

The Superfund Insurance Dilemma: Defining the Super Risks and Rights of Comprehensive General Liability Policies

I. INTRODUCTION

The court room confrontations over who will pay for “cleaning up” America’s past sins of hazardous waste disposal have moved to a new arena and formidable combatants have joined the fray. Throughout the United States, insurance companies and their commercial business insureds are engaged in heated litigation to answer that multi-billion dollar question. The issue is the extent of the insurers’ obligation to defend and indemnify under standard comprehensive general liability (CGL) policies for their insureds’ potential or actual liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹ commonly known as “Superfund.”²

¹42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986). The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (1980), was enacted in 1980. CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 101 Stat. 1613 (1986). SARA established new cleanup standards, settlement and enforcement provisions as well as increased the Fund available to the federal government to initiate response actions. However, the pre-SARA provisions of CERCLA relevant to insurance coverage issues are essentially unchanged. Where SARA has significantly modified insurance related provisions of the 1980 Act, those provisions will be highlighted.

Since its inception, CERCLA and its program implementation have been the subjects of intense comment, criticism and legal analysis. The Act has been described by one jurist as “a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions. . . . [N]umerous important features were deleted during the closing hours of the Congressional session. . . . The courts are once again placed in the undesirable and onerous position of construing inadequately drawn legislation.” *United States v. Northeastern Pharmaceutical and Chem. Co.*, 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984). For a general guide to commentaries on a wide range of CERCLA related legal issues, see Note, *CERCLA 1980-1985: A Research Guide*, 13 *ECOLOGY L.Q.* 311 (1986). See also *Developments in the Law—Toxic Waste Litigation*, 99 *HARV. L. REV.* 1458 (1986); BNA Special Report, *Superfund: Litigation and Cleanup*, 16 *ENV’T REP.* (BNA) No. 9 (June 28, 1985) [hereinafter *Superfund I*]. For a comprehensive analysis of SARA, see Atkeson, Goldberg, Ellrod & Connors, *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 16 *ENVTL. L. REP.* (Envtl. L. Inst.) 10360 (1986) [hereinafter *SARA History*] and BNA Special Report, *Superfund II: A New Mandate*, 17 *ENV’T. REP.* (BNA) No. 42 (February 13, 1987) [hereinafter *Superfund II*].

²All references herein to Superfund are to the Comprehensive Environmental Response, Compensation, and Liability Act, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601-9675.

Superfund authorizes the federal³ government to initiate or compel others to undertake removal and remedial⁴ actions to cleanup hazardous waste sites where there is a release or a threatened release of a hazardous substance into the environment.⁵ The Act also permits the federal and appropriate state government to recover the cost of natural resource damages⁶ and allows private parties to bring their own cost recovery

³The President delegated authority to the United States Environmental Protection Agency (USEPA) to serve as the principal federal agency in Superfund activities in Executive Order 12,316, 46 Fed. Reg. 42,237 (1981).

Pre-SARA participation by the state governments in federal cleanup activities was very limited; yet, the Act required the states to pay 10% of the cost of cleaning up private sites within their jurisdiction. Under SARA, the states will continue to cost share 10% of the cleanup costs, but their role in setting standards, enforcement and settlement negotiations has greatly expanded. *SARA History*, *supra* note 1, at 10379-83.

Nearly forty states have enacted their own "mini-Superfund" statutes patterned after the federal legislation. However, the majority of states with "mini-Superfund" programs have reported that they have neither the level of funds nor staff to keep pace with the number of confirmed sites not eligible for federal funding. Association of State and Territorial Solid Waste Management Officials (ASTSWMO) Survey of State Hazardous Waste Programs, *cited in Taking Up the Slack: Mini-Superfunds in the States*, 13 EPA JOURNAL 9, 32 (January/February 1987) [hereinafter EPA JOURNAL].

⁴CERCLA § 101(23) and (24), as amended, 42 U.S.C. § 9601, define the terms "remove" or "removal" and "remedy" or "remedial action," respectively. The principal difference between the terms is "removal" refers to short term actions while "remedial actions" are actions consistent with a permanent remedy which may be taken instead of or in addition to removal actions. In SARA, the Congress expressed a strong preference for permanent treatment. SARA § 121(a), CERCLA § 121(b)(1), as amended. This imprecise "preference" for more expensive permanent solutions along with more stringent performance standards are controversial aspects of SARA. As one high USEPA official stated, "There's probably not enough money in the world to clean up all the sites permanently." *Superfund II*, *supra* note 1, at 42.

⁵CERCLA § 101(22), as amended, 42 U.S.C. § 9601, defines the term release as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment" Most courts have not had to decide whether a release or threatened release has occurred. In an early Superfund case, one court did observe that the act of disposal, without more, does not necessarily create CERCLA liability. *United States v. Wade*, 577 F. Supp. 1326, 1334 n.6 (E.D. Pa. 1983).

CERCLA § 101(14), as amended, 42 U.S.C. § 9601, also broadly defines the term "hazardous substance" and incorporates by reference, substances listed as hazardous under other environmental statutes. There is little dispute that the government need only show that the waste contains an unspecified quantity of a hazardous substance as defined in the Act to establish liability. *See, e.g., Wade*, 577 F. Supp. at 1332-33.

⁶CERCLA § 107(a)(4)(C), as amended, 42 U.S.C. § 9607(a)(4)(C). The federal government has been slow in promulgating final guidelines for the assessment of natural resource damages. It was not until six years after the original passage of CERCLA that the guidelines were published. 51 Fed. Reg. 27,674 (Aug. 1, 1986). This delay may well explain why the government has not made many claims under this provision. *Superfund II*, *supra* note 1, at 35.

actions.⁷ Potentially responsible parties who may be found jointly and severally liable under CERCLA to undertake cleanup actions or reimburse for cleanup costs incurred by others,⁸ include past and present owners and operators of the hazardous waste sites as well as generators, sellers and transporters⁹ of the wastes disposed of or treated at a facility.¹⁰

⁷CERCLA § 111(a)(2), as amended, 42 U.S.C. § 9611, authorizes the use of Superfund monies to reimburse private parties for costs they incur in cleaning up sites, if those costs are approved and certified by the federal government. Private parties may instead sue responsible parties directly for their cleanup costs under CERCLA § 107(a)(4), as amended, 42 U.S.C. § 9607(a)(4).

⁸As originally enacted, CERCLA did not mandate that liability be joint and several. However, most courts which have addressed the issue have determined that imposition of strict, joint and several liability is appropriate where the harm is indivisible. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). In SARA, Congress apparently affirmed the courts imposition of strict, joint and several liability as it did not change the liability provisions.

⁹CERCLA § 107(a), as amended, 42 U.S.C. § 9607(a), identifies four classes of persons from whom response costs may be recovered:

- (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, shall be liable for-
 - (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
 - (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan
 - (C) 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; and
 - (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title. [This last provision was added by SARA].

Corporate officers and employees may also be found individually liable under CERCLA. In *NEPACCO*, the Eighth Circuit imposed such liability finding that the Act imposes strict liability upon "any person" and is not limited to the defendant corporation. In its

The significance and magnitude of Superfund liability has not been overlooked by the insurance industry or their insureds.¹¹ Over 27,000 potentially dangerous hazardous waste sites have been identified, and the list continues to grow.¹² However, only those sites which pose the most serious threat to health and the environment, anywhere from 2,500 to 10,000 national priority sites, are eligible for clean-up under Superfund.¹³ The cost of cleaning up just the priority sites ranges from over \$22 billion to possibly as high as \$100 billion, and does not include litigation expenses or the costs associated with analogous state statutes.¹⁴

Faced with potential liability which may exceed \$30 million per site,¹⁵ both insurers and their insureds are turning to the courts to determine their respective rights and obligations under their standard third party liability insurance contracts.¹⁶ The heart of the Superfund insurance coverage controversy is the interpretation of two deceptively simple clauses in CGL policies issued in the late 1960's through the early 1980's.¹⁷ These provisions obligate the insurer to pay on behalf of the insured all sums which the insured shall become legally obligated

view, any other construction of the Act "would open an enormous, and clearly unintended, loophole in the statutory scheme." *NEPACCO*, 810 F.2d at 743 (the "EPA" suit).

¹⁰CERCLA § 101(9), as amended, 42 U.S.C. 9601, broadly defines "facility." Courts have interpreted the term to include any site or area where hazardous substances are located. *New York v. General Elec. Co.*, 592 F. Supp. 291, 296 (N.D.N.Y. 1984); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 184-85 (D.C. Mo. 1985).

¹¹An insurance executive, speaking at a national conference on Corporate Liability, observed that the retroactive, strict liability of CERCLA and other statutes has been a major reason for the elimination of environmental liability insurance. Another problem cited was that the competent company, one that complies with all requirements, may end up paying a greater premium because the diligent handler who keeps good records and tracks where the waste has gone may be a possible "liability target" under the present system of joint and several liability. Dennis R. Connolly, Vice President of Johnson & Higgins, *quoted in Current Developments*, 17 ENV'T REP. (BNA) 791 (Sept. 26, 1986).

¹²EPA JOURNAL, *supra* note 3, at 16.

¹³Federal Superfund monies can only be used for sites on the National Priority List. The National Priority List (NPL), authorized by CERCLA § 105(8)(B), as amended, 42 U.S.C. § 9605(8)(B), identifies the worst abandoned or uncontrolled hazardous waste sites targeted for remedial action and is required to be updated annually. As of January 1987, there were 951 sites on the list, but USEPA estimates the NPL may eventually exceed 2500. EPA JOURNAL, *supra* note 3, at 16. The Congressional Office of Technology Assessment estimated the NPL would reach 10,000. Superfund Strategy, OTA-ITE-252, Office of Technology Assessment (April 1985) *reprinted in* CHEM. & RADIATION WASTE Lit. Rep. (Andrews Pub.) 752, 761 (1985) [hereinafter Congressional Assessment].

¹⁴EPA JOURNAL, *supra* note 3, at 16. Congressional Assessment, *supra* note 13, at 761. *See also supra* note 3 discussion of state programs.

¹⁵Current Developments, 17 ENV'T REP. (BNA) 779 (Sept. 26, 1986).

¹⁶*See infra* notes 33-34 and accompanying text.

¹⁷*See infra* notes 40-46 and accompanying text.

to pay as damages because of property damage which occurs during the policy period;¹⁸ and to defend any suit against the insured alleging such damage even if such suit is groundless, false or fraudulent.¹⁹

The simplicity of these phrases rapidly disappears when the courts are forced to apply them to Superfund fact situations involving a number of complex definitional issues as well as competing public policies. Among the more vigorously contested and debated coverage issues are: whether the pollution was "expected and intended" by the insured;²⁰ whether "pollution exclusion" clauses apply to past hazardous waste disposal practices;²¹ whether there was an "occurrence" within the meaning of the CGL policies;²² and whether the exclusion for

¹⁸Standard Liability Policy Forms of 1966 and 1973 *reprinted in* R. CUSHMAN & C. STAMM, *HANDLING PROPERTY AND CASUALTY CLAIMS* 458-475 (1985).

The standard policies include similar provisions for "bodily injury." *Id.* Whether standard CGL policies provide coverage for third party claims against the insureds for "bodily injury" because of environmental contamination is another widely litigated issue. However, this issue and the issues discussed *infra* notes 20-23 are beyond the scope of this Note.

¹⁹*Id.*

²⁰The 1973 standard CGL form defines "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage *neither expected nor intended from the standpoint of the insured.*" *Id.* at 470 (emphasis added). Courts have generally focused on whether the insured had an actual intent to cause a harmful result, not whether the acts which gave rise to the damage were intentional. The term "expected" has generally required a finding that the insured knew or should have known "that certain consequences w[ould] result from its actions." *City of Carter Lake v. Aetna Casualty & Surety Co.*, 604 F.2d 1052, 1058-59 (8th Cir. 1979). For cases discussing the "expected or intended" issue, see Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured*, 31 A.L.R. 4TH 957 (1984).

²¹The pollution exclusion was incorporated into the 1973 Standard Policy Form: The insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere, or any water course or body of water, *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental.*

R. CUSHMAN & C. STAMM, *supra* note 18, at 253 (emphasis added). The litigation concerning the pollution exclusion has focused on the "sudden and accidental" exception. There is no clear consensus in the courts on whether this exclusion should apply in Superfund fact situations and the issue has generated extensive judicial and academic commentary. See generally Annotation, *Construction and Application of Pollution Exclusion Clause in Liability Insurance Policy*, 39 A.L.R. 4TH 1047 (1985); Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO L.J. 1237 (1986).

²²This issue is commonly referred to as the "trigger of coverage" issue. It is a particularly significant issue in Superfund insurance cases where coverage is sought for "bodily injury" or "property damage" due to environmental contaminants and it is unclear when such injuries or damage occur. The "trigger" question has been most frequently

property owned by the insured is applied where environmental contamination migrates and damages adjacent land.²³

litigated in terms of asbestos-related disease, but a similar analysis is beginning to be applied in property damage cases. There are a number of divergent views, with the circuits apparently divided into four camps.

In *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 451 F. Supp. 1230, 1242 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *clarified in part on reh'g*, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981), the court held that the appropriate "trigger" of coverage was the time of an injured party's "exposure" to asbestos, that is, at the time the asbestos was inhaled, not when the injury is discovered. *See also* *Hancock Laboratories, Inc. v. Admiral Ins. Co.*, 777 F.2d 520 (9th Cir. 1986); *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir.), *cert. denied sub nom. Aetna Casualty and Surety Co. v. Porter*, 454 U.S. 1109 (1981).

In contrast, the First Circuit has adopted the "manifestation" theory which holds that the injury or damage "occurs" within the meaning of the CGL policies, only when it is discovered or becomes manifest. *Eagle-Picher Indus. v. Liberty Mut. Ins. Co.*, 523 F. Supp. 110, 115 (D. Mass. 1981), *aff'd*, 682 F.2d 12 (1st Cir. 1982), *cert. denied sub nom. Froude v. Eagle-Picher Indus.*, 460 U.S. 1028 (1983).

The most expansive of the "trigger" theories is the "multiple or continuous" trigger, adopted in *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982). In *Keene*, the court held that every insurer on the risk between the initial exposure and the manifestation was liable for indemnification and litigation expense costs. 667 F.2d at 1044-45.

Finally, the Second Circuit rejected adoption of any of three previous theories, as a matter of law, in *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2nd Cir. 1984). Instead, the court adopted an "actual injury" theory which requires a factual case by case evaluation of the type of injury, the period of exposure and the persons affected. 565 F. Supp. at 1497-98.

In Superfund "property damage" cases, no clear trend is apparent as the "exposure" and "manifestation," theories have found favor in the courts. *See* *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO II)*, 811 F.2d 1180, 1192 n.29 (8th Cir. 1987) ("[w]e adopt the 'exposure' view of coverage."). On rehearing en banc, the court agreed with this finding. 842 F.2d 977, 984 (8th Cir. 1988). *Accord* *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 76 (E.D. Mich. 1987). *But see* *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986) (an occurrence is determined at the time the damage is discovered—the "manifestation" theory).

²³The 1973 standard policy form excludes coverage for damage to "property owned, occupied by or rented to the insured." R. CUSHMAN & C. STAMM, *supra* note 18, at 458, 467. In the Superfund context, this straightforward exclusion has been a particular problem because of the nature of the property damage generally involved: damage to subsurface waters not "owned" by the insured and damage to adjacent land which can not practically be segregated from damage to the insured's own land. A majority of courts which have addressed the issue have held that the "owned property" exclusion is not applicable and cleanup costs incurred on the insured's own property to prevent damage to third parties are recoverable under CGL policies. *See* *Broadwell Realty Servs., Inc. v. Fidelity and Casualty Co. of N.Y.*, 218 N.J. Super. 516, 528 A.2d 76 (1987); *Township of Gloucester v. Maryland Casualty Co.*, 668 F. Supp. 394 (D.N.J. 1987); *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 199-201 (W.D. Mo. 1986); *Riehl v. Travelers Ins. Co.*, 22 Env't Rep. Cas. (BNA) 1544, 1546 (W.D. Pa. 1984), *rev'd on other grounds*, 772 F.2d 19 (3rd Cir. 1985).

Equally complex are the public policy underpinnings. It is clearly the intent of Superfund to make responsible parties pay for cleaning up the waste sites whenever possible.²⁴ On the other hand, Superfund also expressly preserves agreements to insure, to hold harmless or to indemnify parties found liable for those costs.²⁵ Indeed, the federal government has been a vocal *amicus curiae* in favor of liability coverage for Superfund cost recovery judgments.²⁶ Yet consistent judicial guidelines for this burgeoning new area of the law are few. In effect, the courts are left with the task of determining when or if the "square peg" of statutorily created Superfund liability will fit into the "round hole" of standard CGL policies which are steeped in the traditions of state insurance contract law.²⁷

The apparent polarity that results when newly created, retroactive forms of environmental liability clash with traditional principles of insurance law was recently demonstrated in two Superfund insurance coverage cases, *Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*,²⁸ and *Maryland Casualty Co. v. Armco, Inc.*²⁹ Despite identical policy language and comparable Superfund liability, the Eighth and Fourth Circuits, respectively, initially reached diametrically opposed conclusions on significant insurance coverage questions. The fundamental issues which divided the circuits are whether governmental cleanup costs are a measure of damages or merely an economic loss, and whether CGL policies cover only claims for legal damages, not the governments' requests for equitable relief in the form of restitutionary money judgments. Even with the Eighth Circuit's recent reversal of its decision on the equitable relief/legal damages question in

²⁴1 SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUBLIC LAW 96-510, VOLUME 1, at 317-19 (Comm. Print 1983).

²⁵CERCLA § 107(e)(1), as amended, 42 U.S.C. § 9607(e)(1) construed in *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1458 (9th Cir. 1986).

²⁶See Supplemental Brief for the United States as Amicus Curiae on Rehearing En Banc, *Continental Ins. Cos. v. Missouri*, 815 F.2d 51 (8th Cir. 1987) (No. 85-1940WM); *Mardan*, 804 F.2d at 1454; *New York v. General Electric Co.*, 592 F. Supp. 291 (N.D.N.Y. 1984).

²⁷Federal courts adhere to state laws and decisions in interpreting insurance contracts. *Erie R.R. v. Thompkins*, 304 U.S. 64 (1938); "By preserving such agreements [insurance contracts], Congress seems to have expressed an intent to preserve the associated body of state law under which agreements between private parties would normally be interpreted." *Mardan*, 804 F.2d at 1458.

²⁸811 F.2d 1180 (8th Cir. 1987), vacated on reh'g en banc, 842 F.2d 977 (8th Cir. 1988).

²⁹822 F.2d 1348 (4th Cir. 1987).

an en banc rehearing,³⁰ the courtroom confrontations on these issues have not subsided.³¹

Moreover, because the circuits' decisions are ostensibly based on state law, the Supreme Court will likely not resolve the controversy.³² Other courts, insurers and insureds will be forced to enter the fray, insurance rights and obligations will continue to be uncertain, and cleanup costs will undoubtedly escalate. This Note analyzes the Superfund cost recovery issues in light of insurance law principles, the history and language of the standard CGL policies and the underlying public policies. It ultimately suggests that these principles, language and policies support and compel the view that governmental cleanup costs are within the coverage afforded by the CGL policies.

II. WHO GETS THE BENEFIT OF THE BARGAIN? THE ROLE OF STANDARD PROVISIONS AND PRINCIPLES OF INSURANCE CONTRACT LAW

To establish whether a claim falls within the ambit of comprehensive general liability policies, a four part analysis must be undertaken. First, it must be determined whether the claim alleges injury or loss to a third party; second, the actual language of the policy must be examined; third, the meaning of the terms must be ascertained either from the definitions within the policy or from rules of construction where no meaning is contained in the policy; and finally, the policy language and the meaning of terms must be applied to the fact situation which gave rise to the claim.

A. *Third Party Claim Requirement*

CGL policies are third party liability insurance policies that protect insureds against liability that they become legally obligated to pay to others and are distinguished from first party policies which reimburse the insured for losses they directly incur.³³ Hence, a condition precedent

³⁰842 F.2d 977 (8th Cir. 1988).

³¹See *infra* notes 164-170 and accompanying text.

³²One court has lamented the judicial inconsistency which colors insurance coverage litigation for environmental contaminant-related injuries and damages, observing, Four Circuit Courts of Appeal have reached four different results on the questions at issue ["trigger of coverage"], some diametrically opposed to others, and the Supreme Court has refused to review a single one of those cases, leaving the law in conceptual chaos. The Supreme Court seems unlikely to pass on these questions, moreover, because of its long-standing policy against reviewing Circuit Court rulings that purport to be based upon state law.

American Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1512 (S.D.N.Y. 1983).

³³A. WINDT, *INSURANCE CLAIMS AND DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSURED* 239 (1982 & Supp. 1987).

to the CGL insurer's obligation to pay sums on behalf of the insured is that the insured be liable to a third person, by means of either a judgment or a settlement.³⁴

B. *Duty to Defend/Duty to Indemnify*

CGL policies also cover the costs to defend the insured against such third party claims. The duty to defend, however, is generally broader than the duty to pay or indemnify. Because an insurer's duty to defend is generally determined by the allegations in the complaint, it is immaterial whether the insured is ultimately found legally liable.³⁵ Thus, it is normally the *potential* for coverage which triggers the duty to defend, whereas the duty to indemnify is only imposed when legal liability has been established.³⁶ However, in Superfund insurance cases the courts are not in agreement on the breadth of that potential for coverage. In *Maryland Casualty Co. v. Armco, Inc.*, the court found that the duty to defend and the duty to indemnify should be interpreted "coterminously" and held that the government's claim for Superfund cost reimbursement was not a claim for damages; therefore, a mere "possibility" of liability did not arise.³⁷ In contrast, the court in *Fireman's Fund Insurance Cos. v. Ex-Cell-O Corp.*³⁸ rejected the insurers' claim of no duty to defend because the underlying Superfund claims did not allege damages. "The insurers construe their policies too narrowly: coverage does not hinge on the form of action taken or the nature of the relief sought, but on an actual or threatened use of legal process to coerce payment or conduct by the policy holder."³⁹

C. *Language of the Standard CGL Policy*

CGL policies were developed over forty years ago by insurance industry representatives⁴⁰ and were designed to provide commercial enterprises with indemnity for "the broadest spectrum of property damage and personal injury claims brought by third parties arising out of day

³⁴*Id.*

³⁵*Insurer's Duty to Defend*, DEFENSE RESEARCH INSTITUTE, INC. 8 (1978).

³⁶7C J.A. APPLEMAN, INSURANCE LAW & PRACTICE § 4682 (rev. ed. 1979).

³⁷822 F.2d 1348, 1354 (4th Cir. 1987).

³⁸662 F. Supp. 71 (E.D. Mich. 1987).

³⁹*Id.* at 75.

⁴⁰R. KEETON, BASIC TEXT ON INSURANCE LAW § 2.11(d) (1971). For a discussion of the drafting history of CGL policies, see Saylor & Zolensky, *Pollution Coverage and the Intent of the CGL Drafters: The Effect of Living Backwards*, MEALEY'S LITIGATION REPORTS-INSURANCE 4,425 (1987). The authors, counsel for insureds, contend that the drafters of the standard form contract intended broad coverage for pollution claims and assertions to the contrary by insurers are not supported by the documented CGL drafting history.

to day business operations."⁴¹ The 1966 and 1973 versions of the standard form and the policy definitions contained therein have been widely litigated in Superfund insurance coverage cases. The 1966 version defines "property damage" as "physical injury or destruction of tangible property which occurs during the policy period, including the loss of use thereof at anytime resulting therefrom."⁴² An "occurrence" is defined as "an accident, including continuous or repeated exposure to conditions, injury or property damage neither expected or intended from the standpoint of the insured."⁴³ The word "damages" "includes . . . damages for loss of use of property resulting from property damage."⁴⁴ A "pollution exclusion"⁴⁵ was incorporated into the 1973 standard CGL policy. With the onslaught of new forms of statutory liability for pollution-related events, the standard form has continued to be revised. Today, the new standard form, effective in 1986, virtually eliminates the potential for any such coverage.⁴⁶

D. Choice of Law in Insurance Contract Interpretation

A federal court must determine which substantive state law should apply in deciding questions of insurance contract construction.⁴⁷ In the

⁴¹Chesler, Rodberg, & Smith, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 RUTGERS L. J. 9, 14 (1986).

⁴²R. CUSHMAN & C. STAMM, *supra* note 18, at 470.

⁴³*Id.*

⁴⁴*Id.* at 460.

⁴⁵*See supra* note 21.

⁴⁶The new exclusion reads:

This insurance shall not apply to:

- (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.

1984 Insurance Office Commercial General Liability Coverage Form, p. 2.

⁴⁷Where the federal courts are uncertain about the application of state law, they

principal cases both hazardous waste sites giving rise to the underlying Superfund actions are in the state of Missouri. Yet in the insurance coverage actions, the law of Maryland was applied in *Armco*⁴⁸ and Missouri law to the *NEPACCO* site⁴⁹ because the parties stipulated that those state laws, respectively, would apply. The choice of which state law to apply has become a formidable judicial task in Superfund insurance actions because there often are multiple potentially responsible parties who, in the course of business, may have generated, transported, stored or disposed of wastes at sites all across the country.

In *Independent Petrochemical Corp. (IPC) v. Aetna Casualty and Surety*,⁵⁰ the District of Columbia District Court was faced with determining which choice of law provision would apply to an insurance action arising out of Superfund dioxin-related injury and property damage suits. The actions which gave rise to the suits occurred in Missouri, but the insurance contracts of some of the multiple defendants were negotiated and agreed upon in several other states. The court found the general choice of law factors relating to place of contract negotiation, contract performance, and place of business or incorporation⁵¹ to be difficult and burdensome to apply "due to the diverse nature of the parties and places of contracting."⁵² Instead, the court focused on the location of the insured risk. Because the risk was of bodily injury or property damage arising out of IPC's alleged improper waste disposal in Missouri, the court found that Missouri law governed the trigger of coverage issue.⁵³

E. General Rules of Insurance Contract Construction

Once the choice of law issue is resolved, other key insurance law principles become relevant. These general rules are not only essential to

will certify questions to the state's high court. See, e.g., *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467 (Ind. 1985), *certified question*, 764 F.2d 876 (D.C. Cir. 1985). In *Lilly*, the Indiana Supreme Court was asked what "trigger" of coverage the state would apply in a delayed bodily injury claim. The court adopted the multiple trigger interpretation of the "occurrence" issue in a CGL policy arising out of DES-related claims. *Id.* at 471. This result puts in question the holding in *United States Fid. and Guar. Co. v. American Ins. Co.*, 169 Ind. App. 1, 345 N.E.2d 267 (1976), where the court adopted the "manifestation" trigger of coverage in a property damage case. See cases cited *supra* note 22.

⁴⁸*Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987).

⁴⁹*Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 811 F.2d 1180, 1184 n.10 (8th Cir. 1987), *vacated on reh'g en banc*, 842 F.2d 977 (8th Cir. 1988).

⁵⁰654 F. Supp. 1334 (D.D.C. 1986).

⁵¹See 2 COUCH, COUCH ON INSURANCE 2D §§ 16:2, 16:10, 16:12, 16:20 (rev. ed. 1984).

⁵²654 F. Supp. at 1356.

⁵³*Id.*

understanding the insurance relationship, but are of fundamental importance to understanding the holdings in the principal cases.

The basic rule in interpreting insurance contracts is if the terms of the policy are clear and unambiguous, the language is to be construed according to its ordinary and popular meaning,⁵⁴ that is, "the meaning a reasonably prudent layman would infer."⁵⁵ Courts have relied on standard dictionaries to determine the popular meaning of words⁵⁶ and generally "the fact that the policy provision would be unambiguous to one trained in the law or insurance is of no significance."⁵⁷ However, if the language of the policy is susceptible to more than one meaning, most states have adopted the rule that any ambiguity or uncertainty in an insurance policy should be resolved against the insurer, and "[a]n ambiguous insurance policy should be construed to further the policy's basic purpose of indemnity."⁵⁸

The rule that ambiguous terms are to be construed as a matter of law against the drafter of the policy is based on the view that insurance contracts, particularly standard forms, are adhesion contracts.⁵⁹ The insureds generally lack equal bargaining power to negotiate policy terms and, thus, "courts should strive to give effect to the reasonable expectations of the insured."⁶⁰ In some Superfund insurance coverage cases, as well as in other litigation involving commercial business insureds,

⁵⁴13 J.A. APPLEMAN, INSURANCE LAW AND PRACTICE § 7384 (rev. ed. 1976 & Supp. 1987). See also A. WINDT, *supra* note 33, at 225.

⁵⁵"It is black-letter law that the terms of an insurance policy are to be construed according to the meaning a reasonably prudent layman would infer." Maryland Casualty Co. v. Armco, 822 F.2d 1348, 1352 (4th Cir. 1987) (citing Pacific Indem. Co. v. Interstate Fire & Casualty Co., 302 Md. 383, 388, 488 A.2d 486, 488 (1985)).

⁵⁶Southern Guar. Ins. Co. v. Duncan, 131 Ga. App. 761, 206 S.E.2d 672 (1974) (dictionaries supply the plain, ordinary and popular sense of words used in contracts). See also *supra* note 54.

⁵⁷A. WINDT, *supra* note 33, at 232. See *Acands, Inc. v. Aetna Casualty & Surety Co.*, 764 F.2d 968, 973 (3d Cir. 1985) (rule that insurance policy must be strictly construed against insurers applied even when insured is large commercial entity that bargained with insurance company). *But see infra* text accompanying notes 61-67.

⁵⁸*Eli Lilly & Co. v. The Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985).

⁵⁹3 A. CORBIN, CORBIN ON CONTRACTS § 559 at 265-267 (1960).

⁶⁰*Lilly*, 482 N.E.2d at 471. The doctrine of reasonable expectations was created specifically to aid in the interpretation of ambiguities within insurance contracts and is a corollary of the principle of resolving ambiguities against the insurer. It was first articulated by Robert E. Keeton who stated, "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." R. KEETON, BASIC TEXT ON INSURANCE § 36.3(a), at 351 (1971). The doctrine has been adopted by a number of courts and is favored by many commentators. See generally Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981).

insurers and their counsel contend that “the ‘general rule’ requiring construction of an insurance policy against the insurer should have no application” because the policies “have been negotiated by parties with substantially equal bargaining power.”⁶¹ While some courts have refused to automatically place the responsibility for ambiguous terms on the insurer in situations involving sophisticated business insureds who negotiated their policy terms and were represented by trained insurance and legal counsel,⁶² most courts and commentators have been reluctant to discard the *contra insurer* rule.⁶³ Indeed, a number of courts follow the rule that once an ambiguity is discovered, even if the insured is a sophisticated entity with apparent equal bargaining power, the policy will be construed against the insurer and no quantum of evidence on issues of authorship, intent or cause is relevant.⁶⁴ Other courts apply the *contra insurer* rule as a matter of law only if an evaluation of pertinent extrinsic evidence is insufficient to establish the parties’ true intent.⁶⁵ In Maryland, the courts follow yet another procedure. If the language of an insurance contract is ambiguous, extrinsic evidence is admissible to show the parties’ intent and “if disputed factual issues are presented by the evidence bearing on the ambiguity, construction of the contract is for the jury.”⁶⁶ However, while the resolution of insurance contract interpretation is a matter for the trier of fact in Maryland,

⁶¹Ostrager and Ichel, *The Role of Bargaining Power Evidence in the Construction of the Business Insurance Policy: An Update*, 18 FORUM 577 (1983).

⁶²Hartford Accident and Indem. Co. v. Gulf Ins. Co., 776 F.2d 1380 (7th Cir. 1985); Loblaw, Inc. v. Employer’s Liab. Assurance Corp., 85 A.D.2d 880, 446 N.Y.S.2d 743 (1981).

⁶³Eagle-Picher Indus. v. Liberty Mut. Ins. Co., 682 F.2d 12, 21 n.6 (1st Cir. 1982); Pan Am. World Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989, 1002 (2d Cir. 1974); Owens-Illinois, Inc. v. Aetna Casualty & Surety Co., 597 F. Supp. 1515, 1523-24 (D.D.C. 1984). See also *supra* note 61, at 577 n.2 (collecting decisions and commentaries favoring the *contra insurer* rule).

⁶⁴Eli Lilly & Co. v. The Home Ins. Co., 482 N.E.2d 467, 470 (Ind. 1985).

⁶⁵One court described the relationship of extrinsic evidence to insurance contract construction:

An ambiguity in a policy provision induces a construction most favorable to the insured—but does not foreclose evidence for interpretation. The principle that an ambiguous adhesion provision shall be given an intentment favorable to the adherent rests on the public policy that the inept drafter of a form had the resources to do better. The principle that an ambiguous adhesion provision shall be open to interpretation by evidence as well as by the written words rests on the role of the law to protect the reasonable expectations of the parties induced by the agreement.

Estrin Constr. Co. v. Aetna Casualty & Surety Co., 612 S.W.2d 413, 419 (Mo. Ct. App. 1981).

⁶⁶Truck Ins. Exch. v. Marks Rentals, Inc., 288 Md. 428, _____, 418 A.2d 1187, 1190 (1980).

“the ambiguity is to be resolved against the company which prepared the policy and in favor of the insured.”⁶⁷

The question of whether terms in the standard CGL policy are given their common and popular meaning or are deemed ambiguous and construed to give effect to the reasonable expectations of the insured, is of particular significance in Superfund insurance coverage litigation. Policy provisions must be applied to newly-created liabilities for disposal practices which may well have been conducted in good faith and in compliance with applicable laws. In the principal cases that follow, each of these traditional rules of construction plays a significant role.

III. THE PRINCIPAL CASES

A. *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co.*⁶⁸

In *NEPACCO II*, the insurer filed suit against its insured seeking a declaratory judgment that it had no duty to defend or indemnify the chemical company for liability arising out of the government's Superfund cost recovery suit (the “EPA” suit)⁶⁹ in which NEPACCO and its corporate officers were found jointly and severally liable under Superfund for the cost of clean up of a hazardous waste site in Missouri.⁷⁰ The State of Missouri intervened in *NEPACCO II* to protect its interests arising out of claims that it made against NEPACCO in another suit, and counterclaimed against the insurer for coverage in that action, the “IPC” suit.⁷¹

Interpreting Missouri law, the district court found that an insurer is liable only for “bodily injury or property damage which occurs during the policy period” and held that an “occurrence” is the time the loss or damage was sustained rather than the time when the negligence or

⁶⁷Government Employees Ins. v. DeJames, 256 Md. 717, 720, 261 A.2d 747, 749 (1970).

⁶⁸811 F.2d 1180 (NEPACCO II) (8th Cir. 1987), *vacated on reh'g en banc*, 842 F.2d 977 (8th Cir. 1988).

⁶⁹United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO I), 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987).

⁷⁰*Id.* At the time of the *NEPACCO I* trial, NEPACCO was a defunct “shell” corporation. 810 F.2d at 742. Following the decision in *NEPACCO I*, the United States instituted a garnishment proceeding to recover its \$155,171.93 judgment against NEPACCO. United States v. Continental Ins. Co., No. 85-3069 (W.D. Mo. filed Feb. 25, 1985). The district court stayed the garnishment action pending the resolution of the insurance action.

⁷¹Missouri v. Independent Petrochemical Co., 22 Env't Rep. Cas. (BNA) 1735 (E.D. Mo. 1985).

wrongful act was committed.⁷² It held that the governmental entities did not sustain a compensable loss until they incurred remedial or removal costs. Because these costs were incurred after the policy expired, there was no occurrence to give rise to the insurer's liability and the court granted summary judgment to Continental (no coverage for the "EPA" suit or the "IPC" suit).⁷³

On appeal, a panel of the Eighth Circuit reversed the decision concerning Continental's liability in the "EPA" suit, holding that state and federal governments suffer "property damage" at the time hazardous wastes are "released" into the environment, and CERCLA cleanup costs are a recoverable measure of damages for this environmental property damage.⁷⁴ The court rejected the insurer's contention that only actual owners of land on which hazardous wastes are improperly disposed sustain "property damage" and any governmental injury is merely economic injury. The court held injury to governmental "quasi-sovereign" interests in natural resources constitutes "property damage" within the meaning of CGL policies.⁷⁵

The panel also rejected the lower court's reasoning that the governments did not incur a loss until such time as they incurred cleanup costs. It held that environmental damage occurs at the moment hazardous wastes are improperly released, and a liability policy in effect at the time this damage is caused provides coverage for the subsequently incurred costs of cleaning up the wastes.⁷⁶ Finally, the panel affirmed the lower court's ruling that the insurer was not liable in the "IPC" suit because in that case the state sought reimbursement for cleanup costs arising from contamination which did not take place until 1974, after the policies expired.⁷⁷

Judge McMillian⁷⁸ dissented only from the part of the panel opinion which held cleanup costs under Superfund are compensatory damages for "property damage" within the meaning of the CGL policies.⁷⁹ In his view, cleanup costs constitute equitable monetary relief, but not legal

⁷²Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., No. 84-5034-CV-S-4 (W.D. Mo. June 25, 1985) (WESTLAW, Federal DCTU database).

⁷³*Id.*

⁷⁴Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO II), 811 F.2d 1180, 1191 (8th Cir. 1987), *vacated on reh'g en banc*, 842 F.2d 977 (8th Cir. 1988).

⁷⁵811 F.2d at 1187.

⁷⁶*Id.* at 1191.

⁷⁷*Id.* at 1192.

⁷⁸Judge McMillian authored the opinion in *NEPACCO I*, the underlying "EPA" suit, and the en banc decision after rehearing.

⁷⁹811 F.2d at 1193 (McMillian, J., concurring in part and dissenting in part).

damages.⁸⁰ Referring to “black letter” insurance law, Judge McMillian found that “claims for equitable relief are not claims for ‘damages’ under liability insurance contracts.”⁸¹ On rehearing en banc, a sharply divided⁸² Eighth Circuit found Judge McMillian’s dissent and the reasoning articulated in *Maryland Casualty Co. v. Armco, Inc.*⁸³ more persuasive and held that CERCLA cleanup costs are not claims for damages under CGL policies.⁸⁴ The court acknowledged that outside the insurance context the term “damages” is ambiguous, but it found that no such ambiguity exists when interpreting the terms of a standard insurance policy.⁸⁵ Once the court decided the insurer had no duty to defend or indemnify because the governments’ claims for cleanup costs were not legal damages, it declined to reach the other issues discussed in the panel decision. The court made clear, however, that it agreed with the panel that environmental contamination can constitute property damage within the meaning of CGL policies and that Missouri would likely adopt the “exposure” trigger of coverage theory.⁸⁶

B. *Maryland Casualty Co. v. Armco, Inc.*

As the *NEPACCO* decisions suggest, the District Court of Maryland concluded that Superfund cleanup costs are not within the coverage afforded by the CGL policies.⁸⁷ This conclusion was affirmed on appeal by the Fourth Circuit in *Maryland Casualty Co. v. Armco, Inc.*,⁸⁸ an action arising out of a suit brought against the defendant Armco by the United States under Superfund for recovery of cleanup costs and remedial action at another hazardous waste site in Missouri, known as the CCC litigation.⁸⁹

⁸⁰*Id.* at 1194 (McMillian, J., concurring in part and dissenting in part).

⁸¹*Id.* (citations omitted).

⁸²*Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 842 F.2d 977, 987 (8th Cir. 1988) (Heaney, J., dissenting). The final en banc vote was 4 to 3, as Judge Ross took senior status on June 13, 1987, eight months prior to the issuance of the opinion. *Id.* at 978.

⁸³822 F.2d 1348 (4th Cir. 1987).

⁸⁴842 F.2d at 987.

⁸⁵*Id.* at 985.

⁸⁶*Id.* at 983-84.

⁸⁷*Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. 430 (D. Md. 1986).

⁸⁸822 F.2d 1348 (4th Cir. 1987).

⁸⁹*Id.* See *United States v. Conservation Chem. Co.*, 681 F. Supp. 1394 (W.D. Mo. 1988); 661 F. Supp. 1416 (W.D. Mo. 1987); 653 F. Supp. 152 (W.D. Mo. 1986); 628 F. Supp. 391 (W.D. Mo. 1985); 619 F. Supp. 162 (W.D. Mo. 1985); 589 F. Supp. 59 (W.D. Mo. 1984). As the string of citations suggests, the CCC litigation is one of the largest and more complex Superfund actions to date. The United States’ claim sought recovery of \$2,541,107.40 for response costs it incurred in cleaning up the industrial chemicals

In the CCC litigation, Armco was one of many original waste generators allegedly responsible for environmental contamination. It filed a third-party complaint against Conservation Chemical Company's (CCC) insurer, Maryland Casualty, in the Missouri district court where the CCC litigation was being tried, alleging it was an intended beneficiary of the site operator's insurance policies. The Missouri district court adopted a Special Master's report which found CCC, Armco, and others liable for the Superfund cleanup costs and held that this environmental harm constituted "property damage" for purposes of the insurance policy between CCC and Maryland Casualty.⁹⁰ Accordingly, the district court held that Maryland Casualty was under an obligation to indemnify and defend Armco in the CCC litigation.⁹¹ Shortly after the Missouri district court issued its Order, a partial settlement was reached between the insurer and the original waste generators (including Armco). Subsequently, Chief Judge Wright vacated the Order as to the settling parties.⁹²

Because Armco's own insurance policy with Maryland Casualty was written and signed in Maryland, this insurance action was brought in the District Court of Maryland, and Maryland's insurance law was applied.⁹³ However, the insurance policy between Maryland Casualty and Armco contained nearly identical language to the Maryland Casualty—CCC site operator's policy at issue in the Missouri litigation.⁹⁴

The Maryland district court found that action taken by the Missouri district court did not render the present controversy *res judicata* and did not give rise to collateral estoppel.⁹⁵ It held that Maryland Casualty was under no duty to defend or indemnify Armco in the CCC litigation because that litigation involved a claim for equitable relief, not a legal claim which Maryland Casualty must defend or indemnify.⁹⁶

waste facility in Kansas City. 628 F. Supp. at 404. The government also sought injunctive relief to compel the defendants to undertake a long term remedial action program to permanently clean up the site. In terms of environmental contamination, the undisputed facts are that over 50 million gallons of waste material were transported to the site during its more than twenty years of operation. "By defendants' own estimates, more than 22,000 pounds of hazardous substances are being discharged into the Missouri River and Blue River each year. . . . These substances could continue to be discharged for many years . . . into areas likely to be directly encountered by humans or other living organisms," including public water supplies and agricultural lands. 619 F. Supp. at 182-84.

⁹⁰653 F. Supp. at 187-94.

⁹¹*Id.* at 204-16.

⁹²*Id.* at 158.

⁹³See *supra* notes 47-49 and accompanying text.

⁹⁴*Armco*, 822 F.2d at 1351.

⁹⁵*Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. 430, 433-34 (D. Md. 1986). The Circuit affirmed the lower court's view stating, "[w]e decline to hold that the recommendations of a special master, which have been vacated, rise to the level of a 'final judgment' in order to estop the present litigation." 822 F.2d at 1355.

⁹⁶643 F. Supp. at 432.

The Fourth Circuit affirmed, holding that the term "damages" has a technical meaning distinguishable from claims for injunctive or restitutionary relief.⁹⁷ It explicitly disagreed with *United States Aviex Co. v. Travelers Insurance Co.*⁹⁸ and the *NEPACCO* panel opinion,⁹⁹ both of which held to the contrary. The court reasoned that an insurer has to reimburse its insured only when the insured is obligated to pay damages that result from injury, which in the insurance context means damages in the legal sense. It held that the cost to Armco of complying with the directives of a regulatory agency are not covered within the terms of the insurance policy.¹⁰⁰

IV. GOVERNMENTAL CLEANUP COSTS: A MEASURE OF LEGAL DAMAGES OR A NONCOMPENSABLE ECONOMIC LOSS

It would be simple to conclude that Superfund insurance coverage issues are now resolved with the Eighth Circuit's wholesale adoption of the *Armco* definition of legal "damages." However, there are still fundamental differences of view in the opinions that transcend the peculiarities of state law and will have significant bearing on future Superfund insurance actions arising in other states. The first of these issues is whether the government's claim for reimbursement of cleanup costs is a third party claim.

The *NEPACCO* panel decision strongly refuted the insurer's contention that only actual owners of the land suffer property damage and therefore are the only entities qualified to be third party claimants under CGL policies. In the court's view (left undisturbed on rehearing) "state and federal governments suffer injury to their 'quasi-sovereign' interests when pollutants are released into the soil, water, and air within their jurisdiction."¹⁰¹ The court found support for its conclusion that Superfund cost recovery claims are within the coverage provided by the policies because the policy definition of "property damage" is "injury or loss to tangible property."¹⁰² In its view, "the improper release of toxic wastes may cause 'property damage' not only to the actual owner . . . but also to state and federal governments because of their 'interest independent of and behind the titles of its citizens in all the earth and

⁹⁷822 F.2d at 1352.

⁹⁸125 Mich. App. 579, 336 N.W.2d 838 (1983). See *infra* text accompanying notes 166-74 and accompanying text.

⁹⁹*Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO II)*, 811 F.2d 1180, 1189 (8th Cir. 1987), *vacated on reh'g en banc*, 842 F.2d 977 (8th Cir. 1988).

¹⁰⁰*Armco*, 822 F.2d at 1352.

¹⁰¹*NEPACCO II*, 811 F.2d at 1185.

¹⁰²*Id.* at 1186.

air within [their] domain.' ”¹⁰³ Thus, the court held that the governments, like owners of private property, met the first requirement for coverage: they asserted a third party claim.

But the Fourth Circuit apparently disagrees. In *Mraz v. Canadian Universal Insurance Co.*,¹⁰⁴ an action brought against the insurer to defend and indemnify under a CGL policy for liabilities arising under a Superfund cost recovery claim, the court acknowledged that the governments' cost recovery claim alleged that property damage occurred, but “there [we]re no allegations that *plaintiffs* sustained any property damage or that they even ha[d] the requisite interest in the Leslie site.”¹⁰⁵ In this court's view, even though the governments' complaint alleged that the release of hazardous substances caused contamination of land and water, that contamination was not the injury for which the governments sought relief. Rather, the environmental contamination was “merely a factual predicate of the cost reimbursement claim.”¹⁰⁶

When both the policy language and the purpose of Superfund are examined in tandem, the Eighth Circuit's reasoning that governments do have an identifiable interest in protecting the environment when they take direct action to clean up a hazardous waste site is far sounder than the Fourth Circuit's narrow view. First, it is the very purpose of the federal Superfund law to vest in the U.S. government the authority to “protect public health and environment from releases of hazardous substances and waste.”¹⁰⁷ If the government has no “interest” in the environmental property damage caused by these wastes, there would be no necessity for its cleanup authority. Second, the insurance policies at issue provide coverage for liability incurred “because of property damage.” It does not require or specify that coverage is limited to claims by actual owners of the contaminated property.

A more critical issue is whether the governments' claims are compensatory damages for “property damage” or, instead, an economic loss separate and distinct from the hazardous waste contamination. Because neither *Mraz* nor the *NEPACCO* opinions focus on the meaning of the

¹⁰³*Id.* at 1187.

¹⁰⁴616 F. Supp. 1173 (D. Md. 1985), *rev'd*, 804 F.2d 1325 (4th Cir. 1986). The *Mraz* decision is discussed herein because the *Armco* opinion did not contain the circuit's views on whether cleanup costs are a measure of damages or an economic loss. However, the Fourth Circuit declined to base its decision in *Armco* on *Mraz* because the parties did not raise the same issues. 822 F.2d at 1354 n.2. Another reason for the court's reluctance to rely on *Mraz* may be the presence of an alternative holding in that case which “alone would fully support the reversal of the judgment of the district court.” 804 F.2d at 1330 (Ervin, J., concurring).

¹⁰⁵804 F.2d at 1329 (emphasis in original).

¹⁰⁶*Id.* at 1328.

¹⁰⁷*Superfund I*, *supra* note 1, at 1.

phrase “*because of* property damage,” it is necessary to return to the actual language of the insurance policies to resolve this issue.

The CGL definition of “property damage” is “injury to tangible property.”¹⁰⁸ In reviewing that definition, the *Mraz* court correctly stated that “response costs are not themselves property damage.”¹⁰⁹ However, it then concluded, without citation to any authority, that Superfund “response costs are an economic loss.”¹¹⁰ On the other hand, the *NEPACCO* panel, interpreting the same phrase, found that “once there is property damage—here environmental contamination—then the damages that flow from that property damage—here, cleanup costs—are recoverable.”¹¹¹ In effect, the Fourth Circuit adopted the position that the “‘property damage’ definition is the ultimate determinant of the scope of coverage for property damage liability.”¹¹² In contrast, the Eighth Circuit panel begins its analysis by finding that hazardous waste contamination causes property damage and the consequences of that damage, the removal costs, are compensable *because of* that damage.¹¹³

In light of the basic tenets of contract law that all terms are to be given effect and the contract is to be interpreted as a whole,¹¹⁴ the words “because of” must serve some purpose in the policy provision. The CGL policies do not define these words. In the absence of a policy definition, the words in an insurance policy are generally given their “ordinary and common meaning.”¹¹⁵ The generally accepted meaning of “because of” is: “on account of,” “as a consequence of” or “by reason of.”¹¹⁶

This common meaning accorded the words “because of” has found favor with the courts. In *Globe Indemnity Co. v. People*,¹¹⁷ an insurer appealed from a judgment that it was obligated under its CGL policy to satisfy any money judgment the state of California obtained from

¹⁰⁸See *supra* note 42 and accompanying text.

¹⁰⁹804 F.2d at 1329.

¹¹⁰*Id.*

¹¹¹*Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO II)*, 811 F.2d 1180, 1189 (8th Cir. 1987), *vacated on reh'g en banc*, 842 F.2d 977 (8th Cir. 1988).

¹¹²Note, *Liability Coverage for “Damages Because of Property Damage” Under the Comprehensive General Liability Policy*, 68 MINN. L. REV. 795, 815 (1984). The author suggests that no case law directly supports this narrow view of the scope of liability coverage for consequential damages arising from property damage.

¹¹³*NEPACCO II*, 811 F.2d at 1187.

¹¹⁴*WINDT, supra* note 33, at 226 n.3 (collected cases). 13 J.A. APPLEMAN, *supra* note 54, at § 7385.

¹¹⁵See *supra* notes 54-56 and accompanying text.

¹¹⁶13 J.A. APPLEMAN, *supra* note 54, at § 7385; see also Note, *supra* note 112, at 818 nn.117-20.

¹¹⁷43 Cal. App. 3d 745, 118 Cal. Rptr. 75 (1974).

its insured for fire suppression costs. The *Globe* policy, like the policies at issue in most Superfund actions, 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 . . . property damage. . . ." ¹¹⁸ Under the California statute, liability for fire suppression costs could be incurred only if a fire escaped to property belonging to others and caused damage thereto. ¹¹⁹ The court observed that under California law, the word "property" refers to physical or tangible property. Thus, the only issue was whether it was "semantically permissible to say fire suppression costs are sums the insureds became legally obligated to pay *because of* damage to tangible property." ¹²⁰ The court answered the question in the affirmative. It found that liability for fire suppression costs under the applicable statute can arise only if the fire causes damage to property, the property was tangible, and the costs were incurred to prevent further damage to tangible property. Thus, it held that the government's costs were "a sum recoverable under the policies." ¹²¹

In the pollution context, where cleanup costs like the fire suppression cost in *Globe* are incurred "because of" damage to tangible property, other courts have found such costs recoverable under CGL policies. ¹²² In *Port of Portland v. Water Quality Insurance Syndicate*, ¹²³ an action by the insured to recover the cost of containing and cleaning up an oil spill on the Willamette river in Oregon, the Ninth Circuit affirmed the lower court's holding that the "reasonable, enlightened view" is that "discharge of pollution into water causes damages to tangible property and hence cleanup costs are recoverable under a property damage liability clause." ¹²⁴

In Superfund insurance coverage actions, still other courts have rejected the Fourth Circuit's narrow view that cleanup costs are not themselves property damage and therefore are noncompensable under CGL policies. ¹²⁵ Indeed, the court in *New Castle County v. Hartford*

¹¹⁸*Id.* at 748, 118 Cal. Rptr. at 77.

¹¹⁹*Id.* at 750, 118 Cal. Rptr. at 79.

¹²⁰*Id.* (emphasis in original).

¹²¹*Id.* at 751, 118 Cal. Rptr. at 79.

¹²²*See* *Lansco, Inc. v. Department of Env'tl. Protection*, 138 N.J. Super. 275, 283-84, 350 A.2d 520, 524-25 (Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977) (state statutory liability for costs of cleaning up oil spill within coverage afforded by CGL policy); *Kutsher's Country Club Corp. v. Lincoln Ins. Co.*, 119 Misc. 2d 889, 892, 465 N.Y.S.2d 136, 139 (N.Y. Sup. Ct. 1983) (state claim for reimbursement of costs incurred in cleaning up oil spill constitutes "property damage" under the terms of CGL policy).

¹²³796 F.2d 1188 (9th Cir. 1986).

¹²⁴*Id.* at 1194, *aff'g in part* 549 F. Supp. 233 (1982).

¹²⁵*United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 190-91 (W.D. Mo.

*Accident and Indemnity Co.*¹²⁶ noted:

This court disagrees with the holding and reasoning of *Mraz*. To trigger coverage under the policies, the Federal Government in *United States v. New Castle County* need not allege that it suffered property damage. Under the terms of the policy, the underlying claim need only require the insured "to pay damages because of bodily injury or property damage." . . . The Court finds that all of the underlying lawsuits at issue are included within the policies' definition of damages.¹²⁷

Similarly, in *Solvents Recovery Service of New England v. Midland Insurance Co.*,¹²⁸ the court rejected the insurer's contention that the government's costs to remove drums from the Enviro-Chem hazardous waste site in Zionsville, Indiana, did not constitute "damage to tangible property." The court acknowledged that the act of removing the drums was not itself "property damage." But it observed "this contention ignores the fact that the very presence of the drums prompted the EPA to seek removal of the drums. And, that is the damage which rendered the [insured] legally obligated, as opposed to property damage itself."¹²⁹ In holding that the insurer was obligated to indemnify for the government's removal costs, the New Jersey court relied on *United States v. Conservation Chemical Co.*,¹³⁰ the underlying suit in the *Armco* action, where the court found that improper hazardous waste disposal "constitutes actions for injury to or destruction of tangible property" as defined in the CGL policies.¹³¹

In these and other similar cases,¹³² the words "because of" were either explicitly or implicitly given their ordinary and common meaning;

1986) (cleanup costs incurred by, or to be charged against, an insured constitute "property damage" within the meaning of the term as used in a CGL policy); *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, Civ. No. 83-3347, slip op. 23 (D.D.C. May 2, 1986) (WESTLAW, Federal DCTU database) (sums denominated as "cleanup" costs constitute damages for purposes of liability insurance coverage); *Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co. of N.Y.*, 218 N.J. Super. 516, 528 A.2d 76 (1987); *Buckeye Union Ins. Co. v. Liberty Solvents and Chems. Co.*, 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984); *Riehl v. Travelers Ins. Co.*, 22 Env't Rep. Cas. (BNA) 1544 (W.D. Pa. 1984), *rev'd on other grounds*, 772 F.2d 19 (3d Cir. 1985).

¹²⁶673 F. Supp. 1359 (D. Del. 1987).

¹²⁷*Id.* at 1366 (emphasis in original).

¹²⁸No. L-25610-83 (N.J. Super. Ct. Law Div. Nov. 17, 1986), *reported in Hazardous Waste Lit. Rep. (Andrews)* 10,453 (February 16, 1987), *rev'd on other grounds*, 218 N.J. Super. 49, 526 A.2d 1112 (1987).

¹²⁹*Id.* at 10,454.

¹³⁰653 F. Supp. 152 (W.D. Mo. 1986).

¹³¹*Id.* at 194.

¹³²*See* cases cited *supra* notes 122 and 125.

that is, cleanup costs incurred "as a consequence of" damage to tangible property are within the coverage afforded by CGL policies. In each case, there was an established causal nexus between the cleanup costs and the property damage. In Superfund actions where a causal connection¹³³ must also exist to render a responsible party liable for the cleanup costs, the "reasonable and enlightened view" should be that hazardous waste contamination is damage to tangible property and cleanup costs are sums compensable because of, and arising from, that property damage.

V. EQUITABLE RELIEF V. LEGAL DAMAGES

In holding that the insurer had no duty to defend or indemnify its insured in the underlying Superfund action, the *Armco* court never addressed the issue whether governmental cleanup costs are compensable under CGL policies *because of* property damage. The Fourth Circuit limited its inquiry to interpretation of the first part of the insurance clause: "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay *as damages*."¹³⁴

In *Armco* the Fourth Circuit stated that "[i]t is black letter law that the terms of an insurance policy are to be construed according to the meaning a reasonably prudent layman would infer,"¹³⁵ and confirmed that it is a basic "rule of construction that terms of an insurance contract are to be given their ordinary meaning."¹³⁶ Yet it adopted what it described as a "somewhat narrow, technical definition of damages."¹³⁷ In the court's view "'damages,' as distinguished from claims for injunctive or restitutionary relief, include 'only payments to third persons when those persons have a legal claim for damages . . .'"¹³⁸ To give this rather circular definition clearer meaning, the court held that the

¹³³CERCLA § 107 does not mention causation. Courts interpreting this provision have applied a loose causation test and have not required that the government prove the traditional cause-in-fact and proximate cause tort concepts. Rather, the government need only establish a relationship between the generator defendants and the waste site. That is, it need only prove that a generator disposed of a hazardous substance at the site, and that hazardous substances like those placed there by the defendant are present at the site. *United States v. Wade*, 577 F. Supp. 1326, 1333 (E.D. Pa. 1983). As one court stated, Section 107 "does not require the government to match the waste found to each defendant as if it were matching fingerprints." *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985). For a review of the chemical industry and government's arguments on causation, see *Superfund I*, *supra* note 1, at 41-45.

¹³⁴R. CUSHMAN & C. STAMM, *supra* note 18, at 458, 467 (emphasis added). See *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1351-54 (4th Cir. 1987).

¹³⁵822 F.2d at 1352.

¹³⁶*Id.*

¹³⁷*Id.*

¹³⁸*Id.*

underlying Superfund cost recovery claim was a form of equitable, remedial relief, "not damages in the legal sense."¹³⁹ On rehearing en banc, the *NEPACCO* court did not add to or clarify this "technical" definition, choosing instead to adopt the Fourth Circuit view *in toto* without citation to independent authority.¹⁴⁰

There is little doubt that the circuits are correct in viewing Superfund cost recovery claims as equitable rather than legal in nature.¹⁴¹ However, in Maryland and Missouri "the test [for interpreting insurance contracts] is what a reasonably prudent layperson would attach to the term."¹⁴² Had the courts adhered to this test to determine the meaning of "damages," it is not at all clear that a "reasonable layman" would infer or understand the legal distinction "between a money judgment rendered on a cause of action sounding in equitable restitution and a money judgment sounding in law."¹⁴³ Courts have often consulted dictionaries to assist them in determining what meaning the elusive, but ever present, "reasonably prudent person" would afford such terms.¹⁴⁴ Had the Fourth Circuit consulted such sources, it would have found that the standard dictionary definition of "damages" is "compensation in money imposed by law for loss or injury."¹⁴⁵ Again, the definition would not readily

¹³⁹*Id.*

¹⁴⁰*Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 842 F.2d 977, 986 (8th Cir. 1988).

¹⁴¹In determining whether defendants in Superfund cost recovery actions have a right to jury trial, the courts have stated that the governments' actions are equitable, not legal, because the government is seeking restitution for costs it has incurred. *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO I)*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); *United States v. Mottolo*, 605 F. Supp. 898 (D.N.H. 1985); *United States v. Georgeoff*, 22 Env't Rep. Cas. (BNA) 1601 (N.D. Ohio 1984). *But see infra* text accompanying notes 152-62.

¹⁴²*Armco*, 822 F.2d at 1352 (Maryland law); *NEPACCO*, 842 F.2d at 985 (Missouri law).

¹⁴³Supplemental Brief for the United States As Amicus Curiae on Rehearing En Banc at 6, *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 815 F.2d 51 (8th Cir. 1987) (No. 85-1940WM). The government contended that it is not until the first year of law school that such distinctions acquire their specialized meanings. *See also* *Hearst Corp. v. Hughes*, 297 Md. 112, _____, 466 A.2d 486, 489 (1983) ("unfortunately terms like 'injury,' 'actual injury,' 'damage' and 'harm' are used in different decisions, and often within the same decision, to represent different concepts.").

¹⁴⁴*See, e.g., Pacific Indem. Co. v. Interstate Fire & Casualty Co.*, 302 Md. 383, 388, 488 A.2d 486, 488 (1985).

¹⁴⁵WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 323 (1985). The *NEPACCO II* court quoted with approval the BLACK'S LAW DICTIONARY (4th ed. 1951) definition of damage: "'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.'" *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO II)*, 811 F.2d 1191, 1189 n.21 (8th Cir. 1987).

suggest to a reasonable insured that sums he was legally obligated to pay for property damage are somehow not within the coverage afforded by a CGL policy. At the very least, in the context of Superfund claims the terms "damages" and "property damage" are susceptible to more than one reasonable meaning and the traditional rules of construction dictate that the doubtful meaning be construed in favor of the insured.

A possible reason for the Fourth Circuit's apparent abandonment of the "reasonable prudent person" standard in *Armco* may rest in the nature of the contract between the insurer and *Armco*. The court considered it to be "manuscript," that is, some provisions were negotiated with, and specifically written for, the insured.¹⁴⁶ However, the provisions at issue, the duty to indemnify for property damage and the duty to defend, are identical to the language in all standard CGL policies.¹⁴⁷ It is unlikely that *Armco* or any other commercial insured, sophisticated or not, had enough "bargaining power" to negotiate away the very language which makes the standard policy form *standard*. It follows that the ordinary and common meaning of ambiguous terms should continue to control boiler-plate provisions that are intended, as their name suggests, to provide comprehensive general liability protection.

Both circuits adopted the reasoning of *Aetna Casualty and Surety Co. v. Hanna*¹⁴⁸ to support the finding that an insurer has no duty to defend or indemnify its insured for Superfund cost recovery claims because those claims are equitable in nature.¹⁴⁹ In *Hanna*, the Fifth Circuit held the cost of complying with a mandatory injunction only after damages for noncompliance were assessed was not within the coverage afforded by a CGL policy. But the reasoning of *Hanna*, and other cases¹⁵⁰ holding that there is no coverage for claims seeking mandatory injunctive relief, is too restrictive to encompass the unique statutory liability of Superfund.

Superfund provides the government with a number of tools with which to achieve its objective of hazardous waste clean-up, only one of

¹⁴⁶*Armco*, 822 F.2d at 1350. See also Brief of Appellee at 14-15, *Armco* (No. 86-3125). The insurer argued that the manuscript policy was replete with legal terms and was the "product of arm's length negotiations between two sophisticated parties. . . ." *Id.*

¹⁴⁷See R. CUSHMAN & C. STAMM, *supra* note 18, at 458, 467.

¹⁴⁸224 F.2d 499 (5th Cir. 1955).

¹⁴⁹See *Armco*, 822 F.2d at 1352; *NEPACCO*, 842 F.2d at 986.

¹⁵⁰*Ladd Constr. Co. v. Insurance Co. of North America*, 73 Ill. App. 3d 43, ___, 391 N.E.2d 568, 573 (1979) (no coverage for suit seeking injunction to remove debris); *Garden Sanctuary, Inc. v. Insurance Co. of North America*, 292 So. 2d 75, 77 (Fla. Dist. Ct. App. 1974) (no coverage for equitable claims for restoration of cemetery); *Desrochers v. New York Casualty Co.*, 99 N.H. 129, ___, 106 A.2d 196, 198-99 (1954) (costs of complying with a mandatory injunction do not constitute sums payable "as damages" covered by a liability insurance contract).

which is a mandatory court injunction. Superfund section 107 cost recovery actions, negotiated settlements in the form of administrative orders and consent decrees, and voluntary clean-ups undertaken by responsible parties should be distinguished from the government's authority to seek mandatory court injunctions requiring responsible parties to clean up the site if settlement cannot be reached.¹⁵¹ In Superfund cost recovery actions, the governments do not seek injunctive relief, but rather a money judgment to reimburse them for the costs incurred in cleaning up a hazardous waste site. A money judgment is "not a distinctly equitable remedy such as an injunction, an equitable lien, or a constructive trust."¹⁵² The government's section 106 authority¹⁵³ to compel responsible parties to take remedial action if they refuse to cooperate is substantively distinct from a cost recovery action to pay a money judgment.

The Fourth Circuit also relied on *Haines v. St. Paul Fire & Marine Insurance Co.*¹⁵⁴ for the proposition that claims for equitable relief are not covered by CGL policies.¹⁵⁵ In *Haines*, the Maryland District Court found in favor of the insurer, holding that the insured's potential liability for a restitutionary money judgment ancillary to a SEC claim for injunctive relief was equitable, "not damages in any sense."¹⁵⁶ The *Haines* court, like the district court in *Armco*, analogized to judicial interpretations of the seventh amendment right to a jury trial to support the finding of "no coverage" for claims seeking equitable relief within a CGL policy.¹⁵⁷ Under this theory, if the courts have determined that

¹⁵¹The major elements of the Superfund enforcement process are: Identification of responsible parties; Notification of responsible parties of their potential liability for cleaning up the site; Negotiations among EPA and responsible parties to determine if a settlement is possible; Negotiated settlements, which are recorded in administrative orders or court-issued consent decrees; Issuance by EPA of an administrative order or initiation of litigation to obtain a court injunction under Section 106 requiring the responsible party to clean up the site if a settlement has not been reached; and/or, Cleanup of the site with federal funds and action to recover the cost of cleanup later under Section 107.

EPA Could Benefit From Comprehensive Management Information On Superfund Enforcement Actions, reported by General Accounting Office, Dec. 28, 1984 (GAO/RCED-85-3) (quoted in *Superfund I*, *supra* note 1, at 27).

¹⁵²Note, *The Quasi-Contractual Nature of Cost Recovery Actions Under CERCLA*, 5 VA. J. NAT. RESOURCES 85, 142 (1985). The author analyzes the historical basis for restitution and suggests that Superfund cost recovery claims are derived from the common law quasi-contractual action (an action at law) that affords quantum meruit money recovery, recoverable at law as well as in equity.

¹⁵³42 U.S.C. § 9606 (1982 & Supp. IV 1986).

¹⁵⁴428 F. Supp. 435 (D. Md. 1977).

¹⁵⁵*Armco*, 822 F.2d at 1352.

¹⁵⁶428 F. Supp. at 440.

¹⁵⁷*Id.*; see *Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. 430, 432 (D. Md. 1986).

defendants in the underlying actions have no right to a jury trial because those claims are equitable in nature, then under an insurance contract the same equitable/legal distinction compels the “no coverage” result. At first glance this seems a logical outcome—Superfund actions cannot be “equitable” for seventh amendment purposes and “legal” for insurance contracts.¹⁵⁸ On closer examination, however, the analogy to the right to a jury trial is not dispositive. The right to a jury trial in the underlying Superfund action has no bearing on the interpretation of a private agreement to insure where the contract is governed not by the dictates of the seventh amendment,¹⁵⁹ but by the intent of the parties,¹⁶⁰ the character and purpose of the contract¹⁶¹ and the ordinary and popular meaning of its terms.¹⁶²

The general rule followed in most states is that the existence of coverage is controlled by the gravamen of the underlying complaint.¹⁶³ The principal does not appear to be abrogated where the insurer is obligated to indemnify for Superfund cost recovery claims. The gravamen of the underlying suit is legal liability for sums expended in cleaning up property contaminated by hazardous wastes generated, transported or disposed of by responsible parties.

Even with the benefit of the Fourth Circuit’s reasoning in *Armco*, other federal courts have specifically questioned the value of the equitable relief/legal damages distinction as it applies to contaminated sites. In *Township of Gloucester v. Maryland Casualty Co.*,¹⁶⁴ the township was

¹⁵⁸*Armco*, 643 F. Supp. at 435.

¹⁵⁹*Tull v. United States*, 107 S. Ct. 1831 (1987) (Petitioner had right to jury trial on the government’s civil penalties claim for alleged violations of the Clean Water Act, as amended, 33 U.S.C. §§ 1311, 1344 and 1362(7) (1982 & Supp. IV 1986)).

¹⁶⁰13 J.A. APPLEMAN, *supra* note 54, at § 7385 (collecting cases which hold that the cardinal rule in construing insurance contracts is to ascertain the intention of the parties).

¹⁶¹In construing insurance contracts, courts “examine the character of the contract, its purpose and the facts and circumstances of the parties at the time of execution.” *Pacific Indem. Co. v. Interstate Fire & Casualty Co.*, 302 Md. 383, 388, 488 A.2d 486, 488 (1985); “[A Court’s function] is to search broadly for the probable common intent of the parties in an effort to find a reasonable meaning in keeping with the expressed general purposes of the policy.” *Flynn v. Hartford Fire Ins. Co.*, 146 N.J. Super. 484, 488, 370 A.2d 61, 63 (1977).

¹⁶²*See supra* notes 54-58 and accompanying text.

¹⁶³G. COUCH, *COUCH ON INSURANCE* 2D § 51:42 (rev. ed. 1982).

¹⁶⁴668 F. Supp. 394 (D.N.J. 1987). The court stated it must follow New Jersey law, but observed that “courts in this jurisdiction and outside this jurisdiction have reached opposite conclusions on the coverage question. . . .” *Id.* at 397. It chose to follow *Solvents*, No. L-25610-83 (N.J. Super. Ct. November 17, 1986), *reported in Hazardous Waste Lit. Rep.* (Andrews) 10,453 (February 16, 1987) (*see supra* notes 128-31 and accompanying text) and *Broadwell Realty Servs. Inc. v. Fidelity & Casualty Co. of N.Y.*, 218 N.J. Super. 516, 528 A.2d 76 (1987).

under court order to close and clean up a sanitary landfill that the state claimed had caused and was continuing to cause damage to surrounding ground and surface waters. The township sought a declaratory judgment that its insurers were obligated to indemnify it for those costs under standard CGL policies. The federal district court found the costs of clean-up and closure of the landfill "do constitute 'damages' under the CGL policies at issue,"¹⁶⁵ and adopted the reasoning of *United States Aviex Co. v. Travelers Insurance Co.*¹⁶⁶ In *Centennial Insurance Co. v. Lumbermens Mutual Casualty Co.*,¹⁶⁷ the court also rejected the *Armco* reasoning in favor of those courts following *Aviex*, stating

Even if the action is preventative or equitable in nature, the costs incurred in cleaning up property damage from toxic contamination are damages within a comprehensive general liability insurance policy. . . . It is in everyone's best interest that toxic waste contamination be prevented in the first place and promptly cleaned up if it is allowed to occur.¹⁶⁸

In *Aviex*, the Michigan Court of Appeals held that an insurer's obligation to pay under a CGL policy included sums expended by the insured in complying with equitable orders. The court stated:

If the state were to sue in court to recover in traditional "damages", including the state's costs incurred in cleaning up the contamination, for the injury to groundwater, defendant's obligation to defend against the lawsuit and to pay damages would be clear. It is merely fortuitous from the standpoint of either plaintiff or defendant that the state has chosen to have plaintiff remedy the contamination problem, rather than choosing to incur the costs of cleanup itself and then suing plaintiff to recover these costs. The damage to the natural resources is simply measured in the cost to restore the water to its original state.¹⁶⁹

The Fourth Circuit found this reasoning wholly unpersuasive.¹⁷⁰ It was particularly critical of the view that cost of restoration is an appropriate measure of damages for injury to property.¹⁷¹ Like the courts in *New*

¹⁶⁵*Gloucester*, 668 F. Supp. at 399-400.

¹⁶⁶125 Mich. App. 579, 336 N.W.2d 838 (1983).

¹⁶⁷677 F. Supp. 342 (E.D. Pa. 1987).

¹⁶⁸*Id.* at 350.

¹⁶⁹125 Mich. App. at _____, 336 N.W.2d at 842-43 (quoted in *Gloucester*, 668 F. Supp. at 399).

¹⁷⁰*Armco*, 822 F.2d at 1353.

¹⁷¹*Id.*

*Castle*¹⁷² and *Centennial Insurance*,¹⁷³ the *Gloucester* court did not share the Fourth Circuit's narrow view of damages nor its allegiance to the equitable/legal distinction. It held that the *Aviex* view better comported with the reality of toxic waste contamination and clean-up.¹⁷⁴ The Fourth Circuit's criticism notwithstanding, the *Aviex* reasoning not only comports with reality, it recognizes the inequities in a system which would permit insurance coverage for a Superfund suit brought for "damages" to ground water, but would not allow coverage for a suit brought to recover the cost of cleaning up that same ground water. If that were the case, no one with insurance would choose to clean up hazardous wastes in the hope that they would eventually be sued for legal "damages."

Indeed, the *Armco* view does not even seem to comport well with Maryland precedent on the issue of alternative measures of damages. For instance, in *Regal Construction Co. v. West Lanham Hills Citizen's Association*,¹⁷⁵ the Maryland high court held that the cost of restoration is a compensable measure of damages for injury to property. It reaffirmed that the state follows the rule that damages for injury to property may be measured either by loss of value which results from the harm or by the cost of restoration, even if this latter cost "may be greater than the entire value of the property."¹⁷⁶

The more fundamental reason for the *Armco* decision may rest on either the court's misreading of the facts in the underlying suit or its concern with the breadth and scope of the actions the government is directly empowered to take because of environmental property damage under Superfund. In *United States v. Conservation Chemical Co.*,¹⁷⁷ the government sued the potentially responsible parties under CERCLA section 106 seeking to compel them to implement a comprehensive remedial action program. It also sued the parties under section 107 to obtain reimbursement for its current and future cleanup costs.¹⁷⁸ Yet the *Armco* court apparently did not consider the \$2,544,107.40 the government had already incurred in cleaning up contaminated surface and ground water

¹⁷²673 F. Supp. 1359 (D. Del. 1987).

¹⁷³677 F. Supp. 342 (E.D. Pa. 1987).

¹⁷⁴*Township of Gloucester v. Maryland Casualty Co.*, 668 F. Supp. 394, 399-400 (D.N.J. 1987).

¹⁷⁵256 Md. 302, 260 A.2d 82 (1970).

¹⁷⁶*Id.* at _____, 260 A.2d at 84. See also *NEPACCO*, 842 F.2d at 988 (the legal definition of "damages" under Missouri law includes the cost of restoring real property to its predamaged condition) (Heaney, J., dissenting).

¹⁷⁷653 F. Supp. 152 (W.D. Mo. 1986).

¹⁷⁸822 F.2d at 1350. The government also brought suit pursuant to the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. §§ 6901-91 (1982 & Supp. IV 1986), but that claim is not involved in the insurance action. *Id.*

and adjacent lands as actual injury to tangible property.¹⁷⁹ In the court's view:

The case thus presents no instance of harm to human or animal life, but merely the prevention of such harm. Even if some such harm has occurred, the fundamental nature of the government's intervention is the same: the government seeks to prevent or mitigate the occurrences or reoccurrences of hazardous contamination. This action is fundamentally prophylactic, and is not of the sort that Maryland Casualty contracted to cover.¹⁸⁰

In light of the documented environmental damage in the underlying litigation,¹⁸¹ the *Armco* reasoning is difficult to justify. CERCLA section 107 liability is not limited to liability for costs associated with preventative measures. It gives the government the necessary authority to sue responsible parties for the costs to remove and dispose of hazardous substances which have caused actual environmental damage.¹⁸² Neither the *Armco* definition of "actual injury," nor its definition of "damages," adopted in *NEPACCO*, seems well suited to the factual reality of Superfund liability, a liability that is imposed because of pervasive and migratory hazardous waste contamination. In an effort to confine insurance coverage to legal rather than equitable claims, the courts have created their own definition of injury which appears to exclude the very real injuries to tangible property caused by environmental contamination.¹⁸³

VI. CONCLUSION

In resolving Superfund insurance coverage questions, the courts should continue to give consideration to the language of the standard form policies and the traditional rules of insurance contract construction because they provide the foundation for interpreting private insurance

¹⁷⁹See *supra* note 89 and accompanying text.

¹⁸⁰*Armco*, 822 F.2d at 1354.

¹⁸¹See *supra* note 89.

¹⁸²CERCLA § 107(a)(3)(A), (B), (C), and (D), as amended, 42 U.S.C. § 9607(a)(3)(A), (B), (C) and (D). SARA added section (D) which provides that health assessments and health effects studies carried out under Section 110 are now recoverable costs. Recoverable costs also include interest accruing from the date of expenditure or the date that the payment is demanded in writing, whichever is later. Further, Section 101 (25) was amended to include the costs for enforcement in the definition of "response."

¹⁸³"It is difficult to imagine a more serious or concrete injury to tangible property than that resulting from hazardous waste contamination." Supplemental Brief for the United States as Amicus Curiae at 15, *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 842 F.2d 977, 987 (8th Cir. 1988) (No. 85-1940WM).

agreements. However, the analysis should be coupled with a careful reading of the public policies and purposes associated with both insurance agreements and newly-created statutory liabilities because these policies and purposes provide guideposts for the resolution of these insurance coverage issues.

Superfund is an Act intended to remedy the effects of past disposal practices which only now are perceived to have been improvident and to have caused damage. Its purpose is not to punish responsible parties. It is intended to compensate for the damage caused by past disposal practices as measured by the cost of hazardous waste clean up and removal. The language of the comprehensive general liability policies in effect over the past four decades has provided coverage to insureds for legal liability because of property damage that arises from the day-to-day operations of commercial business. It is neither unreasonable nor against public policy to suggest that those same insurance agreements should encompass the legal liability imposed on insureds for Superfund cost recovery claims.

MADONNA F. MCGRATH