the insurance coverage cases, even though the cases involve essentially state law issues.<sup>210</sup> Although federal courts interpreting insurance contracts must construe the state law that governs the insurance contracts,<sup>211</sup> the outcome regarding coverage ultimately rests upon the court's determination of whether a particular clause is ambiguous.<sup>212</sup> Once a court determines the ambiguity question, the result naturally flows.<sup>213</sup> Courts generally hold that unambiguous insurance policies do not cover cleanup costs, while ambiguous policies do.<sup>214</sup> Application of the standards for determining ambiguity necessarily involves a certain degree of unpredictable judicial discretion.

With circuits divided over the issue of insurance policy coverage of cleanup costs, the party who preempts the other by instigating litigation in a favorable forum essentially wins, while a party who is preempted loses. This happens even though the losing party with the same fact scenario before a different court would win. This disparity of result, while inherently unfair, also as a practical matter prompts the filing of lawsuits in the parties' efforts to get favorable law applied. Encouraging preemptive filing, moreover, increases the likelihood that unripe cases or cases based on trumped-up, frivolous, or groundless charges will reach a court. This increase in potentially meritless litigation burdens an already overworked court system.

### C. *The Real Problem*

The current state of affairs has created burdens for both commercial transactions and the legal system. Courts and commentators alike have at-

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210. Congress established the supremacy of state law in interpreting insurance contracts in the McCarran-Ferguson Act, 15 U.S.C. § 1012 (1988). In addition, the *Erie* doctrine requires federal courts to apply state law when resolving substantive issues of law in diversity cases. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

211. *See Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1181-82 (N.D. Cal. 1988).

212. All cases that have held that cleanup costs are damages covered under CGL policies first determined that the applicable insurance provisions were vague. *See cases cited supra* note 170.

213. *See supra* note 212.

214. *Compare Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987) (finding policy unambiguous and denying coverage of cleanup costs) with *United States Aviox Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (1983) (holding policy provision ambiguous and finding coverage of cleanup costs); *see also Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979, 981 (4th Cir. 1988) (holding word "damages" not ambiguous and denying recovery for cleanup costs); *NEPACCO II*, 842 F.2d 977, 985 (8th Cir. 1988) (finding term "damages" unambiguous and stating that plain meaning of damages does not include cleanup costs); *Aetna Casualty & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955) (including equitable relief under the term "damages" does violence to the policy's plain and unambiguous meaning); *Chesapeake Util. Corp. v. American Home Assurance Co.*, 704 F. Supp. 551, 559 (D. Del. 1989) (finding cleanup costs covered under CGL policy and finding ambiguity in the term "damages"); *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1189-90 (N.D. Cal. 1988) (reading term "damages" according to "reasonable expectations doctrine" and finding coverage for cleanup costs); *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1168 (W.D. Mich. 1988) (noting that from standpoint of insured, cleanup costs are "damages"); *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1365 (D. Del. 1987) (holding term "damages" ambiguous and cleanup costs covered under CGL policy).

tempted to solve the environmental crisis by holding either the insurance carrier or the insured solely liable for the cleanup of hazardous waste sites. Framing the solution in terms of requiring either the insured or the insurer to shoulder the entire financial burden fails to go far enough into the analysis of this complex problem. Saddling either side with the entire burden will force some insurance carriers or corporations into bankruptcy. The duty under the CGL policy to defend and to indemnify insureds carries with it enormous implications in the environmental context. Cleaning up all of the toxic waste sites that currently exist will cost billions or trillions of dollars.<sup>215</sup> Despite a strong temptation to look to insurance carriers as the "deep pockets," the insurance industry cannot shoulder the entire financial burden of these cleanup operations without some carriers going into bankruptcy.<sup>216</sup> Likewise, the business and industry sector is unable to foot the entire bill because the enormity of the costs will drive at least some of the parties into bankruptcy.<sup>217</sup>

Placing the entire burden either on insurance carriers or on business and industry, therefore, will threaten the parties with financial destruction. From a societal standpoint, forcing businesses or insurance companies to seek the protection of bankruptcy is undesirable. Practically, if the responsible parties go into bankruptcy, they will be unable to finance the cleanup operations and thus carry out the purpose of CERCLA to rid the environment of hazardous waste.

#### D. *The Real Solution: Revamp CERCLA*

CERCLA created a strict liability system,<sup>218</sup> primarily concerned with expeditious cleanup and only secondarily with ascribing fault.<sup>219</sup> Because a lame duck Congress enacted CERCLA in the closing days of the 1980 congressional session, the legislation is essentially a compromise.<sup>220</sup> CERCLA has been very effective in its prospective application, as business people apparently are more carefully disposing of toxic waste and more diligently assessing environmental implications in business transactions.<sup>221</sup>

The problems with CERCLA lies in its retroactive application to previously created toxic waste sites. At the time when business and industry generated and disposed of this hazardous waste, they did so without the benefit

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215. See Cheek, *supra* note 184, at 81 n.25. Cheek predicted that the cleanup cost per site could rise to as much as \$30 to \$50 million as a result of more stringent cleanup standards promulgated in SARA (Superfund Amendments and Reauthorization Act of 1986). *Id.* at 81. See 42 U.S.C. § 9617 (1988).

216. According to Cheek: "If insurance coverage is found not to cover such [cleanup] costs, many [hazardous] site owners will be forced into bankruptcy. If insurance companies must cover all such liabilities, they too will be bankrupted." Cheek, *supra* note 184, at 75.

217. *Id.*

218. See 42 U.S.C. §§ 9601-9657 (1988).

219. See S. REP. NO. 848, 96th Cong., 2d Sess. 3 (1980) (purpose of CERCLA is to facilitate quick cleanups without regard to fault; fault can be ascribed later).

220. C. CHADD & L. BERGESON, GUIDE TO AVOIDING LIABILITY FOR WASTE DISPOSAL 27 (1986).

221. For a discussion of environmental assessments in the context of commercial transactions, see *supra* notes 197-203 and accompanying text.

of CERCLA or other in-depth environmental legislative guidelines.<sup>222</sup> CERCLA's statutory establishment of PRPs fails to apportion liability equitably among the responsible parties. CERCLA allows one responsible party to be held solely liable for cleaning up a hazardous site,<sup>223</sup> merely affording a statutory right to institute a subsequent action for contribution.<sup>224</sup> The statutory scheme thus allows the EPA to force one party to fund the entire cleanup operation without the help of other responsible parties.

Because the current scheme of CERCLA does not provide for burden-sharing sufficient to facilitate the cleanup of all of the toxic sites, Congress must step in and solve this problem. One commentator recently suggested that to solve the environmental problem, all CGL insurance carriers should indemnify their insureds for CERCLA cleanup costs.<sup>225</sup> By balancing the social usefulness of the insurance industry against the interests of insureds in receiving unexpected benefits of their CGL policies, the commentator determined that the insurance industry should be the loser.<sup>226</sup> This Comment recognized that carrying the entire financial burden of cleaning up the hazardous waste facilities will force some insurance carriers into bankruptcy;<sup>227</sup> the author, however, insists that the government will step in and provide coverage if the insurance companies become bankrupt.<sup>228</sup> Forcing insurance carriers into bankruptcy is justified by the predicted result of such an occurrence: insurance coverage will simply become more expensive, unfortunate companies will go bankrupt, and the government will subsidize insurance guaranty associations.<sup>229</sup>

In light of the social usefulness of insurance companies as a method for businesses to protect themselves from financially ruinous liability and in light of the severe economic problems facing our nation in the budgeting and deficit areas, the commentator's justifications are unpersuasive. The taxpayers and the federal government simply cannot afford to subsidize yet another failed industry. Business people, moreover, need to be able to purchase insurance at reasonable rates in order to protect themselves. The real problem with this commentator's analysis lies in the fact that he merely balances the interests of insureds and insurers and chooses which side he thinks should be forced into bankruptcy. A better approach would be to balance the potential harm of the environmental problem and the probability of a serious loss due to the environmental problem against the cost of foisting the solution on only one segment of society. In balancing the very real threat to the general health and welfare of society from toxic waste against forcing business or insurance carriers into bankruptcy, the latter form of analysis also ironically

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222. See *supra* note 180 and accompanying text.

223. 42 U.S.C. § 9607 (1988).

224. *Id.*

225. See Comment, *Insurance Coverage of CERCLA Response Costs: The Limits of "Damages" in Comprehensive General Liability Policies*, 16 *ECOLOGY L.Q.* 755, 799-801 (1989).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

ensures that some sites will go unremedied because the responsible party is insolvent.

Under a public policy analysis, Congress clearly needs to revise CERCLA to distribute the costs of retroactive cleanups equitably among the parties in a manner that attempts to preserve the solvency of both and provides for the cleanup of all of the hazardous waste facilities.<sup>230</sup> Congress should provide that CGL insurance carriers who issued policies during the 1966-1973 period share liability for the environmental cleanup with industries and governments engaged in toxic-related enterprises. This goal could be accomplished by requiring potentially responsible insureds and their insurance carriers to divide evenly the costs of cleaning up the toxic wastes. Sharing the costs would increase the probability that sites would be remedied because, from a practical standpoint, combined resources form a larger fund than one side's resources can create alone.

A compromise solution is necessary in the face of such a difficult issue. With the circuit courts divided on the issue and with strong arguments abounding on both sides of the debate, Congress should step in and adopt compromise legislation that allocates the financial burden among the parties. Admittedly, formulating the specifics of such a compromise is a difficult task. Congress, however, could adjust the exact allocation of costs to each side to shift a larger part of the burden to one side or to the other as needed. Regardless of the exact ratio Congress chooses, the parties should have to share the burden of ridding the environment of toxic waste. This Comment does not attempt to recommend a detailed compromise plan. Rather, this Comment advocates a broad solution and offers an analytical framework for resolving this problem. Congress should attack the difficult issue and find some way to allocate the costs of cleanup among the CGL insurance carriers and the insureds.

#### IV. CONCLUSION

Litigation surrounding insurance carriers' duty to defend and to indemnify their insureds under Comprehensive General Liability policies in hazardous waste cleanup actions has sparked a heated debate and a fundamental split among courts, commentators, the government, and the parties to the CGL insurance policies. Faced with the prospect of financially debilitating cleanup costs, insureds are looking to the insurance companies to fund the necessary remedial action. Unwilling to accept the burden, both insurance companies and insureds alike are opting for protracted litigation as a means of postponing the inevitable.

With the lack of consensus and the split in authority over the issue of policy coverage of environmental cleanup costs, both sides are engaging in preemptive filing and forum shopping in the hope of obtaining favorable rul-

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230. Pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1012 (1988), the states normally have the exclusive power to regulate the business of insurance. To the extent, however, that the states are not regulating a particular facet of the insurance business, McCarran-Ferguson does not prohibit federal regulation. *Id.*

ings. The lack of uniformity in judicial decisions renders prudent business planning difficult, if not impossible, for both insurance carriers and their insureds. The current climate of insecurity and unpredictability discourages cleanup efforts because neither party can confidently assess its potential liability.

Until courts begin to resolve the conflicts among themselves and reach uniform decisions, the litigious trend will continue, with the winner, if such it can be called, being the party who runs fastest to a favorable courthouse. The environmental litigation arena presents a quagmire of complex problems for a legal system and business community premised upon the tenets of stability, predictability, and uniformity of decision. Congress, therefore, must resolve the problem. By revamping CERCLA to apportion liability fairly among the CGL insurance carriers that wrote policies between 1966 and 1973 and those industries that involve the generation, production, storage, or transportation of toxic substances, Congress could resolve this major issue. Until Congress revises CERCLA, insureds and insurers will continue to waste valuable time and money litigating CGL policy coverage issues, and hazardous waste sites will go unremedied. Congress must unite to solve the problems it overlooked in the creation of CERCLA.







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