CERCLA Cost Recovery Suits: A Suit against an Insured for Damages under a Comprehensive General Liability Policy

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CERCLA COST RECOVERY SUITS: A SUIT AGAINST
AN INSURED FOR DAMAGES UNDER A
COMPREHENSIVE GENERAL LIABILITY
POLICY

The Comprehensive Environmental Response Compensation and Liability Act (CERCLA) was enacted to facilitate prompt cleanup of hazardous waste disposal sites while imposing liability on those responsible for the contamination. Whether comprehensive general liability insurance provides coverage for CERCLA liability has become a rigorously litigated issue across the country as insurers have asserted numerous defenses to coverage. This Note explores the insurer’s defense that this insurance does not cover CERCLA liability because it does not constitute “damages” within the meaning of a CGL policy. The author analyzes complicated contract interpretation issues as well as policy questions to support the position that the motivating concern should be enforcement of the policy of CERCLA.

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INTRODUCTION

The most controversial environmental law issue of the decade is the enactment of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). A key objective of CERCLA is to impose liability for cleanup costs on persons involved in the transportation, storage, disposal and generation of hazardous...
wastes at currently inactive waste disposal facilities.\textsuperscript{2} Under CERCLA, liability is predicated upon the Environmental Protection Agency's (EPA) designation of responsible party status on a polluter.\textsuperscript{3} Actual liability arises whenever the EPA spends Superfund money to clean up a hazardous waste site when a responsible party fails to do so.\textsuperscript{4} CERCLA provides that a responsible party may be held strictly liable for past activities associated with the hazardous waste.\textsuperscript{5} Federal courts have consistently held that where the harmful effects of hazardous waste activities by more than one responsible party are indivisible, CERCLA liability can also be joint and several.\textsuperscript{6}

CERCLA provides the EPA and private entities with various remedies against responsible parties. First, CERCLA authorizes the EPA to sue the responsible party for the loss in value to the environment

\begin{enumerate}
\item an act of God;
\item an act of war;
\item an act or omission of a third party other than an employee or agent of the defendant, or other 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
\item any combination of the foregoing paragraphs.
\end{enumerate}

42 U.S.C.A. § 9607(b) (West 1987). \textsuperscript{6}

\begin{enumerate}
\item See, e.g., South Carolina Recycling & Disposal, Inc., 653 F. Supp. at 999, following United States v. Chem-Dyne, 572 F. Supp. 802 (S.D. Ohio 1983) (joint and several liability is determined on case by case basis and turns on whether or not harm is divisible and there is a reasonable basis for apportionment of damages); United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984) (court may order joint and several liability whenever a defendant could not prove his contribution to an injury, however, a court could still apportion damages according to the Gore amendment). The Gore amendment set four criteria for determining whether or not joint and several liability should be imposed on a responsible party but was not passed by the Senate. See generally Comment, Generator Liability Under Superfund for Clean-up of Abandoned Hazardous Waste Dumpsites, 130 U. Pa. L. Rev. 1229, 1269-1278 (1982) (discussing the Gore amendment and damage apportionment criteria).
\item See id. § 9607(a)(2)-(4).
\item See Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co., 17 Ohio App. 3d 127, 130, 477 N.E.2d 1227, 1232 (1984) (responsible party status means that the EPA has determined that the party is liable for the cleanup of a hazardous waste site).
\item See United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 991 (D.S.C. 1986). Once the requisite connection between the party and the waste site as described in 42 U.S.C.A. § 9607(a)(1)-(4) is established, the party is strictly liable for EPA response costs. 42 U.S.C.A. § 9607(a). The party will not be held liable, however, if it can prove that, under the defenses enumerated in 42 U.S.C.A. § 9607(b)(1)-(4), the release or threat of release of hazardous substances was caused solely by unrelated persons or events. The defenses to strict liability are:
\item an act of God;
\item an act of war;
\item an act or omission of a third party other than an employee or agent of the defendant, or other 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
\item any combination of the foregoing paragraphs.
\end{enumerate}
caused by the contamination.7 Second, CERCLA authorizes private parties to clean up a hazardous waste site and sue either the Superfund or the responsible party for the cleanup costs.8 Third, CERCLA authorizes the EPA to take direct action against responsible parties. This Note will focus on this third remedy under the following CERCLA authority: (1) direct EPA cleanup under CERCLA Section 104 followed by an EPA cost recovery suit against responsible parties under CERCLA Section 107;9 or (2) an EPA suit to recover cleanup costs after the responsible party fails to comply with an order directing the responsible party to initiate cleanup operations under CERCLA Section 106.10

If the responsible party fails to clean up the hazardous waste site as directed by the EPA, CERCLA grants the EPA broad authority to clean up the site and recover its cleanup costs from the responsible parties.11 The EPA’s broad authority includes the power to recover costs for investigation, testing, evaluation as well as the actual removal of the waste and future maintenance and monitoring of the site.12 A responsible party who is sued by the EPA for cleanup costs

7. 42 U.S.C. § 9607(a)(4)(C) (Supp. III 1987). A responsible party who is liable for damages for injury or destruction of natural resources may also be liable for the reasonable costs incurred in assessing the damage. Id.

8. See id. §§ 9112(a); § 9607(a)(4) (B) (the term “private party” also includes local governments). If the private party sues the responsible party directly for cleanup costs, it is not necessary that the site be listed on the NPL. See also Cadillac Fairview/California, Inc. v. Dow Chem. Co., 840 F.2d 691, 694 (9th Cir. 1988) (inclusion on the NPL is not a precondition for a section 107 action seeking recovery of response costs from sources other than the Superfund).

9. 42 U.S.C. § 9604 (1983 & Supp. III 1987). When a hazardous substance is released or there is a substantial threat of release, the President is authorized to initiate cleanup operations under Section 104. The President has delegated most of this authority under CERCLA to the EPA. Section 107 is the vehicle by which the federal government or a particular state replenishes the Superfund for cleanup costs it expends. See id. § 9607.

In order to recover cleanup costs, the EPA must establish the following: (1) the costs incurred were “response” costs as defined at id. § 9601(25); (2) the defendants fall under the category of persons who can be held liable pursuant to id. § 9607(a)(1)-(4); (3) the EPA responded to a “release” or “threatened release” as defined at id. § 9601(22); (4) the substance released was a “hazardous substance” as defined at id. § 9601(14); (5) the release was from a facility as defined at id. § 9601(9). See Frank and Atkeson, Superfund: Litigation and Cleanup, at 33-57 (BNA Special Report) (1985).


12. See 42 U.S.C. § 9604(b) (Supp. III 1987). Courts generally construe the EPA’s right to recover costs broadly and hold that the burden of proving that the costs are not recoverable is on the defendant. See, e.g., United States v. Northeastern Pharmaceutical and Chem. Co., 810 F.2d 726, 747-48 (8th Cir. 1987), (EPA may
or for noncompliance with an EPA cleanup order may also be liable for the EPA's litigation expenses. If the responsible party is a property owner, the amount for which a responsible party is liable may constitute a lien against his real property. Finally, the EPA may request that treble damages be assessed against a responsible party who fails to comply with a Section 104 cleanup request and is later sued by the EPA for cleanup costs. Failure to comply with a Section 106 cleanup order may result in a civil penalty of $25,000 per day for each day the violation occurs.

It is not surprising that many insureds have tendered the defense of an EPA cost recovery action under CERCLA Sections 104, 106 and 107 to their Comprehensive General Liability (CGL) carrier. Likewise CGL carriers typically deny coverage under one or more of the following theories:

1. The pollution does not constitute an “occurrence” under the meaning of the policy;

14. See 42 U.S.C. § 9607(l)(1) (Supp. III 1987). The lien attaches when response costs are first incurred by the United States government or at the time that the property owner first received notice of his potential liability, whichever is later. See id. § 9607(l)(2).
15. See 42 U.S.C. § 9607(c)(3) (1983). CERCLA § 107(c)(3) provides that any person who fails without sufficient cause to undertake remedial or removal action as requested by the EPA may be liable for up to three times the amount that was expended from the Superfund to respond to the hazardous condition. Id.
17. Comprehensive General Liability (CGL) insurance provides coverage for injury to third persons or property owned by someone other than the insured. See infra text accompanying note 93. The insurer has several options for responding to an environmental damage claim made pursuant to a CGL policy. The insurer may deny coverage, assume the defense, file a declaratory judgment action or proceed to defend the insured subject to a reservation of rights. See 7C Appelman, Insurance Law and Practice § 4683 at 54 (1979); see also Dohoney, The Liability Insurer’s Duty to Defend, 33 Baylor L. Rev. 451 (1981); Hourihan, Insurance Coverage for Environmental Damage Claims, 15 Forum 551 (1980) (additional information regarding the insurer’s duty to defend).
18. The standard CGL policy covers liability for damages caused by an “occurrence.” Occurrence is defined as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the Insured . . . .” City of Carter Lake v. Aetna Casualty & Sur. Co., 604 F.2d 1052, 1056 (8th Cir. 1979). Courts have reached different conclusions regarding the existence of an “occurrence” in cases involving disposal of hazardous wastes. See, e.g., American States Ins. Co. v. Maryland Casualty Co., 587 F. Supp. 1549, 1553 (E.D. Mich. 1984) (occurrence does not include intentional acts that cause environmental damage, when the damage is unintentional); Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co., 17 Ohio App. 3d 127, 131-32, 477 N.E.2d 1227, 1232-33 (1984) (“occurrence” is broader than “accident” and includes unintended results of intended acts). When there is continuous

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2. There was no occurrence within the policy period;¹⁹
3. The pollution exclusion clause in the policy precludes coverage;²⁰
4. Pollution damage does not constitute property damage within the meaning of the policy;²¹
5. The completed operations exclusion in the policy precludes coverage;²² and
6. No coverage exists because cleanup costs are not damages within the meaning of a CGL policy.²³

This Note will focus on the last theory: Whether the cleanup costs

seepage or occurrence, the majority of the courts appear to take the view that the "per occurrence" language is to be construed from the point of view of the cause of the accident, rather than its effect. See, e.g., Jackson Township Mun. Util. Auth. v. Hartford Accident and Indem. Co., 186 N.J. Super. 156, 451 A.2d 990, 994 (App. Div. 1982) (if there was but one proximate, uninterrupted and continuing cause which resulted in all of the injuries and damages, then there was one single occurrence).

19. See infra text accompanying notes 93-99 (courts have advanced conflicting theories for determining when an occurrence triggers liability under a CGL policy).

20. See infra text accompanying notes 100-108 (courts have advanced conflicting theories in determining whether the pollution exclusion precludes coverage or the pollution exclusion is ambiguous and thus has no effect on coverage).


22. The completed operation and product hazard exclusion is meant to be a limitation on coverage for accidents due to defective workmanship occurring after the completion of work by the insured on a construction or service contract. Courts agree that this exclusion does not preclude coverage in an environmental damage case because unlike products liability cases, CERCLA liability arises by being a generator, transporter or operator of a waste site, and not upon proof of a defective condition. See Buckeye Union Ins., 17 Ohio App. 3d at 135, 477 N.E.2d at 1236.

23. The typical CGL policy provides that:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of: Coverage A. bodily injury or Coverage B. property damage to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage . . . .

Mraz, 804 F.2d at 1327 (emphasis added).

The issue is whether or not the cost of a cleanup or abatement of a threatened release are damages within the meaning of a CGL policy. Insurers argue that an EPA cost recovery suit under CERCLA Sections 104 and 107 seeks equitable relief because the damage sought, the cost of cleanup, is "restitution." Damages under a CGL policy mean compensation for loss in value to property, not restitution to return the environment to its status quo. Therefore, equitable cleanup costs are not recoverable under a CGL policy. See infra text accompanying notes 109-25.
incurred by the EPA are damages within the meaning of a CGL policy. Part I of this Note will discuss authority granted to the EPA under CERCLA to recover cleanup costs and the nature of cleanup costs. Part II of this Note will discuss the CGL policy and the coverage issues created by the EPA’s administration of CERCLA’s cleanup costs recovery provisions. This section will also discuss recent case law on the issue of an insurer’s duty to defend and/or indemnify its insured for CERCLA cleanup costs and whether the cost to clean up a hazardous waste site constitutes damages within the meaning of a CGL policy. Finally, this Note will conclude that EPA cleanup cost recovery actions should constitute “damages” because of overriding policy reasons.

I. BASIS OF AUTHORITY FOR EPA INITIATED CLEANUPS OR INJUNCTIVE RELIEF UNDER CERCLA

CERCLA encourages the EPA to cooperate with state and local governmental authorities to develop a means for discovering and cleaning up hazardous waste sites. Commonly, a state environmental agency will agree to perform services for the EPA such as conducting site assessments, performing remedial investigation/feasibility studies and selecting the appropriate response action. Although many states have enacted legislation similar to

24. 42 U.S.C. § 9604(b)(2) (Supp. IV 1987) (EPA must notify the state of results of investigations and coordinate assessments and planning for response action with the state); id. § 9621(f) (setting forth criteria EPA must use to develop standards for state involvement in selection of remedial actions); 40 C.F.R. § 300.62 (1987) (stating authority and criteria for state and federal cooperation in cleanup of hazardous waste sites); see also 42 U.S.C. § 9605(a)(8)(B) (Supp. IV 1987) (each state shall submit a priority list for site cleanup which the EPA shall consider in preparation of the Federal Hazard Ranking System (NPL)).

25. The Minnesota Pollution Control Agency has entered into a cooperative agreement with the EPA to establish a site assessment program for potential hazardous waste sites. The site assessment program consists of the following four phases:

1. Site Discovery — The process of identifying previously unknown potential hazardous waste sites. Sources for this information could include: citizen complaints, tip hot lines, mandated federal/state/local government records, etc.

2. Preliminary Assessment — Review of readily accessible information to characterize the potential hazard and determine if the site warrants further action. The information gathered at a preliminary assessment includes: site history, known or alleged hazardous substances present and the potential effect of the contamination on nearby population and resources.

3. Site Inspection — Includes collection and analysis of water, soil and air samples, surveys, documentation of affected persons, property and resources and review of owner and operator records.

4. Hazard Ranking Scoring — If the preliminary assessment indicates that the site is a hazardous site, the site is ranked according to its relative severity against other sites. The hazard score is used to establish a priority for determining if the site is eligible for federal or state superfund money.

Following the hazard ranking process, a site may be added to the NPL or Minnesota

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CERCLA, the United States Supreme Court has held that state environmental regulations may not preempt CERCLA.27

CERCLA also grants the EPA the authority to develop the National Contingency Plan (NCP).28 The NCP is a comprehensive plan which sets forth the standards and procedures for cleanup of hazardous waste sites.29 These procedures are significant because the EPA may only recover cleanup costs "not inconsistent" with the NCP.30 CERCLA Section 105 requires that the NCP contain the National Priority List (NPL) of hazardous waste sites.31 Placement of a site on the NPL is significant because Superfund money can only be spent on a site which is listed on the NPL.32 The NCP must also include the standards to determine the cleanup priority among the 703 hazardous waste sites which are currently listed on the NPL.33

list of priorities. A remedial investigation/feasibility study (RI/FS) is then conducted to determine the extent of the contamination and to evaluate response action alternatives. After the RI/FS is completed, appropriate response actions are taken at the site. Minn. Pollution Control Agency Memo Re: MPCA's Site Assessment Program For Potential Hazardous Waste Sites, Aug. 20, 1986.


31. Id. § 9605. The National Contingency Plan is set out at 40 C.F.R. § 300.1-.86 (1987). The National Priority List, which is part of the National Contingency Plan, is set out in Appendix B of 40 C.F.R. § 300.1-.86 (1987).

32. 40 C.F.R. § 300.68(a) (1987). Sites not listed on the NPL may be cleaned up with private funds and the party incurring the costs may recover them directly from the responsible party. See supra note 8; see also Pinole Point Properties v. Bethlehem Steel Corp., 596 F. Supp. 283, 290 (N.D. Cal. 1984) (city brought suit against waste generator for cleanup costs of site not listed on the NPL). It should be noted that a site need not be listed on the NPL as a prerequisite to the EPA issuing an administrative cleanup order. The EPA must establish only that the cleanup was necessary to protect the public safety and welfare. Thus, the EPA may recover its costs if it subsequently cleans up the site because of a responsible party's non-compliance with the order.

33. 42 U.S.C. § 9605(a)(8)(A) (Supp. IV 1987). The criteria for determining the cleanup priority among hazardous waste sites is based upon the site's relative danger to the public health or welfare or the environment in the judgment of the EPA. The EPA must take into account to the extent possible the population at risk, the hazard potential of the hazardous substances at such facilities, the potential for contamination of drinking water supplies, the potential for human contact, the potential for destruction of sensitive ecosystems, the damage to natural resources which may affect the human food chain, the contamination or potential contamination of the air, state preparedness to assume state costs and responsibilities and any other appropriate factors. Id.
CERCLA’s term of art for the EPA’s authority to clean up a site is to take a “response action.” 34 “Response” means to initiate a remedial 35 or removal 36 action when there is a release or threatened release of a hazardous substance or contaminant. 37 Remedial actions are permanent cleanup measures taken by the EPA in response to a release or threatened release of a hazardous substance. 38 Removal actions are temporary measures taken by the EPA to mitigate or prevent environmental damage. 39 To the extent practicable, removal actions must be consistent with the EPA’s permanent remedial action plan. 40

The EPA is required to request responsible parties to cleanup the site before the EPA initiates a response action under section 104. 41 If the responsible party refuses to cleanup the site, the EPA may then spend Superfund money to do so and bring a cost recovery action

34. Id. § 9604(a). CERCLA § 104 sets forth the EPA’s response authority whenever (1) any hazardous substance is released or there is a substantial threat of release into the environment, or (2) any pollutant or contaminant is a released or there is a substantial threat of release into the environment which may present an imminent and substantial danger to the public health or welfare. Id. The actual procedures the EPA must follow in a response action are set forth at 40 C.F.R. §§ 300.61-.71 (1987).

35. Remedial actions are actions taken consistent with the permanent remedy. These actions are taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment. In addition, they may be taken to prevent or minimize the release of hazardous substances so that the hazardous substances do not migrate and cause substantial danger to the public health, welfare or the environment. Included in the cost of remedial actions are costs for permanent relocation of residents, businesses and community facilities where the EPA determines that relocation is more cost-effective and environmentally preferable to the transportation, storage, treatment, destruction or secure disposition of hazardous substances. Examples of remedial actions include storage, confinement or perimeter protection using dikes, trenches or ditches, cleanup of released substances, dredging or excavations, on-site treatment or incineration, collection of leachate or runoff, repair and replacement of leaking containers and any monitoring reasonably required to protect the public health and welfare and the environment. 42 U.S.C. § 9601(24) (Supp. IV 1987).

36. Removal actions are actions taken to clean up or remove released hazardous substances or such actions as may be necessary in the event of the threat of release of a hazardous substance. Removal actions include actions deemed necessary to monitor, assess and evaluate the release or threat of release of hazardous substances, along with such actions to prevent, mitigate or minimize damage to public health or welfare or to the environment. Examples of removal actions include security fencing or other measures to limit access, provision of alternative water supplies, and temporary evacuation and housing of threatened individuals not provided for under the Disaster Relief Act of 1974. See id. § 9601(23).

37. See id. § 9601(25).
38. See supra note 35.
39. See supra note 36.
41. See id. § 9604(a)(1).
under CERCLA Section 107 to replenish the Superfund.\textsuperscript{42} Alternatively, CERCLA Section 106 authorizes the EPA to seek an injunction to compel a responsible party to cleanup a site that poses an imminent and substantial danger to the public health or the environment.\textsuperscript{43} Section 106 further allows the EPA to issue administrative orders as necessary to protect the public health and the environment.\textsuperscript{44}

Whether the EPA chooses a Section 104 or a Section 106 action may depend on several considerations. For example, Section 104 direct cleanup actions may be administered quickly, but they deplete the Superfund and require a significant amount of commitment by EPA personnel.\textsuperscript{45} Section 106 abatement orders are less costly to the Superfund, but may be hampered by demands for judicial review by responsible parties.\textsuperscript{46} Controversy exists as to whether Section 104/107 or Section 106 should be the primary tool for enforcement of CERCLA.\textsuperscript{47} Inadequate statutory drafting and unfavorable court rulings have been given as reasons for the EPA's primary reliance on the more costly Section 104 action.\textsuperscript{48}

\begin{itemize}
\item[A. Response Actions: CERCLA Section 104]
\end{itemize}

Response actions may be aimed at short-term removal of a hazardous substance or threatened hazard, or they may be aimed at long-term remedial solutions to the environmental problems caused by the hazardous substance.\textsuperscript{49} The Federal Regulations set forth the criteria for the EPA in determining whether a removal action, a remedial action or a combination of the two should be implemented to cleanup the site.\textsuperscript{50} The degree of cleanup that the EPA must obtain

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\item[43.] See 42 U.S.C. § 9606(a) (1983).
\item[44.] Id.
\item[46.] Id.
\item[47.] Id.
\item[48.] Id.
\item[49.] See generally 42 U.S.C. § 9604 (1983 & Supp. IV 1987) (setting forth the EPA's authority to respond to a hazardous substance or threatened hazard). Note that removal actions should, to the extent that the EPA deems practicable, contribute to the efficient performance of any long term remedial action taken with respect to the release or threatened release. Id.
\item[50.] 40 C.F.R. § 300.65(b)(2)(i)-(viii) (1987). The following factors must be considered by the EPA in determining the appropriateness of a removal action:
\begin{itemize}
\item[(i)] Actual or potential exposure to hazardous substances or pollutants or contaminants by nearby populations, animals, or food chain;
\item[(ii)] Actual or potential contamination of drinking water supplies or sensitive ecosystems;
\item[(iii)] Hazardous substances or pollutants or contaminants in drums, bar-
when implementing a response action is set forth in CERCLA Section 121 and the NCP.

The following factors must be considered by the EPA in determining the appropriateness of a remedial action:

(i) Population, environmental, and welfare concerns at risk;
(ii) Routes of exposure;
(iii) Amount, concentration, hazardous properties, environmental fate and transport (e.g., ability and opportunity to bioaccumulate, persistence, mobility, etc.), and form of the substance(s) present;
(iv) Hydrogeological factors (e.g., soil permeability, depth to saturated zone, hydraulic gradients, proximity to a drinking water aquifer, floodplains and wetlands proximity);
(v) Current and potential ground water use (e.g., the appropriate ground water classes under the system established in the EPA Ground-Water Protection Strategy);
(vi) Climate (rainfall, etc.);
(vii) The extent to which the source can be adequately identified and characterized;
(viii) Whether substances at the site may be reused or recycled;
(ix) The extent to which future releases could contaminate the substance and the adequacy of the barriers;
(x) The extent to which natural or man-made barriers currently contain the substance;
(xi) The extent to which the substances have migrated or are expected to migrate from the area of their original location, or new location, if relocated, and whether future migration may pose a threat to public health, welfare or the environment;
(xii) The extent to which Federal environmental and public health requirements are applicable or relevant and appropriate to the specific site, and the extent to which other Federal criteria, advisories, and guidance and State standards are to be considered in developing the remedy;
(xiii) The extent to which contamination levels exceed applicable or relevant and appropriate Federal requirements or other Federal criteria, advisories, and guidance and State standards;
(xiv) Contribution of the contamination to an air, land, water, and/or food chain contamination problem;
(xv) Ability of responsible party to implement and maintain the remedy until the threat is permanently abated;
(xvi) For Fund-financed responses, the availability of other appropriate Federal or State response and enforcement mechanisms to respond to the release; and
(xvii) Other appropriate matters may be considered.


The EPA has broad authority to gather information on a hazardous waste site in order to determine the appropriate response action. For example, CERCLA Section 104 provides the EPA with authority to enter a waste site for the purpose of inspecting and gathering samples. The EPA may also require anyone who has information about the hazardous substance to provide that information to the EPA upon request. The EPA is authorized to gather information on the type of hazardous substance at the facility, the nature and extent of the release of the substance and the ability of the potentially responsible party to pay for the cleanup of the site. Additionally, the EPA has the authority to inspect and copy all documents relevant to these issues.

The EPA may issue a compliance order if a person refuses to provide requested information. The EPA may also commence suit to compel compliance with its order. The EPA need only show a reasonable basis for its belief that a release or threatened release of a hazardous substance has occurred, to obtain a court order to compel compliance. Additionally, the court may assess up to a $25,000 penalty for each day of noncompliance.

Upon completion of its investigation, the EPA is required to notify all persons who it has identified as potentially responsible parties (PRP) that they may be liable for the cleanup costs at the site. The EPA will then prepare a response plan and issue a request for response action to the PRP. Issuance of a request for response action means that the EPA has determined that the party is no longer potentially responsible, but is in fact responsible for the hazardous

52. See 40 C.F.R. § 300.68(i) (1987). For remedial actions, the degree of cleanup must attain or exceed applicable or relevant and appropriate Federal public health and environmental requirements that have been identified for the specific site. Id.
54. Id. § 9604(e)(4)(A)-(B).
55. See id. § 9604(e)(2).
56. See id.
57. Id.
58. See id. § 9604(e)(5)(A).
59. See id. § 9604(e)(5)(B).
60. See id.
61. Id.
63. See 42 U.S.C. § 9621(f) (Supp. IV 1987). In many cases, a state or local agency will prepare the preliminary assessment and the response plan will subsequently direct the cleanup if the responsible party does not comply with the cleanup request. In these cases, the state or local agency is referred to as the “lead agency.” In order to become a “lead agency” and obtain access to Superfund money, the agency must be certified as competent by the EPA and enter into either a contract or cooperative agreement with the EPA for those services. Id. § 9604 (c)-(d). See generally 40 C.F.R. § 300 (1987).
condition. On the basis of this determination, with few exceptions, the responsible party is effectively liable for all cleanup costs. This is true whether the party chooses to cleanup the site as requested by the response plan, or to disregard the request and be subject to suit by the EPA for cleanup costs.

Courts agree that the EPA's designation of PRP status is not reviewable because it is not a final agency action. This conclusion is based on the fact that, at this juncture, the EPA has not developed or initiated a response plan and may ultimately decide not to respond to the release. Nevertheless, courts also hold that there can be no review of an EPA response plan because pre-enforcement review would frustrate the purpose of CERCLA by encouraging litigation. Although courts have recognized that this lack of review raises due process concerns, they have held that the responsible parties are adequately protected by their opportunity under CERCLA Section 107 to raise their claim of inconsistent response actions as a defense in the EPA's subsequent cost recovery action.

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64. See id. § 9607(a). EPA identification as a responsible party means that the EPA has identified the person or entity as one who is strictly liable for cleanup costs by being a past transporter, generator, waste site operator or waste handler. Id.

65. See id. § 9607; see also supra note 5 (defenses to the imposition of strict liability).


68. See, e.g., Lone Pine Steering Comm. v. United States Envtl. Protection Agency, 777 F.2d 882 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986) (no due process violation in barring pre-enforcement review of emergency or remedial action on top priority hazardous waste site); J. V. Peters & Co. v. Administrator, 767 F.2d 263, 265 (6th Cir. 1985) (no pre-enforcement review of CERCLA Section 104/107 as it would hinder objective of CERCLA, prompt cleanup); United States v. Reilly Tar & Chem. Corp., 606 F. Supp. 412, 422 (D. Minn. 1985) (no violation of due process when civil penalties are assessed for noncompliance without provisions for review). See also S. REP. No. II, 99th Cong., 1st Sess. 58 (1985). This report states ("[P]re-enforcement review would be a significant obstacle to the implementation of response actions... Pre-enforcement review would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlements and voluntary cleanups"). But see Aminoil, Inc. v. United States Envtl. Protection Agency, 599 F. Supp. 69, 75 (C.D. Cal. 1984) (government enjoined from assessing penalties for noncompliance upon showing of pollutor's probable success on the merits).

69. See, e.g., Lone Pine Steering Comm., 777 F.2d at 887; United States v. United Nuclear Corp., 610 F. Supp. 527, 529 (D.N.M. 1985) (defendant can raise objections to EPA response activity in cost recovery suit along with damages caused to defendant by the procedural irregularity). One commentator points out that a PRP is afforded practical protection from unjust claims "by the fact that the EPA has no incentive to undertake unjustified cleanup measures. The reason is that the EPA may only recover from responsible parties those costs 'not-inconsistent' with the NCP." Note, supra note 45, at 1489.
It is prudent for a PRP with CGL coverage to notify his carrier upon receipt of a PRP notice even though many CGL carriers will subsequently deny coverage on the theory that their duty to defend does not arise unless an actual lawsuit is filed. Furthermore, if the EPA directs the PRP to abate a threatened release, many carriers deny coverage because an occurrence causing property damage has not yet triggered coverage. In declaratory proceedings, the outcome of these theories are mixed. One court has unequivocally held that potential liability under CERCLA establishes the CGL carrier's duty to defend and indemnify its insured unless there is another provision in the policy which clearly and unambiguously excludes coverage.

The majority of courts hold, however, that a CGL carrier has no duty to defend its insured prior to the EPA cost recovery suit, if at all. This means that actual property damage must occur before coverage is triggered. Consequently, most response actions are taken by the EPA before CGL coverage issues between the responsible party and the CGL carrier have been resolved.

B. Administrative Enforcement: CERCLA Section 106

Under CERCLA Section 106(a), the EPA may ask the Attorney General to seek injunctive relief in federal court against a responsible party when the EPA determines that a hazardous waste site poses an imminent and substantial danger to the public health or the environment. Alternatively, CERCLA Section 106(a) authorizes the EPA to issue an administrative order to compel a responsible party to take remedial action when such action is necessary to protect the public health and welfare or the environment. Injunctive relief may be difficult to obtain because courts have held that CERCLA Section 106(a) is only a jurisdictional statement. Because of this judicial interpretation of Section 106, the EPA must establish that the site poses an imminent and substantial danger before a federal


72. See, e.g., Bunker Hill Co., 647 F. Supp. at 1068 (duty to defend arises upon filing of a complaint when allegations reveal a potential for liability). But see Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1354 (4th Cir. 1987) (CGL carrier has no duty to defend EPA cost recovery suit because there is no suit against the insured seeking "damages" within the meaning of a CGL policy).


74. Id. § 9606(a) (Supp. III 1987).

The court will grant the injunction.\textsuperscript{76} One Note suggests that this interpretation is supported by the fact that CERCLA Sections 104 and 107 provide the government with the means to promptly respond to a hazardous condition that poses an immediate threat to public health and environment.\textsuperscript{77}

The EPA will often issue administrative cleanup orders as a result of the judiciary's interpretation of the EPA's authority to seek injunctive relief.\textsuperscript{78} The EPA has two alternatives when a responsible party does not comply with its administrative order. First, the EPA may attempt to enforce the order in federal court under CERCLA Section 106(b).\textsuperscript{79} If the EPA obtains the enforcement order, the responsible party may be fined up to $25,000 per day for noncompliance with the original administrative order.\textsuperscript{80} One Note points out that "[n]othing prevents the EPA from waiting an extended period of time to bring its enforcement action and thereby increasing the pressure on potentially responsible parties to comply without judicial review."\textsuperscript{81} Second, if the EPA can prove that the responsible party lacked sufficient cause for noncompliance, it may clean up the site and then sue the responsible party for treble damages under CERCLA Section 107(c)(3).\textsuperscript{82} The sufficient cause defense has been narrowly construed and only rarely has a responsible party prevailed.\textsuperscript{83} As one Note points out, Congress intended the punitive nature of CERCLA's administrative enforcement provisions to have an "\textit{in terrorem}" effect on a PRP.\textsuperscript{84}

II. The CGL Carrier's Duty to Defend a Suit for "Damages"

CERCLA grants the EPA broad authority to respond to a hazardous waste condition. Consequently, an insured under a CGL policy who is identified as a responsible party faces extensive liability for cleanup costs and possible civil penalties, but is provided with few procedural protections.\textsuperscript{85} The procedural protections that are available are simply threshold requirements. In a response action under CERCLA Section 104, the EPA need only establish that the site is

\textsuperscript{76} See id.
\textsuperscript{77} See Note, supra note 45, at 1494; see also 42 U.S.C. §§ 9604, 9607 (1983 & Supp. IV 1987).
\textsuperscript{78} See Note, supra note 45, at 1493-94 (discussing factors which influence the EPA in issuing an administrative cleanup order rather than seeking injunctive relief).
\textsuperscript{80} See id.
\textsuperscript{81} See Note, supra note 45, at 1494.
\textsuperscript{82} See id.
\textsuperscript{83} See id.
\textsuperscript{84} See id.
\textsuperscript{85} See supra text accompanying notes 3-10.
listed on the NPL.\textsuperscript{86} For the issuance of an administrative cleanup order under CERCLA Section 106, the EPA need only demonstrate that the release or threatened release poses an imminent and substantial danger to the public health or welfare or the environment.\textsuperscript{87} The EPA may initiate either action only after it meets these threshold requirements as set out in CERCLA.\textsuperscript{88}

Failure to meet these threshold requirements does not leave the EPA without a remedy to respond to a release of a hazardous substance. CERCLA Section 107 provides that the EPA can sue for damages for loss of value to the environment caused by the release of a hazardous substance.\textsuperscript{89} This provision is seldom used, however, since the main objective of the EPA is to cleanup waste sites according to the NCP.\textsuperscript{90} As a result, the EPA has seldom sought compensatory relief against responsible parties. Instead, the EPA has consistently exercised its cleanup authority under CERCLA Sections 104/107 and 106.\textsuperscript{91}

When a responsible party tenders the defense of the suit to its CGL carrier, the CGL carrier has three options. First, the carrier may agree to defend and indemnify its insured. Second, the carrier may agree to defend its insured under a reservation of rights. Third, the carrier may deny coverage based on a variety of theories.\textsuperscript{92} Section II of this Note will explore one such theory: that EPA response costs are not damages within the meaning of a CGL policy because a threatened release is not tangible injury to property, and in any event, cleanup costs are restitution rather than compensatory damages and thus are not covered under a CGL policy.

\subsection*{A. The Typical CGL Policy}

A typical CGL policy provides insurance coverage for:

all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this (insurance) applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage.\ldots\textsuperscript{93}

Occurrence is defined under a typical CGL policy as "an accident,"

\begin{itemize}
  \item \textsuperscript{87} Id. § 9606(a) (1983).
  \item \textsuperscript{88} See id. §§ 9604, 9606 (1983 & Supp. IV 1987).
  \item \textsuperscript{89} See id. § 9607(a)(4)(C) (Supp. IV 1987).
  \item \textsuperscript{90} Id.
  \item \textsuperscript{91} See Note, supra note 45, at 1486 (discussing factors which influence whether EPA implements a Section 104/107 or Section 106 response action and why the EPA does not sue for loss in value to natural resources under its CERCLA authority).
  \item \textsuperscript{92} See supra text accompanying notes 18-23.
  \item \textsuperscript{93} See Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1327 (4th Cir. 1986).
\end{itemize}
including injurious exposure to conditions, which results in bodily
injury or property damage neither expected nor intended from the
standpoint of the insured. So long as the resulting damage is unex-
pected and unintended it will be deemed to be caused by an accident
or be an occurrence.94

Under the CGL policy, the carrier's duty to defend and indemnify
the insured arises when an injury occurs to a person or property
owner by someone other than the insured during the policy period.95
As long as the injury occurs during the policy period, neither the
event causing the injury nor the actual filing of a claim need occur
during the policy period.96 Establishing the exact moment of injury
is difficult when pollution has leaked over an extended period of
time.97 Various theories for triggering coverage have emerged, how-
ever, a complete analysis of these theories is beyond the scope of this
Note.98 It should be noted that the case law and literature in support
of one trigger theory over another is quite extensive, and varies con-
siderably between jurisdictions.99

B. The CGL Pollution Exclusion Clause

In 1970, insurance companies attempted to exclude CGL coverage
for environmental damage caused by the release of pollutants or haz-
ardous substances, except for "sudden and accidental" pollution.100
CGL coverage was intended to apply only to liability for accidents

94. See supra note 18 and accompanying text.
95. See Adler & Broiles, The Pollution Exclusion: Implementing the Social Policy of
See generally Willmarth, Outline of Insurance Developments, 21 Fed'n Ins. Couns. Q. 23,
23-26 (Summer 1971) (discussing coverage provided by CGL policy).
96. See Adler & Broiles, supra note 95, at 1253.
97. See id. at 1253-54.
98. Id.
99. See generally Hourihan, supra note 17, at 551-52, 559 (setting out scenario for
typical pollution claim where leakage occurs over a long period of time, but pointing
out that insured only has burden to prove that damage occurred, while the insurance
carrier must bring forth evidence that damage did not occur within the policy
period).
100. See generally McGeough, The Applicability of Liability Insurance Coverage to Actions
Involving Environmental Damage, 1971 A.B.A. Sec. Ins., Negl. and Compensation Law
312 (historical overview of pollution exclusion clause). The typical pollution exclu-
sion in a CGL policy excluded coverage for:
body injury or property damage arising out of the discharge, dispersal, re-
lease or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals,
liquids or gases, waste materials or other irritants, contaminants or other
pollutants into or upon the atmosphere or any water course or body of
water, but this exclusion does not apply if such discharge, dispersal, release
or escape is sudden and accidental . . . .
See Willmarth, supra note 95, at 25-26 (quoting exclusion endorsement clause used by
insurance rating board) (emphasis added).
when the effects of the pollution contamination were known reasonably soon after the occurrence. Problems arose, however, when the effects of the pollution were not known until years after the injury, or where there was continuous or gradual leakage over a long period of time. In these cases, many courts found that the exclusion was ambiguous and held that it does not preclude coverage for pollution damages. Specifically, courts interpreted the terms "sudden and accidental" in the exclusion as simply a restatement of the definition of occurrence — the policy will cover claims where the injury was neither expected nor intended by the insured. The effect is that courts construed the pollution exclusion to be an affirmation of the principle of what constitutes an occurrence. Coverage will not be provided for intended results of an intentional act but will be provided for the unintended results of an intentional act.

Some courts have not found this ambiguity in the pollution exclusion clause. In these jurisdictions, the pollution exclusion provides the CGL carrier with a defense to providing coverage when its insured is faced with PRP status or an EPA cost recovery action. It is interesting to note, however, that the standard CGL policy has been recently revised in an attempt to exclude coverage for all pollution damage claims.

C. Duty to Defend a Suit for "Damages"

As stated above, under the typical CGL policy, the CGL carrier contracts to provide insurance coverage for all sums which the insured shall become legally obligated to pay as "damages" because of

101. See Adler & Broiles, supra note 95, at 1254.
102. See id. at 1253-54. See generally McGeough, supra note 100.
103. See Adler & Broiles, supra note 95, at 1261-63.
104. See id. at 1253.
105. See id. at 1268. A good survey of decisions finding the pollution exclusion to be ambiguous is found in Jackson Township Municipal Utilities Auth. v. Hartford Accident & Indemnity Co., 186 N.J. Super. 156, 161-64, 451 A.2d 990, 992-94 (1982). Many of these cases, including Jackson Township, find the "sudden and accidental" exception clause itself to be ambiguous. Id. at 165-66, 451 A.2d at 994-95. See also CPS Chem. Co. v. Continental Ins. Co., 199 N.J. Super. 558, 569, 489 A.2d 1265, 1270-71 (1984) ("It may well be that the drafters of this [pollution exclusion] clause believed that 'sudden and accidental' connoted a sense of a dramatic catastrophe, limited in duration and immediate in its consequences, but it cannot fairly be said that this was unambiguously expressed").
107. See supra note 106 and cases cited therein.
108. This revision was drafted in 1987 in an effort to prevent the ambiguous language of the standard pollution exclusion clause used by the insurance industry.
bodily injury or property damage. Many CGL carriers will deny coverage for an EPA cleanup cost recovery suit because cleanup costs are simply restitution to return the environment to its status quo rather than compensatory "damages" for actual loss of value to the environment. The defense therefore concerns the form of relief sought for environmental property damage and hinges on definitions of "property damage" and "damages."

The definition damage is set forth in Black's Law Dictionary as follows:

Damage. Loss, injury or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter's person or property. The word is to be distinguished from its plural, "damages" which means a compensation in money for a loss or damage.

The definition of "damages" in Blacks Law Dictionary supports the insurer's proposition that a CGL policy only provides coverage for compensation for loss, rather than restitution. This definition is relevant in this situation, the carriers argue, because of the well established principle that insurance policy language must be given the meaning that it would convey to an ordinary insured. Of course, whether an ordinary insured would understand the technical meaning of damages is debatable in states that apply the objective expectation doctrine in insurance contract disputes. Since federal courts must apply state law in interpreting the contract, there is no nationwide consensus as to whether CERCLA response costs are

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109. See supra note 23 and accompanying text.

In defining "damages," and distinguishing "damages" from equitable remedies, we focus not on the nature of the underlying action, but rather on the form of relief sought. In other words, whether a particular cause of action has historically been considered a "legal" or "equitable" proceeding, with the differing procedural and substantive rights thereto appertaining, is irrelevant. The insurance contract, which controls the obligations between the parties and therefore centers the focus of this court, is written in terms of the relief sought, and not in terms of the form of the cause of action. The contract describes "damages" to be paid, and not liabilities arising out of "legal," rather than "equitable" proceedings.

Id. at 1352 (emphasis in original).

111. See id.; see also Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 811 F.2d 1180, 1189 n.21 (8th Cir. 1987), rev'd on other grounds, 842 F.2d 977 (8th Cir. 1988).
112. BLACK'S LAW DICTIONARY 351 (5th ed. 1979).
113. See Continental Ins. Cos., 811 F.2d at 1189 n.21.
damages.115

Insurance carriers also provide policy reasons for denying coverage for CERCLA cleanup costs.116 One reason is that the costs incurred in complying with an EPA injunction under CERCLA Section 106 are not the result of a tangible injury to property.117 Instead, these costs represent an amount spent to prevent a future tangible injury or to mitigate the effects of a hazardous waste condition.118 Therefore, there is no bodily injury or property damage. Furthermore, injury prevention and mitigation are not insurable risks under a CGL policy because the carrier would be unable to insure these types of risks with any certainty.119 A judicial finding of coverage for injury prevention would thus result in the insurer providing coverage for measures outside of the insurance contract.120

The final argument offered by insurance carriers in opposition to coverage for CERCLA cleanup costs involves the EPA's choice of remedy to respond to a hazardous waste condition.121 Under CERCLA Section 107, responsible parties are liable for: 1) all costs of removal or remedial actions incurred by the United States government which are not inconsistent with the NCP; 2) any other necessary costs of response incurred by any other person consistent with the NCP; 3) damages for injury to, destruction of, or loss of natural resources; and 4) the costs of any health assessment or health effects study carried out under CERCLA Section 104(i).122 The carrier's argument is that the EPA has not exercised its remedy to sue for damages for loss in value of natural resources as provided by CERCLA Section 107.123 Instead, the EPA has chosen to clean up the site and sue the responsible party for any costs incurred in the cleanup process.124 The cost of cleanup cannot be interpreted to be a claim for damages under CERCLA because the remedies listed in CERCLA Section 107 make the distinction between restitution costs and com-

115. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938) (federal courts to apply state law in diversity cases).
116. See, e.g., Maryland Casualty Co., 822 F.2d at 1353-54.
117. See id.; see also supra note 21.
118. See Maryland Casualty Co., 822 F.2d at 1353-54; see also supra notes 35-36 and accompanying text (discussion on the types of activities which the EPA may implement as remedial or removal actions pursuant to its authority under CERCLA).
120. See Maryland Casualty Co., 822 F.2d at 1353.
121. See id.
123. See Maryland Casualty Co., 822 F.2d at 1353-54.
124. See id.
D. The Liberal and Strict Interpretation of "Damages" Under A CGL Policy

Courts are split as to the merits of the insurer's theory that the costs of EPA response actions are not "damages." Some courts find coverage for an insured because the insured could reasonably expect CGL coverage when faced with a CERCLA cost recovery suit or an administrative cleanup order. Other courts have held that the insured could not expect coverage for CERCLA suits because the term "damages" is not ambiguous in the insurance context. These courts give damages its technical meaning: compensation for loss in value. These courts deny coverage since cost recovery suits seek restitution and CGL policies only provide coverage for compensatory damages for loss in value to property.

I. The Liberal View

In Fireman's Fund Insurance Cos. v. Ex-Cell-O Corp., the United States District Court for the Eastern District of Michigan adopted the Michigan Court of Appeals' reasoning in United States Aviex Co. v. Travelers Insurance Co. The Ex-Cell-O court held that damages include money spent to clean up environmental contamination. The Ex-Cello-O court also held that coverage does not hinge on the nature of relief sought but on an actual or threatened use of the legal process to coerce payment or conduct by a policyholder. Following this rationale, responsible party status, or even PRP status, would trigger the insurer's duty to defend its insured because CERCLA authorizes the EPA to either "coerce payment" through a cost recovery suit or "coerce conduct" through the issuance of an administrative order.

In Aviex, a polluter sought a declaratory judgment that its CGL carrier provide indemnification for the costs of compliance with a Michigan Department of Natural Resources order to clean up con-
taminated underground water. The trial court held in favor of the polluter, holding that the insurer was obligated to defend and indemnify any claim or action against its insured. The court ordered the insurer to pay for the costs of cleaning up the contaminated water underneath the insured's premises and the water which had migrated beyond the insured's premises. The decision was appealed by the insurer on a variety of grounds. One ground for appeal which the insurer asserted was that the trial court's ruling incorrectly construed the CGL policy to cover compliance costs of injunctive orders, instead of covering only money paid or ordered to be paid as compensation for injury or loss. The polluter argued that damages should be interpreted as all sums which the insured is obligated to pay by reason of liability imposed by law stemming from property damage to a third party.

The Michigan Court of Appeals recognized that the insurer's obligation to pay would depend on its interpretation of damages. It noted that other jurisdictions have held that the cost of complying with an EPA directive is not covered by a CGL policy because such relief is injunctive, rather than compensation for damages. Nevertheless, the Aviex court ruled that such construction of damages would be too narrow under Michigan law. In support of its opinion, the court cited a Michigan statute that empowered the attorney general to file a suit to recover the full value of the injuries done to the natural resources of the state. The court then held that damage to natural resources is measured by the cost to restore the water to its original condition rather than the loss in property value.

The Aviex court recognized that damages under a CGL policy traditionally mean compensatory loss and not restitution. This dis-

135. Id. at 584-85, 336 N.W. at 841.
136. United States Aviex Co., 125 Mich. App. at 587-88, 336 N.W.2d at 842. The insurer also appealed the trial court's order for summary judgment that the policy covered damage to percolating water directly beneath the insured's property. The insurer argued that the damage was excluded from coverage because it was property owned by the insured. Id. at 590, 336 N.W.2d at 843. The Michigan Court of Appeals affirmed the trial court and held that the percolating water under a landowner's property is not the property of the landowner. Thus, damage to the water directly beneath the insured's property was covered under the CGL policy. Id. at 590-92, 336 N.W.2d at 843-44.
137. See id. at 588, 336 N.W.2d at 842.
138. Id.
139. Id. at 588-89, 336 N.W.2d at 842-43.
140. Id. at 589-90, 336 N.W.2d at 843.
141. Id.
142. Id. The Aviex court found that "[t]he damage to natural resources is simply measured in the cost to restore the water to its original state." Id.
143. Id. at 842-43.
tinction is important because it may very well cost more to clean up a site than to compensate the damaged party for loss in value to the property.\textsuperscript{144} Ironically, the \textit{Aviex} court used a statute empowering the state to recover the full value of injuries to natural resources in support of its finding that damages under Michigan law should be construed to include restitution damages.\textsuperscript{145}

The \textit{Aviex} court also found that it was “merely fortuitous” that the state issued a cleanup injunction rather than clean up the site itself and sue the polluter for its cleanup costs.\textsuperscript{146} This is a common state court position because under most state laws, the environmental agency could have cleaned the site itself and sued for cleanup damages, rather than sue for injunctive relief.\textsuperscript{147} The \textit{Aviex} court thus ignored the artificial distinction between the equity of restitution and compensatory money damages because it recognized that the measure of damages would be the same under either remedy.

The United States District Court for the Eastern District of Michigan in \textit{Ex-Cell-O} adopted the \textit{Aviex} court’s “merely fortuitous” reasoning that both the cost of complying with an injunction and a cost recovery suit constitute damages under a CGL policy.\textsuperscript{148} Unlike \textit{Aviex}, \textit{Ex-Cell-O} involved CERCLA.\textsuperscript{149} The policyholders in \textit{Ex-Cell-O} sought partial summary judgment for an order directing their CGL carriers to defend and indemnify against potential liability under CERCLA.\textsuperscript{150} At the time the motion was brought, the policyholders had received only a PRP letter from the EPA.\textsuperscript{151} The insurers refused to defend on the ground that the PRP letter did not constitute a suit and that CERCLA response actions were not “damages.”\textsuperscript{152} Relying on \textit{Aviex}, the \textit{Ex-Cell-O} court held that “suit” includes any effort to impose on a policyholder a liability ultimately enforceable by a court, and that “damages” include money spent to clean up environmental contamination and restore the site to its previous

\begin{itemize}
  \item \textsuperscript{144} See, e.g., Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1353 (4th Cir. 1987), \textit{cert. denied}, 108 S. Ct. 703 (1988).
  \item \textsuperscript{145} See United States \textit{Aviex Co.}, 125 Mich. App. at 589-90, 336 N.W.2d at 843 (“under M.C.L. § 323.10; M.S.A. § 3.529(1), the Attorney General is empowered to file a suit to recover the full value of the injuries done to the natural resources of the state”).
  \item \textsuperscript{146} \textit{Id.} at 590, 336 N.W.2d at 843 (The \textit{Aviex} court assumed that the CGL policy would provide coverage for cleanup costs incurred by the state).
  \item \textsuperscript{148} \textit{Ex-Cell-O Corp.}, 662 F. Supp. 71, 75 (E.D. Mich. 1987).
  \item \textsuperscript{149} \textit{Id.} at 73.
  \item \textsuperscript{150} \textit{Id.}
  \item \textsuperscript{151} \textit{Id.} at 74.
  \item \textsuperscript{152} \textit{Id.} at 75.
\end{itemize}
condition.\textsuperscript{153}

Other courts have also interpreted their state law to mandate liberal construction of damages because of the ultimate liability that will fall on the responsible party. In \textit{Broadwell Realty Services, Inc. v. Fidelity & Casualty Co. of New York},\textsuperscript{154} the Superior Court of New Jersey applied the doctrine of "reasonable expectations of the insured" in interpreting the meaning of damages in a CGL policy.\textsuperscript{155} In \textit{Broadwell}, the insured brought suit against its CGL carrier for monetary damages for breach of its insurance agreement.\textsuperscript{156} The CGL carrier had denied indemnification to its insured for amounts the insured spent at the direction of the New Jersey Department of Environmental Protection (DEP) to mitigate the effects of a gasoline spill.\textsuperscript{157}

The \textit{Broadwell} court held that the CGL policy provided coverage for the mitigation measures because such measures fell within the category of coverage for which liability insurance ordinarily applied.\textsuperscript{158} This is true, the court reasoned, even if mitigation measures are non-compensatory because such measures are designed to prevent the continued destruction of property owned by third parties.\textsuperscript{159} The \textit{Broadwell} court was satisfied that the insurer would have been obligated to indemnify its insured for the costs incurred in order to protect a third party's property.\textsuperscript{160} As the court stated, "the policy does not require the parties to calmly await further catastrophe."\textsuperscript{161}

The \textit{Broadwell} court conceded that "damages" under a CGL policy typically mean pecuniary compensation and that the cost of complying with an injunction does not ordinarily fall within that definition.\textsuperscript{162} Despite that concession, the court concluded that the state environmental agency's directive and threats of triple penalties constituted a claim for damages.\textsuperscript{163} The court reasoned that the insured's compliance costs were incurred to discharge a legal obligation to the agency or to prevent what would have been an unavoidable legal obligation to a third party.\textsuperscript{164} The court also took notice of the coercive effect that the state directive and penalties had on

\begin{itemize}
\item \textsuperscript{153} \textit{Id.}
\item \textsuperscript{154} 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987).
\item \textsuperscript{155} \textit{See id.} at 525-28, 528 A.2d at 80-82.
\item \textsuperscript{156} \textit{Id.} at 522, 528 A.2d at 79.
\item \textsuperscript{157} \textit{Id.} at 521-22, 528 A.2d at 79.
\item \textsuperscript{158} \textit{Id.} at 525, 528 A.2d at 81.
\item \textsuperscript{159} \textit{Id.} at 526, 528 A.2d at 81.
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.} at 527, 528 A.2d at 82.
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{Id.}
\end{itemize}
the insured. Under these circumstances, the court concluded that the insured would have a reasonable expectation of indemnification for the mitigation costs under New Jersey law.

The New Jersey environmental statute gives the state environmental agency authority similar to that given the EPA under CERCLA. Similar to the New Jersey statute, CERCLA imposes strict liability for cleanup costs on a responsible party but provides the responsible party few procedural protections. CERCLA, as the New Jersey statute in Broadwell, provides for civil penalties for noncompliance with an EPA cleanup request. CERCLA response actions or cleanup orders thus cause a coercive effect on a responsible party similar to the New Jersey directive in Broadwell. Therefore, despite the fact that Broadwell is not a CERCLA case, the ramifications of the objective expectation of the insured doctrine in insurance coverage disputes involving environmental cleanups are enormous since federal courts must apply state law in interpreting insurance contracts. This results in inconsistent interpretation of the term damages throughout the nation.

2. The Strict View

Not all courts hold that the coercive effect of environmental claims trigger the objective expectations of the insured doctrine. In Continental Insurance Co. v. Northeastern Pharmaceuticals & Chemical Co. ("NEPACCO"), the Eighth Circuit Court of Appeals affirmed the District Court for the Western District of Missouri's order granting summary judgment for the insurer that damages under a CGL policy constitute "damages" have answered the issue negatively. See NEPACCO, 842 F.2d 977 (8th Cir. 1988); Maryland Casualty Ins. Co. v. Armco, 822 F.2d 1348 (4th Cir. 1988). While no federal circuit court has ruled to the contrary, a number of federal district courts and state courts have held such costs do constitute damages. See, e.g., New Castle County v. Hartford Accident & Indemnity Co., 673 F. Supp. 1359 (D. Del. 1987); Ex-Cell-O, 662 F. Supp. 71; Aviex, 125 Mich. App. 579, 336 N.W. 2d 838 (1983); Broadwell, 528 A.2d 76 (N.J. Sup. Ct. App. Div. 1987); Compass Ins. Co. v. Cravens, Dargan & Co., 748 P.2d 724 (Wyo. 1988). See also 13 POLL. LITIG. RPRTR. 208-09 (Aug. 1988) (listing federal and state court decisions finding response costs are damages under a CGL policy).

165. See id.
166. Id. at 528, 528 A.2d at 82.
167. See supra notes 68-69 and accompanying text.
168. See supra text accompanying note 84.
169. Erie Railroad Co., 304 U.S. at 78.
171. See, e.g., Continental Ins. Cos., 842 F.2d 977 (8th Cir. 1988) ("damages" should be given its technical meaning); Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987) ("damages" should be given its legal, technical meaning as described in Hanna).
172. 842 F.2d 977 (8th Cir. 1988).
do not include cleanup costs. The NEPACCO court held that "damages" was not ambiguous in the insurance context and that the plain meaning of the term damages as used in the insurance context refers to legal damages and does not include equitable relief. The NEPACCO court pointed out that if damages were given a liberal interpretation to include any obligation to pay, then the term "damages" in the insurance contract would be surplusage because any obligation, whether compensatory or restitution, would be covered. The majority concluded that even though the term damages is not defined in the CGL policy, it is not ambiguous and should, therefore, be accorded its technical meaning ordinarily given in insurance contracts.

The NEPACCO minority was critical of what it perceived as the majority's disregard of Missouri law in interpreting the term damages. The minority believed that the term damages should convey the meaning that an ordinary insured would understand, i.e., coverage for damage to property. The NEPACCO minority argued that there is no distinction under Missouri law between legal damages and equitable or restitution damages unless the cost of restoring the damaged property exceeds the value of the property interest damaged. The NEPACCO minority thus took the position of the insured that the policy covers any damages sought for injury to property owned by a third party, and that the technical meaning of damages should not control.

The objective expectation of the insured is not the only basis on which coverage has been determined in favor of the insured, as in Broadwell, or against the insured, as in NEPACCO. The coverage issue has also been framed as a choice of remedies issue to which the insured's expectation is of no consequence. The argument is that Section 107(a)(4)(C) authorizes the EPA to sue a responsible party for loss in value to the environment. As a result of the EPA's decision to exercise its response authority under Sections 104 and 106, it has chosen the restitutional remedy over the compensatory remedy. This decision has been held to preclude an insured from coverage since a CGL policy only provides coverage for compensatory damages.

173. Id. at 987.
174. Id. at 985.
175. See id. at 986.
176. See id. at 985-87.
177. See id. at 988-90.
178. Id. at 989.
179. Id.
180. See id. at 989-90.
181. See, e.g., Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1354 (4th Cir. 1987), cert. denied, 108 S. Ct. 703 (1988) (response costs are not damages within the
The EPA's choice of remedy argument has been characterized by the Aviex court as "merely fortuitous" since the measure of compensatory damages, or loss in value to the environment, is measured by the cost to cleanup the environment. Consequently, the measure of damages under either of CERCLA's remedies would be the same.

The federal circuit courts of appeal addressing this issue have rejected the liberal Aviex court's "merely fortuitous" reasoning. In rejecting this view, the fourth circuit, in *Maryland Casualty Insurance Co. v. Armco*, and the eighth circuit in *NEPACCO*, concluded that the "merely fortuitous" rationale ignored the fact that the coverage issue was really a matter of interpretation of the insurance contract rather than the EPA's "fortuitous" choice of remedies under CERCLA.

The Armco court hesitated to stretch the black letter meaning of damages to include equitable forms of relief such as restitution because such interpretation would change the obligation of the parties to the insurance contract. To rule otherwise would effectively "extend

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182. *Aviex*, 125 Mich. App. at 590, 336 N.W. 2d at 843. Note that *Aviex* concerns a state environmental regulation rather than CERCLA. For purposes of analogy, however, this factor is not important since many state cleanup regulations model CERCLA.

183. *Armco*, 822 F.2d at 1348 (4th Cir. 1987), cert. denied, 108 S. Ct. 703 (1988). The Armco court found the Aviex court's reasoning faulty for two reasons: First, it is not necessarily correct that the measure of relief is unrelated to whether the government sues for reimbursement or for damages. Damages is a form of substitutinal redress which seeks to replace the loss in value with a sum of money. Restitution, conversely, is designed to reimburse a party for restoring the status quo. It might very well cost far more to restore a contaminated [environment] than it would to pay damages for its loss . . . . Second, even assuming that the costs to the defendant are the same regardless of whether the government sues for restitution or for damages, thus in some sense rendering the decision by the government regarding whether to sue for damages or restitution a "mere fortuity," it is a great step, and a dangerous one, for courts to begin to construe insurance policies to encompass costs of compliance with injunctive and reimbursement relief.

184. *Armco*, 822 F.2d at 1353.
the obligations of insurance carriers beyond the well-illumined area of tangible injury and into the murky and boundless realm of injury prevention."

In coming to this conclusion, the Armco court reasoned that EPA response costs are fundamentally geared to prevent injury because they are taken to avoid future tangible injury to humans and the environment or to mitigate environmental damage that has already occurred. As discussed in the first section of this Note, the EPA only has authority to take response actions when there has been a release or threat of release of a hazardous substance. Response costs flowing from the response actions are defined under CERCLA as costs to remedy or mitigate a hazardous substance or condition or threatened release. By its very definition, CERCLA response actions can be implemented before any property damage occurs. Thus, CERCLA costs may be incurred to prevent property damage, rather than to compensate the public for loss of value to the environment.

This distinction between the restitutinal nature of response actions and recovery for loss in value under CERCLA Section 107(a)(4)(c) is paramount under the strict view expressed by the Armco court and the courts which side with the Armco decision. In support of this view, those courts cite a long history of case law holding that an insured's cost of complying with an equitable directive of a governmental agency is not recoverable under a CGL policy. In particular, the case of Aetna Casualty & Surety Co. v. Hanna is cited as precedent for this view.

In Hanna, the Fifth Circuit Court of Appeals held that a CGL carrier is only obligated to indemnify its insured for damages for destruction or injury to property. The Hanna court reasoned that the CGL policy did not provide coverage for mandatory injunctive orders because the nature of relief sought was not to compensate for the destruction of property. To hold otherwise, the Hanna court concluded, would be to ignore the plain and unambiguous provi-
sions of the CGL contract which stated that the policy covers payments to third persons who have a legal claim for compensatory damages against the insured on account of injury to or destruction of property.\textsuperscript{196}

In addition to following the \textit{Hanna} court's strict construction of the CGL policy, the \textit{Armco} court gave two public policy reasons for denying coverage for injury actions.\textsuperscript{197} The first public policy reason is that such expenditures are subject to the discretion of the insured. If the insured has discretion in taking safety precautions, for example, and will later be indemnified by his carrier, the carrier loses its certainty as to the extent of his liability under the policy.\textsuperscript{198} The second and less obvious, but perhaps more compelling, public policy reason is that insureds are far more likely to misuse safety measures where another party is paying the bill.\textsuperscript{199} \textsuperscript{200} "Should [CGL] policies be construed to cover some forms of harm-avoidance measures," the \textit{Armco} court concluded, "courts would [then] be faced with the very difficult problem of separating needed prophylactic measures from unnecessary or inefficient ones."\textsuperscript{201}

\section*{III. The Liberal View: The Better of Two Rules}

With either the strict or liberal view, the best argument is the policy argument. For example, the strict view stresses the artificial distinction between an insured who is sued for response costs and an insured who will comply with an injunction or order, but seeks indemnification from its insurer. The problem with focusing on legal damages resulting from a response cost or administrative enforcement suit as the trigger for coverage is that the insured must wait to be sued, or risk losing coverage for acting before the coverage disputes were settled. The insured thus has no incentive to cooperate or negotiate a settlement agreement with the EPA. The result is that limited Superfund monies are spent at the worst sites, while other sites slated for cleanup are put on hold until the EPA can replenish the Superfund. This scenario undercuts the policy of CERCLA: to facilitate prompt cleanup of sites on the NPL.

One commentator points out that the strict view of damages not only contradicts Superfund policy, but also grants the government broad discretion through artful pleading in deciding who bears the cost of cleanup. Although the government may attempt to shift cleanup costs to the deep pocket polluter, without regard to insur-

\textsuperscript{196} See id.
\textsuperscript{197} \textit{Armco}, 822 F.2d at 1353.
\textsuperscript{198} See id.
\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{201} See supra notes 66-69 and accompanying text.
ance coverage, this strategy may ignore the most efficient cost allocation, which would include insurance coverage of all PRP's.\textsuperscript{202}

As for the strict view, the policy arguments proposed by insurance companies and adopted by the Armco court are unconvincing. There are numerous strictly enforced federal and state safety and environmental laws which require corporations to internalize their pollution costs. The liberal view of damages will not cause corporations to externalize or over-utilize pollution control measures. Insurance coverage does not apply to a knowing polluter, nor would a corporation recoup its pollution control expenses from its insurance carrier.\textsuperscript{203}

Large corporations, such as Armco, that broker and negotiate a manuscript CGL policy, should be held to the terms of their contract. They would, however, internalize response costs by taking preventive measures if it was clear that they did not buy coverage for CERCLA liability. The landowner or a small business owner who signs a CGL form is another matter. The term damages means an obligation to pay, regardless if it is damages in the technical sense or an EPA cleanup order or response cost suit.

Courts that adhere to the technical meaning of damages, i.e., legal compensatory damages, "beg the question because no one can value the loss to the environment in monetary terms."\textsuperscript{204} The policy behind CERCLA is to clean up hazardous sites, and as most state and many federal district courts realize, the value of damage to the property is the cost to clean up the site. The measure of damages is the same, whether couched as equitable or restitutional relief, or as compensation for loss in value to the environment.

**Conclusion**

The restitutional nature of EPA cleanup costs cannot be avoided because of the nature of the property damage and valuation problems when there is environmental contamination. The reality is that no amount of money can replace natural resources which have been contaminated. The only recourse is to clean up the site as best as modern technology is able. This is the policy behind CERCLA. If the artificial distinction between restitution and compensatory damages were dropped, the polluters, the EPA and the insurance carrier


\textsuperscript{203} Id.

\textsuperscript{204} Id.
could cooperate early in the response plan to facilitate a prompt and cost efficient cleanup.

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