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CERCLA Cleanup Costs Under Comprehensive General Liability Insurance Policies: Property Damage or Economic Damage?

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CERCLA CLEANUP COSTS UNDER COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICIES: PROPERTY DAMAGE OR ECONOMIC DAMAGE?

INTRODUCTION

The 1980's have been a time of environmental awakening in the United States, as Americans have become aware of the need to control waste and to reclaim the environment.[1] The polluting of the environment, however, is nothing new. In fact, chemical companies and waste haulers used to dispose of toxic wastes by sealing the wastes in drums and burying them, or by pouring them directly into the waterways.[2] Since the emergence of chemical production, the state of waste disposal has been disgraceful,[3] and we are left with Times Beach, Love Canal, the Valley of the Drums[4]

1. The problem of waste disposal has recently surfaced in disturbing ways. A barge carrying 3,100 tons of garbage from Islip, Long Island was refused permission to dock and dump its cargo by six states and three countries and spent months at sea. *See* N.Y. Times, May 18, 1987, at A1, col. 1. In addition, beaches were closed on the east coast after medical debris and human waste washed up on shore. *See* N.Y. Times, Jul. 12, 1988, at A1, col. 5. One New York City Health Commissioner referred to the 1980's as "the time the planet struck back." N.Y. Times, Jul. 13, 1988, at A1, col. 2.

2. Waste generators, without regulatory incentives, either dumped wastes in ill-prepared ponds and landfills, burned them in an uncontrolled fashion, or turned wastes over to transporters, who often disposed of them improperly. *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, H.R. Rep. No. 1016, 96th Cong., 2nd Sess. 1, 18-19, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6119, 6121-22 (hereinafter "CERCLA House Report"); Popkin, *Hazardous Waste Cleanup and Disaster Management*, 28 Env't 2, 3 (April 1986).

In 1979, the United States Environmental Protection Agency ("EPA") conducted a study and determined that as many as 30,000 to 50,000 inactive hazardous waste sites existed. 1,200 to 2,000 of these sites were estimated to present a "serious risk to public health." *See* CERCLA House Report, *supra* at 6120. For criticism of this survey as sensationalism, see 126 Cong. Rec. H33,423 (daily ed. Dec. 10, 1980) (remarks of Rep. Crane of Illinois); 126 Cong. Rec. H26,231-32 (daily ed. Sept. 18, 1980) (remarks of Rep. Jeffries of Kansas). Presently, it is impossible to determine the precise dimensions of the toxic chemical problem, but clearly it has caused a major and growing health problem, adding significantly to the disease burden of the United States. *See* 1 A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund) Public Law 96-510, at 560, 739-40 (statement of Nathan Stark, Under Secretary of Health and Human Services, in a letter transmitting a Surgeon General's Report, Nov. 20, 1980).

3. Until the 1970's, most businesses were in the habit of simply throwing their "goop" into local dumps or letting it collect in "oozy lagoons." *See* Finegan, *Double Billing*, Inc., March 1988, at 50; *supra* note 2 and accompanying text. Nobody really knows how much hazardous waste has been disposed of inadequately, *see supra* note 2, but it is estimated that approximately 70% of the hazardous waste comes from the chemical industry. *See* M. Katzman, Chemical Catastrophes: Regulating Environmental Risk Through Pollution Liability Insurance 14 (1985).

4. While these are only a few examples of problematic inactive hazardous waste sites, they dramatize the seriousness of the environmental catastrophe at issue. Love Canal, in Niagara Falls, New York, is one of the most infamous hazardous waste sites in the United States. There, the town built a public school on top of reclaimed land that had previously been used by Hooker Chemical and Plastics Corporation as a dump site

and countless future sites to remind us of these disastrous actions and to inspire the desire for action.

In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),[5] popularly known as "Superfund." Enacted in response to such disasters as Love Canal,[6] CERCLA authorizes the Environmental Protection Agency ("EPA"), under certain circumstances, to clean up inactive hazardous waste sites and then to seek reimbursement of its cleanup costs[7] from the

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for chemical wastes. Also, a residential subdivision was built adjacent to the site. In the 1970's, authorities discovered that hazardous chemicals from the dump site had entered the neighborhood water supply. As a result, approximately two hundred families were evacuated from Love Canal, and the property in the entire neighborhood became virtually worthless. Love Canal health data showed elevated miscarriage and birth defect rates along with many other negative health effects, the nature and extent of which are still in dispute. *See* CERCLA House Report, *supra* note 2, at 6121-22.

The Valley of the Drums in Shephardsville, Kentucky, contained over 17,000 barrels of hazardous waste that had been stacked illegally in a waste hauler's backyard. The EPA discovered the drums in a seriously deteriorating state. *See* CERCLA House Report, *supra* note 2, at 6121.

Times Beach, Missouri is a dioxin-contaminated site. In 1982, tests on 112 of 130 residents in nearby Imperial, Missouri, showed abnormalities in blood, liver, or kidney functions. *See* M. Katzman, *supra* note 3, at 2. The EPA, in response to the severity of the dioxin hazard, bought Times Beach and evacuated its 2,000 inhabitants. *See id.*

5. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9657 (1982 & Supp. 1988)), *reauthorized and amended in part by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at scattered sections of 42 U.S.C.A. §§ 9601-9675 (Supp. 1988)).

6. *See* CERCLA House Report, *supra* note 2, at 6122.

7. The EPA derives its response authority from CERCLA § 104, codified at 42 U.S.C. § 9604, which provides in pertinent part:

> (1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act . . . to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure . . . deem[ed] necessary to protect the public health or welfare or the environment.

42 U.S.C.A. § 9604(a)(1) (Supp. 1988); *see* United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); United States v. Mottolo, 605 F. Supp. 898, 904 (D.N.H. 1985). The President delegates to the EPA and other administrative agencies the authority to implement CERCLA through Exec. Order No. 12580, 52 Fed. Reg. 2,923 (Jan. 29, 1987), *reprinted in* 42 U.S.C.A. § 9615 (Supp. 1988).

In addition, the President is required to consult with "the affected state or states before determining any appropriate remedial action to be taken" in response to a release or threat of release of any hazardous substances. *See* 42 U.S.C.A. § 9604(b)(2) (Supp. 1988). Where states or local governments are capable of carrying out the actions deemed necessary to respond effectively to the release or threatened release of hazardous substances and where such governments agree to carry out the actions, the President must enter into contracts or cooperative agreements with the states or local governments to take the actions. *See* 42 U.S.C.A. §§ 9604(b)(3), (d)(1) (Supp. 1988).

careless chemical producers and waste haulers.[8]

No one disputes the liability of these polluters for damage done to the environment.[9] The question that arises today, rather, is whether the Comprehensive General Liability ("CGL") insurance policies[10] taken out by these polluters years before toxic waste cleanup expenses became a problem cover expenses incurred by the EPA in cleaning up toxic waste.[11] This Note discusses the issue of the classification of EPA recovery costs under CERCLA. Courts have disagreed whether to classify these suits as claims for "property damage,"[12] which are recoverable under a CGL policy, or as claims for equitable relief,[13] for which the CGL policy provides no coverage.[14] Because uncertainty over this term has caused confusion in the courts and delayed cleanups, a consensus as to its meaning is essential.

Part I of this Note sets forth the basic provisions of CERCLA, emphasizing its cost recovery provisions, and addresses the impact of the amendment to CERCLA, the Superfund Amendments and Reauthorization Act of 1986 ("SARA").[15] Part II analyzes the conflict in the courts' classifications of response costs and argues that the courts must focus on the relief sought by the EPA, which is in the form of restitution. This focus should cause courts to find that EPA cleanup costs constitute equitable, monetary expenses, and not "property damage" within the meaning of CGL policies.

I. CERCLA BACKGROUND

Congress enacted CERCLA in 1980[16] to combat the specific problem

8. *See* 42 U.S.C. § 9607 (1982 & Supp. 1988); *infra* note 24.

9. For cases in which courts presume the liability of polluters, see, for example, Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1351 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516, 519, 528 A.2d 76, 77 (App. Div. 1987).

10. *See infra* notes 37-48 and accompanying text.

11. *See infra* notes 49, 50, 101 and accompanying text.

12. *See infra* notes 42, 101 and accompanying text.

13. Equitable remedies are distinguishable from damages. "Damages is a form of substitutional redress which seeks to replace the loss in value with a sum of money. Restitution, conversely, is [an equitable remedy] designed to reimburse a party for restoring the status quo." Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1353 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988). Injunctions and specific performance decrees, for example, clearly are equitable remedies. D. Laycock, Modern American Remedies 5 (1985). *See infra* notes 36, 49, 59 and accompanying text.

14. *See infra* notes 49, 59 and accompanying text.

15. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at scattered sections of 42 U.S.C.A. §§ 9601-9675 (Supp. 1988)).

16. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9657 (1982 & Supp. 1988)), *reauthorized and amended in part by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at scattered sections of 42 U.S.C.A. §§ 9601-9675 (Supp. 1988)).

of inactive hazardous waste sites.[17] Under CERCLA, upon learning that a waste site has released hazardous substances into the environment or threatens such a release, the EPA notifies the party found responsible for the pollution[18] and gives that party an opportunity to clean up the site voluntarily.[19] Should the liable party fail to comply with the cleanup request, CERCLA authorizes the EPA to implement response actions[20] and to seek from the responsible party compensation for its response costs.[21] Due to its sovereign interest in the general public health and welfare,[22] the government may implement these actions at any site that actually or potentially presents a threat to the environment. CERCLA initially provided a $1.6 billion fund to be used for these response actions,[23] and broad-based liability intended to cover any and all parties who at any time handled the hazardous waste.[24]

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17. *See supra* note 4; CERCLA House Report, *supra* note 2, at 6120-23; Administrative Testimony to the Subcommittee on Environmental Pollution and Resource Protection, Committee on Environment and Public Works, United States Senate, June 20, 1979, *reprinted in* 1 A Legislative History of The Comprehensive Environmental Response Compensation, and Liability Act of 1980 (Superfund), Public Law 96-510, at 55, 57 (statement of Sen. Muskie, co-chairman, Subcommittee on Resource Protection and Environmental Pollution).

18. *See* 42 U.S.C.A. § 9612(a) (Supp. 1988); *see also supra* note 7. In an emergency, however, the EPA can implement cleanup actions without notifying the responsible parties. *See* 42 U.S.C.A. § 9604(a)(1) (Supp. 1988); *see also* United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1396-97 (D.N.H. 1985).

19. In cases where the insured voluntarily cleans up the contaminated site, courts have found coverage under the CGL policy as long as the policyholder informs the insurer of its intention to respond. *See, e.g.*, Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516, 525-26, 528 A.2d 76, 81 (App. Div. 1987); Millen Indus., Inc. v. Greater N.Y. Mutual Ins. Policy, No. 77-22174, slip op. at 7 (N.Y. Sup. Ct. June 18, 1980); *see infra* notes 78-82 and accompanying text.

20. 42 U.S.C.A. § 9604(c)(4) (Supp. 1988). Section 9601(24) defines "remedy" or "remedial action" as used in § 9604(c)(4) to include "storage, confinement . . . [or] cleanup of released substances or contaminated materials, recycling or reuse . . . , diversion, destruction, segregation of reactive wastes . . . and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment." 42 U.S.C.A. § 9601(24) (Supp. 1988).

21. *See* 42 U.S.C. § 9608 (1982 & Supp. 1988); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio 1983); *supra* note 7.

22. *See, e.g.*, United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 734 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); Lansco, Inc. v. Department of Envtl. Protection, 138 N.J. Super. 275, 283, 350 A.2d 520, 524 (Ch. Div. 1975), *aff'd* 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976) (per curiam); Kutsher's Country Club Corp. v. Lincoln Ins. Co., 119 Misc. 2d 889, 892, 465 N.Y.S.2d 136, 139 (Sup. Ct. 1983).

23. 42 U.S.C. § 9631(b)(2) (1982), *repealed by* Pub. L. 99-499, Title V, § 517(c)(1), Oct. 17, 1986, 100 Stat. 1774; *see* United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio 1983). The legislature realized that the $1.6 billion fund (the "Superfund") would be inadequate to cover all abandoned hazardous waste sites. *See* CERCLA House Report, *supra* note 2, at 6136. It thus included a provision to recover monies expended on cleanup costs. *See id.*

24. *See* 42 U.S.C. § 9607 (1982 & Supp. 1988). CERCLA provides that:

> (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

CERCLA's legislative history is confusing and sparse.[25] A monumental piece of legislation,[26] CERCLA was rushed through the legislature as Congress strove to adopt *some* sort of environmental law before the expiration of the ninety-sixth Congress and the commencement of the Reagan administration.[27] Due to this time constraint, the bill was passed under a suspension of the rules, during which bills must be adopted without amendment.[28] There was, therefore, little debate during CERCLA's

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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.

42 U.S.C.A. § 9607(a) (Supp. 1988). In addition, courts have indicated that CERCLA should be given a broad and liberal construction in order to avoid frustrating the government's ability to respond promptly and efficiently. *See, e.g.*, Cadillac Fairview/California, Inc. v. Dow Chem. Co., 840 F.2d 691, 696 (9th Cir. 1988) (prior governmental action not prerequisite to suit under CERCLA § 9607(a)); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 737 (8th Cir. 1986) (no retroactivity limitation in providing for recovery of pre-CERCLA response costs), *cert. denied*, 108 S. Ct. 146 (1987); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("CERCLA should be given a broad and liberal construction").

This broad-based liability often leads to anomalous results. *See* Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1326 (4th Cir. 1986) (prior to enactment of CERCLA, owners of a solvent recycling plant arranged with state and county health department officials to dispose of 1300 barrels of chemical wastes in a clay-lined pit, but later were held liable by EPA for costs of cleaning up the site); Finegan, *supra* note 3, at 50, 58 (operator of waste treatment facility in Oswego, New York was insolvent, so EPA placed $12 million cleanup cost on former customers who believed their wastes had been incinerated lawfully and safely).

25. *See* United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 737 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 Colum. J. Envtl. L. 1, 20 (1982).

26. Characterized by President Carter when signed into law as "landmark in its scope and in its impact on preserving the environmental quality of our country," Current Developments, 11 Env't Rep. (BNA) 1261 (Dec. 19, 1980), CERCLA was the end product of two competing bills: S. 1480, introduced to the Senate on July 11, 1979 by Sen. Culver, *see* 125 Cong. Rec. S17,988 (daily ed. July 11, 1979), and H.R. 7020, introduced to the House on April 2, 1980 by Rep. Florio. *See* 126 Cong. Rec. H2,490 (daily ed. Apr. 2, 1980).

27. *See* Grad, *supra* note 25, at 19.

28. *See* 126 Cong. Rec. 11,773 (Dec. 3, 1980); Grad, *supra* note 25, at 29-30.

creation, and, because members of both houses compromised their views, congressional intent is difficult to discern.

The task of filling in the statute's gaps thus has fallen to the courts. For instance, the legislative history explicitly states that the courts are to determine the standard of liability to be applied under CERCLA.[29] During the process of amending CERCLA in 1986,[30] however, Congress made it clear that in its implementation of CERCLA, Congress had never considered the impact that the broad-based liability provisions ultimately would have on the insurance industry.[31]

II. CGL POLICIES DO NOT COVER EPA RESPONSE COSTS

The question whether costs incurred by the EPA in cleaning up toxic waste under the prophylactic response provisions of CERCLA constitute "property damage" within the meaning of a CGL policy presents the courts with two alternatives: Courts can construe CGL policies, written years before toxic waste became an issue, to provide coverage for these cleanup costs, to the detriment of the insurance industry, or courts can find no coverage under CGL polices, leaving the EPA uncompensated for its expenses. The second alternative, although seemingly the harshest, is the better choice. By refusing to rely on insurance companies to clean up the environment, courts can force Congress to act constructively and quickly to find a fair and workable solution.

The threshold issue of classification of damages arises when the EPA

29. Representative Florio, who introduced H.R. 7020 to the House on April 2, 1980, *see supra* note 26, stated that the scope of liability and the term "joint and several liability" purposely were deleted in order that they be determined by the courts under common law principles. *See* 126 Cong. Rec. 31,965 (1980). Accordingly, the court in United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983), established that joint and several liability under CERCLA be applied on a case-by-case basis. *Id.* at 808. Courts universally have adopted this rationale. *See, e.g.*, Bulk Distribution Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1443 n.15 (S.D. Fla. 1984); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 843-44 (W.D. Mo. 1984), *modified*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); United States v. Price, 577 F. Supp. 1103, 1113-14 (D.N.J. 1983).

In addition, courts have determined that CERCLA has retroactive application, *see Northeastern Pharm. & Chem. Co.*, 810 F.2d at 732; Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1313-14 (N.D. Ohio 1983), and that under CERCLA, owners of property at the time hazardous wastes are discovered are liable for cleanup costs, even if they were not responsible for the pollution. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1043-44 (2d Cir. 1985); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 577-78 (D. Md. 1986).

30. The Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at scattered sections of 42 U.S.C. §§ 9601-9675 (1982 & Supp. 1988)) reauthorized CERCLA for the next five years and increased the Superfund by $8.5 billion, 42 U.S.C. § 9611 (1982 & Supp. 1988), reflecting a more studied evaluation of the magnitude of the problem of inactive hazardous waste sites. *See* Superfund Amendments and Reauthorization Act of 1986, H.R. Rep. No. 253(II), 99th Cong., 2nd Sess. 1, 48, *reprinted in* 1986 U.S. Code Cong. & Admin. News 2986, 2998.

31. *See infra* notes 119-26 and accompanying text.

cleans up[32] and then, pursuant to CERCLA section 107, sues the insured polluter for recovery of its cleanup costs.[33] In turn, the insured polluter seeks coverage for the EPA's cleanup costs under its CGL policy.[34] The insurer refuses to provide coverage, arguing that, because claims for reimbursement of cleanup costs constitute claims for economic damage, these response costs are not covered under the CGL policy;[35] the CGL policy only covers claims for "property damage" as defined in the CGL policy,[36] not claims for equitable relief. These arguments derive from the nature of insurance policies in general and of CGL's in particular.

For over forty-five years, the insurance industry has issued general insurance policies.[37] Promulgation of such standardized policies serves three purposes: it theoretically clarifies the extent of intended coverage to the benefit of the courts, the insurers and the insureds; it pools the

32. *See* 42 U.S.C.A. § 9604(a)(1) (Supp. 1988); *see, e.g.*, Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 980 (8th Cir.) (en banc), *cert. denied*, 57 U.S.L.W. 3230 (1988); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 730 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); *see also* Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1302 (N.D. Ohio 1983) (state agency cleaned up).

33. 42 U.S.C. § 9607 (1982 & Supp. 1988); *see, e.g.*, Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1351 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1329 (4th Cir. 1986); New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1362 (D. Del. 1987) (mem.). CERCLA § 113(b) provides exclusive federal subject matter jurisdication for claims by the EPA against polluters. *See* 42 U.S.C.A. § 9613(b) (Supp. 1988).

34. *See, e.g.*, *Mraz*, 804 F.2d at 1326; *New Castle County*, 673 F. Supp. at 1362. Contractual issues between an insured and its insurer arising from EPA cleanup actions can be brought either in state court or in federal court when diversity jurisdiction exists. *See* 28 U.S.C. § 1332 (1982).

35. *See Mraz*, 804 F.2d at 1326; *New Castle County*, 673 F. Supp. at 1362; 11 G. Couch, Couch on Insurance 2d § 44:287 (R. Anderson 2d ed. 1982).

36. *See* Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1329 (4th Cir. 1986). Although it is true that law and equity have merged for the most part, certain issues, such as the granting of a jury trial, may hinge upon the classification of the case as one in equity or in law. *See* D. Dobbs, Remedies § 2.6, at 68-81 (1973). The distinction between legal and equitable relief, therefore, remains viable. *See id.*; Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 985-86 (8th Cir.) (en banc), *cert. denied*, 57 U.S.L.W. 3230 (1988); United States v. Price, 688 F.2d 204, 212 (3d Cir. 1982); Jaffee v. United States, 592 F.2d 712, 715 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979), *aff'd on reh'g*, 663 F.2d 1226 (3d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982).

37. *See* General Liability Insurance 1973 Revisions 3 (F. Bardenwerper & D. Hirsch eds. 1974); Tinker, *Comprehensive General Liability Insurance—Perspective and Overview*, 25 Fed'n Ins. Couns. Q. 217, 220-21 (1975). The National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau promulgate standard insurance policy terms for use by insurance companies that belong or subscribe to either bureau. *See* Obrist, *New Comprehensive General Liability Insurance Policy*, in General Liability Insurance 1973 Revisions 38 (F. Bardenwerper & D. Hirsch eds. 1974).

Recently, eight states filed antitrust suits against thirty-one insurance companies, reinsurers, brokers, and insurance industry trade associations for allegedly conspiring to create an extensive boycott of certain types of commercial general liability insurance, including insurance for environmental pollution. *See* N.Y. Times, March 23, 1988, at 1, col. 1. The validity of the allegations has yet to be determined.

experience of many companies for rate-making purposes; and standardization, while benefitting the insurance industry, continues to allow insurers to meet the needs of individual insureds through attachments to policies.[38]

Insurers began issuing standardized CGL policies to businesses in 1940,[39] when toxic waste had not yet become an issue.[40] The CGL policies at issue in the cases discussed in this Note were written before insurers had any reason to plan for the costs of cleaning up the environment.[41] As a result, these standardized CGL policies generally cover property damage[42] or bodily injury[43] to a third party caused by the insured if the damage or injury results from an "occurrence," defined as an unexpected and unintended event.[44] For example, costs expended by an insured to

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38. *See* Obrist, *supra* note 37, at 38.

39. *See* General LiabilityInsurance 1973 Revisions, *supra* note 37, at 3; Tinker, *supra* note 37, at 221.

40. Until the mid-1970's, United States environmental policy focused on regulating commonplace, visible pollution such as smog and water pollution. *See* CERCLA House Report, *supra* note 2, at 6120; M. Katzman, *supra* note 3, at 1.

41. *See, e.g.*, Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1350 (4th Cir. 1987) (policy negotiated in 1966, modified periodically, and remained in effect until 1983), *cert. denied*, 108 S. Ct. 703 (1988); Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1326 (4th Cir. 1986) (coverage sought under 1969 policy).

42. The definition of property damage in CGL policies reads as follows:

> (1) Physical injury or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom,
>
> (2) Loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 979-80 (8th Cir.) (en banc), *cert. denied*, 57 U.S.L.W. 3230 (1988); *see generally infra* note 101 and accompanying text.

This definition of property damage incorporates revisions made in 1973 intended to make clear that the substance of the property must be damaged for there to be recovery. Thus, inadequate performance by the insured, such as a poorly constructed product or building, does not constitute property damage, but fire damage to a building will. *See* Tinker, *supra* note 37, at 224-25. The 1973 revisions also clarified the "loss of use" coverage, which provides that even if tangible property is not damaged physically but is made useless by an insured, the damage must have been caused by an "occurrence" for coverage to apply. Reichenberger, *The General Liability Insurance Policy—Analysis of 1973 Revisions*, in General Liability Insurance 1973 Revisions 38 (F. Bardenwerper & D. Hirsch eds. 1974); *infra* note 44 and accompanying text.

43. *See* Reichenberger, *supra* note 42, at 10.

44. *See* R. Cushman & C. Stamm, Handling Property and Casualty Claims § 2.26, at 55-56 (1985). A CGL occurrence-based policy differs from a claims-made policy, which provides coverage to the insured for claims made during the policy term, even if the accident occurred before the policy became effective. M. Katzman, *supra* note 3, at 85. For example, Environmental Impairment Liability ("EIL") policies are claims-made policies that identify a specific retroactive date from which point on coverage will apply for accidental occurrences. *See* Parker, *The Insurance Crisis and Environmental Protection*, 28 Env't 14, 17 (Apr. 1986); M. Katzman, *supra* note 3, at 85.

The claims-made policy is used to relieve insurers of claims brought long after the original occurrence, *see* N.Y. Times, Jun. 11, 1985, at A1, col. 2, because once the policy terminates, the insured can make no future claim for damage that occurred during the

repair damage caused to a third party's property caused when a contractor's crane falls against a third party's building illustrates the type of property damage covered under the CGL policy.[45] As long as it is clear that the event occurred unexpectedly and unintentionally[46] during the effective period of the CGL policy[47] and is not excluded,[48] the insurer will compensate the insured for the costs of repairing the resulting property damage.

The Fourth Circuit, recently joined by the Eighth Circuit, consistently has held that a complaint by the EPA or the state seeking reimbursement for cleanup costs under CERCLA does not constitute a claim for "injury to or destruction of property" within the meaning of the CGL policy. They reason that the EPA claims for recovery of cleanup costs constitute claims for equitable, monetary relief not covered by a CGL policy.[49] In

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policy period. This reduces the difficulty of predicting the number of claims that will be made since there is an applicable termination date. *See* 50 Fed. Reg. 33,903 (Aug. 21, 1985).

In contrast, under the CGL policy the insured is able to request coverage years after the policy has terminated, as long as it is proven that the accident or injury occurred during the effective period of the CGL policy. *See* Arness & Eliason, *Insurance Coverage for "Property Damage" in Asbestos and Other Toxic Tort Cases*, 72 Va. L. Rev. 943, 947 (1986).

45. *See* Obrist, *supra* note 37, at 40.

46. *Id.*; *see supra* note 44.

47. *See* Arness & Eliason, *supra* note 44, at 947.

48. The CGL policy provides a number of exclusions from its coverage. *See* Obrist, *supra* note 37, at 13-26. For discussion of the environmental pollution exclusion, see *infra* note 101. Exclusions form an essential part of any standardized insurance contract. There are four possible reasons for a given exclusion: 1. other forms of insurance exist to cover an excluded risk, such as automobile insurance and workers' compensation; 2. not all insureds require more than the bare-bones standardized policy, so exclusions permit insurance to be affordable to these insureds; 3. insurers are able to avoid covering business risks—uninsurable or excessively expensive hazards; and 4. the insured is able to self-insure for certain hazards. *See* Tinker, *supra* note 37, at 264; *see also* R. Cushman & C. Stamm, *supra* note 44, § 1.1, at 3.

49. *See* Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 987 (8th Cir.) (en banc), *cert. denied*, 57 U.S.L.W. 3230 (1988); Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1329 (4th Cir. 1986); *see also* Arness & Eliason, *supra* note 44, at 961 (remedial activities are not property damage); Note, *The Pollution Exclusion Clause Through The Looking Glass*, 74 Geo. L.J. 1237, 1247-48 (1986) (insurers' intent in drafting policies often misconstrued by courts); *cf.* United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 750 (8th Cir. 1986) (response costs incurred by government before enactment of CERCLA are in form of equitable relief as abatement costs), *cert. denied*, 108 S. Ct. 146 (1987); United States v. Price, 688 F.2d 204, 212 (3d Cir. 1982) ("preliminary injunction designed to prevent an irreparable injury is conceptually distinct from a claim for damages"); United States v. Mottolo, 605 F. Supp. 898, 913 (D.N.H. 1985) (jury trial in CERCLA § 107 action denied because claim for reimbursement is equitable in nature); Wehner v. Syntex Corp., 618 F. Supp 37, 37 (E.D. Mo. 1984) (jury trial denied in private action for CERCLA response costs because type of relief available under CERCLA is equitable in nature).

These courts and legal theorists argue that suits seeking equitable relief are not covered under a CGL policy and refuse to "indulge in speculation as to whether a court by exercising its inherent power might award damages when none were sought and then conclude that such inherent power exists and [the] insurance company must defend an

contrast, other courts have equated cleanup costs with property damage, finding that once actual damage to the environment occurs, cleanup costs that flow from that environmental injury are recoverable under a CGL policy.[50] Both groups of courts base their holdings on interpretations of the language of the CGL policies and CERCLA provisions pertaining to EPA response costs.

Finding insurer liability for reimbursement of EPA cleanup costs is unwarranted and dangerously misguided for three reasons. First, the parties to the CGL policy typically are of equal negotiating power;[51] therefore, there is no reason to "protect" sophisticated insureds from the contracts they have signed. Second, the problem of hazardous waste cleanup is a national one;[52] thus Congress, with its superior fact-finding resources, occupies a much better position than the judiciary to formulate productive solutions to the problem.[53] Third, misinterpretation of insurance policies has created uncertainty in the insurance industry and contributed to an insurance crisis.[54]

Courts should focus, as do the Fourth and Eighth Circuits,[55] on the response authority provisions of 42 U.S.C. § 9604[56] and the liability provisions of 42 U.S.C. § 9607.[57] These sections, when read together, make it clear that the type of relief sought by the EPA is equitable in nature.[58]

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action." Ladd Constr. Co. v. Insurance Co. of N. Am., 73 Ill. App. 3d 43, 48, 391 N.E.2d 568, 572 (1979). They thus correctly deny coverage for cleanup costs, thereby avoiding the temptation to alter the responsibilities between the parties as set forth in the insurance contract. *Id.*

50. *See* Intel Corp. v. Hartford Accident & Indem. Co., No. C 87-20434, slip op. at 41-43 (N.D. Cal. Apr. 26, 1988); New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1365 (D. Del. 1987) (mem.); Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 662 F. Supp. 71, 75 (E.D. Mich. 1987); Independent Petrochem. Corp. v. Aetna Casualty & Sur. Co., 654 F. Supp. 1334, 1359 (D.D.C. 1986); United States v. Conservation Chem. Co., 653 F. Supp. 152, 194 (W.D. Mo. 1986); Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516, 525, 528 A.2d 76, 81 (App. Div. 1987). For concurring commentators, see Chesler, Rodburg & Smith, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 Rutgers L.J. 9 (1986); Spurgeon, *Determining the Scope of "Bodily Injury or Property Damage" Under the Comprehensive General Liability Policy*, 23 Idaho L. Rev. 379 (1986).

51. *See infra* note 104 and accompanying text.

52. *See supra* notes 1-4.

53. *See infra* note 138 and accompanying text.

54. *See infra* Section II.C.

55. *See, e.g.*, Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 987 (8th Cir.) (en banc), *cert. denied*, 57 U.S.L.W. 3230 (1988); Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1329 (4th Cir. 1986); United States v. Mottolo, 605 F. Supp. 898, 909 (D.N.H. 1985); Wehner v. Syntex Corp., 618 F. Supp. 37, 37-38 (E.D. Mo. 1984); *see also* United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 749 (8th Cir. 1986), (response costs under CERCLA sought in form of restitution, an equitable remedy), *cert. denied*, 108 S. Ct. 146 (1987); *cf.* United States v. Price, 688 F.2d 204, 212 (3d Cir. 1982) (request for injunction and request for funds for diagnostic study are not claims for damages).

56. 42 U.S.C. § 9604 (1982 & Supp. 1988).

57. 42 U.S.C. § 9607 (1982 & Supp. 1988).

58. *See infra* notes 61-68 and accompanying text.

The proper judicial finding is that coverage is not provided under a CGL policy for cleanup and response costs of the EPA because claims for injunctions and other equitable relief are beyond the scope of the insurance contract.[59]

A. *CERCLA Cleanup Costs Represent Injury to Economic Interests and Not Actual Property Damage*

Congress intended that the response authority given to the federal government under CERCLA[60] be prophylactic in nature.[61] By granting the EPA the power to effect a cleanup, as opposed to allowing the EPA only the power to police those responsible, Congress sought to prevent further migration of hazardous substances.[62] Under CERCLA, Congress intended to hold the responsible parties liable for the costs expended by the government in the implementation of these prophylactic measures.[63] Because the goal of CERCLA cleanup actions is to return the contaminated site to a neutral condition,[64] the EPA typically requests "restitution" of the money expended in restoring the environment to its status quo ante.[65] Accordingly, since restitution is an equitable remedy designed to reimburse a party for this restoration of the status quo,[66] it is not "merely fortuitous" that the government chooses to pursue equitable remedies rather than damages.[67] That equitable relief be recovered is, in fact, what Congress intended.[68]

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59. *See* Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 985-86 (8th Cir.) (en banc), *cert. denied*, 57 U.S.L.W. 3230 (1988); Hourihan, *Insurance Coverage for Environmental Damage Claims*, 15 Forum 551, 554 (1980).

60. 42 U.S.C. § 9604 (1982 & Supp. 1988).

61. This provision authorizes the EPA to take emergency actions to protect the public health or the environment whenever an inactive site presents or may present an imminent and substantial danger to public health or the environment. 42 U.S.C.A. § 9604(a)(1) (Supp. 1988); *see also* Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1353 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1329 (4th Cir. 1986).

62. 42 U.S.C.A. §§ 9601(23)-(25) (Supp. 1988); *see* New York v. Shore Realty Corp., 759 F.2d 1032, 1041 (2d Cir. 1985).

63. *See supra* note 7 and accompanying text.

64. *See* CERCLA House Report, *supra* note 2, at 6125; *cf.* Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 980 (8th Cir.) (en banc) (EPA "cleaned up" contaminated site), *cert. denied*, 57 U.S.L.W. 3230 (1988); Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1326 (4th Cir. 1986) (cleanup action consisted of removing contaminated materials, disposing of contaminated soil, and treating contaminated water).

65. *See, e.g.*, *Continental Ins. Cos.*, 842 F.2d at 987; *Mraz*, 804 F.2d at 1329; Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988).

66. *See supra* note 13.

67. *See Continental Ins. Cos.*, 842 F.2d at 986 (rejecting reasoning in United States Aviex Co. v. Travelers Ins. Co., 125 Mich. App. 579, 590, 336 N.W.2d 838, 843 (1983), that government's choice to pursue equitable remedies was "merely fortuitous").

68. Applicable sections of CERCLA, such as 42 U.S.C. § 9607(a)(4), which indicates a difference between the meanings of cleanup costs and damages, make it clear that property damage and response costs stand independent of one another. *See Continental Ins.*

CGL policies do not cover EPA "restitution," which constitutes economic damage or equitable relief, because the CGL policies require the insured, not a third party, to expend monies in repairing actual property damage.[69] The CGL policy definition of damages does not include reimbursement of response costs;[70] payments to third persons are included only when there exists a legal claim for damages.[71] Damages does not include an obligation to pay a civil or criminal penalty,[72] the cost of complying with a mandatory injunction,[73] or the cost to the insured of preventing or avoiding future loss.[74] Because in every case at issue the government cleaned up and then sued for reimbursement,[75] the CGL policy should not be construed to provide coverage.[76]

Cos., 842 F.2d at 986. For example, the government may take response action in cases that substantially threaten a release of hazardous substances before any damage ever occurs. 42 U.S.C.A. § 9604(a)(1) (Supp. 1988); *see Continental Ins. Cos.*, 842 F.2d at 986; Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1353-54 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1329 (4th Cir. 1986).

69. *See, e.g.*, *Continental Ins. Cos.*, 842 F.2d at 985-87; Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1353-54 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); Aetna Casualty & Sur. Co. v. Hanna, 224 F.2d 499, 503 (5th Cir. 1955).

70. *See Continental Ins. Cos.*, 842 F.2d at 987; Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1329 (4th Cir. 1986); *cf.* Aetna Casualty & Sur. Co. v. Hanna, 224 F.2d 499, 503 (5th Cir. 1955) (insurance coverage exists only for injuries expressly stated in policy).

71. *See* Transport Indem. Ins. v. Argonaut Ins. Co., No. 262425, slip op. at 2 (Cal. Super. Ct. May 25, 1988); Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); *Hanna*, 224 F.2d at 503; Desrochers v. New York Casualty Co., 99 N.H. 129, 131-32, 106 A.2d 196, 198 (1954).

72. *See* Tinker, *supra* note 37, at 254.

73. *See* Aetna Casualty & Sur. Co. v. Hanna, 224 F.2d 499, 503 (5th Cir. 1955); Desrochers v. New York Casualty Co., 99 N.H. 129, 132-33, 106 A.2d 196, 198-99 (1954); Hourihan, *supra* note 59, at 554; Tinker, *supra* note 37, at 254.

74. Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1353 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); Tinker, *supra* note 37, at 254. For instance, if an insured manufacturer knows of a problem with a product, a CGL policy provides no coverage for any preventive costs such as recalling, inspecting, or replacing the products. R. Cushman & C. Stamm, *supra* note 44, § 1.8, at 13. Once the products have failed, however, the CGL covers liability for "physical damage to or loss of use of the equipment or facility in which they were installed." *Id.*

75. *See supra* notes 49, 50 and accompanying text; *cf.* United States v. Price, 688 F.2d 204, 212 (3d Cir. 1982) (request for funds for a diagnostic study and abatement not a traditional form of damages); Jaffee v. United States, 592 F.2d 712, 715 (3d Cir.) ("creation of expense does not necessarily remove a form of relief from category of equitable remedies"), *cert. denied*, 441 U.S. 961 (1979), *aff'd on reh'g*, 663 F.2d 1226 (3d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982).

76. *See* Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 987 (8th Cir.) (en banc), *cert. denied*, 57 U.S.L.W. 3230 (1988); Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1329 (4th Cir. 1986); Wehner v. Syntex Corp., 618 F. Supp. 37, 37 (E.D. Mo. 1984).

Courts confronting the EPA reimbursement issue also disagree whether a letter from the EPA to a "Partially Responsible Person" ("PRP letter") constitutes a "suit" against the insured, triggering coverage under a CGL policy. *Compare* Evart v. Home Ins. Co., No. 86-004019-CX, slip op. at 3 (Mich. Mar. 3, 1987) (PRP letter not a suit, but a mere

CGL policies exclude coverage for safety precautions and reimbursement[77] because insurers require certainty as to the extent of their liability.[78] This certainty enables insurers to estimate each insured's potential liability, charge the insured a premium based on this estimate, and thereby spread the costs of potential liability among all similar policies.[79] Precautionary safety measures are subject to the discretion of the insured; cleanup costs expended by an injured third party are likewise subject to the discretion of the third party.[80] If these parties were assured that insurance would cover their expenditures, they most likely would lose their incentive to monitor costs,[81] thus destroying the required element of certainty.[82] In response to the toxic waste explosion, the insurance industry implemented a pollution exclusion clause which excludes liability for gradual losses, such as seepage of chemicals that do not manifest until years after the initial disposal.[83] This exclusion, however, is inapplicable to the cases at issue, since it was implemented after the CGL policies concerned were issued.

Contrary to those who cling to the argument that the reasonable expectations of the insured should be honored above all else,[84] insurers never were intended to be risk preventers or the policemen of insureds.[85] As one court stated, "[if] the term 'damages' in the insurance contract were to be given the broad, boundless connotations sought by the [insured], . . . [it] would become mere surplusage, because any obligation to pay would be covered."[86] The CGL policy was not created to serve as an

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allegation, accusation, or claim under which insurer has no duty to defend) *with* Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 662 F. Supp. 71, 75 (E.D. Mich. 1987) ("a 'suit' includes any effort to impose on the policyholders a liability ultimately enforceable by a court"). The resolution of this issue is outside the scope of this Note.

77. *See supra* note 74 and accompanying text.

78. *See* R. Cushman & C. Stamm, *supra* note 44, § 1.1, at 3; I. Taylor, The Law of Insurance 1 (3d ed. 1983).

79. *See* R. Keeton, Basic Text on Insurance Law 6-7 (1971); W. Vance, Handbook on the Law of Insurance 4 (3d ed. 1951); Tinker, *supra* note 37, at 224.

80. *See* R. Cushman & C. Stamm, *supra* note 44, § 1.9, at 14.

81. *See* Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1353 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); R. Cushman & C. Stamm, *supra* note 44, § 1.9, at 14.

82. CGL's do not cover precautionary measures for the simple reason that it is impossible to predict their costs. *See* Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 987 (8th Cir.) (en banc), *cert. denied*, 57 U.S.L.W. 3230 (1988); *Armco*, 822 F.2d at 1353. Finding coverage for precautionary measures would force the courts to bear the task of weeding out unnecessary measures. *See Armco*, 822 F.2d at 1353; R. Cushman & C. Stamm, *supra* note 44, § 1.9, at 14.

83. *See infra* note 101.

84. *See infra* notes 94-96 and accompanying text.

85. *See* Cheek, *Risk-Spreaders or Risk-Eliminators? An Insurer's Perspective on the Liability and Financial Responsibility Provisions of RCRA and CERCLA*, 2 Va. J. Nat. Resources L. 149 (1982); Tinker, *supra* note 37, at 224.

86. Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 986 (8th Cir.) (en banc) (quoting Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988)), *cert. denied*, 57 U.S.L.W. 3230 (1988); *see* Aetna Casualty & Sur. Co. v. Hanna, 224 F.2d 499, 503 (5th Cir. 1955).

"all-risk liability policy."[87] The duty of risk *elimination* is contrary to the purpose of insurance;[88] insurance principally is designed to "spread, over time and usually over a risk group, risks that cannot otherwise economically be managed."[89]

Courts therefore must determine the availability of relief pursuant to the CGL policy, focusing on the form of protection contracted for and the form of relief sought under CERCLA, rather than grant relief for purely speculative economic damage that the CGL policy does not cover. The lack of consistent judicial interpretation of the insurance policies at issue places an unfair, inestimable and unforeseen burden on the insurance industry.[90]

B. *Manipulation of Business Contracts to Serve Public Policy Goals is Unjustified and Dangerous*

Courts and legal scholars that find coverage for EPA response costs under CGL policies overlook the true character of a typical insured. The companies that purchase CGL policies are sophisticated insureds, frequently having risk management divisions and often negotiating—and even drafting—their own attached coverage provisions.[91] Given the parties' equal bargaining positions, the defined terms of the CGL policy, such as the term "property damage," should be given their legal, technical meaning.[92] If this is done, it becomes clear that the equitable relief sought under the typical EPA complaint falls outside the scope of the CGL policy.[93]

In contrast, courts that find coverage for EPA response costs under CGL policies manipulate the plain language of the relevant CGL policy provisions[94] to support a broad theory of public policy. This method of

87. Tinker, *supra* note 37, at 220. *See* 11 G. Couch, *supra* note 35, at 44:264; Reichenberger, *supra* note 42, at 13.

88. *See* R. Cushman & C. Stamm, *supra* note 44, § 1.1, at 3; I. Taylor, *supra* note 78, at 1.

89. R. Cushman & C. Stamm, *supra* note 44, § 1.1, at 2.

90. *See* Finegan, *supra* note 3, at 52 ("The public thinks the EPA is rounding up the bad guys. It's not. Even the good guys realize that they have no way of fighting [liability], and that creates a lot of ill feeling about fairness."); N.Y. Times, Jun. 11, 1985 at 1, col. 2 (damages being paid not contemplated when insurance contracts written); 15 Env't Rep. (BNA) 1842 (Mar. 8, 1985) (litigation costs soaring as Superfund defendants sue insurance companies for recovery of cleanup costs in "second phase" of litigation); *cf.* Brandt, *An Asbestos Decision That's Hazardous to Insurers' Health*, Bus. Wk., June 15, 1987, at 34 (decision holding insurers liable for $2 billion in asbestos claims labeled by insurer as "patently unfair").

91. *See* Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1350 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); *see generally* Arness & Eliason, *supra* note 44, at 950 (large companies often have extremely sophisticated risk management divisions).

92. *See supra* note 86 and accompanying text. *See also supra* notes 70-76 and accompanying text.

93. *See supra* notes 70-82 and accompanying text.

94. *See, e.g.*, New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1364 (D. Del. 1987) (mem.) (despite conclusion of county's Risk Manager that

interpreting insurance policies as contracts of adhesion originated in order to protect parties negotiating at a disadvantage.[95] To courts that adopt this approach, the plain language of the CGL policy is irrelevant.[96] They argue that "[t]he objectively reasonable expectations of [the majority of] applicants and intended beneficiaries regarding the terms of [the] insurance contracts [should] be honored even though painstaking study of the policy provisions would have negated those expectations."[97] Under this view, if enforcement of a policy provision, such as the exclusion of coverage for EPA cleanup costs, would defeat the reasonable expectations of the great majority of policyholders to whose claims it is

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pollution exclusion clause excluded claims, court found term ambiguous and construed it in favor of insured); Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516, 527, 528 A.2d 76, 82 (App. Div. 1987) (holding that although "damages" ordinarily does not cover "the cost of complying with an injunctive decree, . . . [a] directive which *threatened* to assess . . . an amount equal to triple the costs of the prospective cleanup operation constituted a claim for damages within the meaning of the [insurance] policy language") (emphasis added); *cf.* Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 662 F. Supp. 71, 75 (E.D. Mich. 1987) (defining "suit" as including "any effort to impose on the policyholders a liability ultimately enforceable by a court," court found duty to defend insured even before policyholders became defendants in a traditional suit for damages).

95. *See* W. Vance, *supra* note 79, at 243 (typical insurance contract is one of "adhesion" whose terms "do not result from mutual negotiation and concessions of the parties and so do not truly express an agreement at which they have arrived"); Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516, 523, 528 A.2d 76, 80 (App. Div. 1987) (adhesion doctrine applied due to unequal bargaining power of parties); Meier v. New Jersey Life Ins. Co., 101 N.J. 597, 612, 503 A.2d 862, 869 (1986) ("Insurance companies possess all the expertise and unilaterally prepare the varied and complex insurance policies.") *See also* CPS Chem. Co. v. Continental Ins. Co., 222 N.J. Super. 175, 189, 536 A.2d 311, 318 (App. Div. 1988) (principle that contract should be construed in favor of insured is "no less applicable merely because the insured is itself a corporate giant").

96. For example, because a CGL policy requires the insurer to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage," *see infra* note 102, some courts reason that damages that flow from property damage, such as cleanup costs, are recoverable. *See* New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1366 (D. Del. 1987) (mem.); Riehl v. Travelers Ins. Co., 15 Env't L. Rep. (Envtl. L. Inst.) 20,004 (W.D. Pa. 1984), *rev'd on other grounds*, 772 F.2d 19 (3d Cir. 1985); *see also* Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961, 962 (1970) (insurance decisions "often seem arbitrary"). This reasoning is faulty, however, because in order for the terms of the CGL policy to have any meaning, the obligation of the insured should be limited to pay "damages" as it is understood in an insurance context. Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 986 (8th Cir.) (en banc), *cert. denied*, 57 U.S.L.W. 3230 (1988). As has been established, this obligation does not include coverage for equitable relief claims. *See Continental Ins. Cos.*, 842 F.2d at 986; Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1353 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); *supra* notes 13, 74 and accompanying text.

97. Keeton, *supra* note 96, at 967; *see, e.g.*, New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1365 (D. Del. 1987) (mem.) (referring to Webster's Third New International Dictionary to determine that the "definition of . . . 'damages' makes no distinction between actions at law and actions in equity"); Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516, 526, 528 A.2d 76, 81 (App. Div. 1987) (abatement measures designed to prevent continued property damage covered by CGL policy based on theory of honoring the reasonable expectations of the insured).

relevant, it should not be enforced even against those who knew of its restrictive terms at the time of contracting.[98]

Advocates of this type of approach erroneously assert that these results are justified by goals of promoting efficiency, equity and risk distribution.[99] Such an approach, however, does a grave injustice to the sanctity of contract, "finding ambiguities in the policies even where none exist,"[100] because it is clear from the insurance industry's many attempts to clarify its CGL policy for the courts and insureds[101] that insurers

98. *See* Keeton, *supra* note 96, at 974; *see also New Castle County*, 673 F. Supp. at 1362; Meier v. New Jersey Life Ins. Co., 101 N.J. 597, 612, 503 A.2d 862, 869 (1986).

99. *See New Castle County*, 673 F. Supp. at 1365; Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 662 F. Supp. 71, 75 (E.D. Mich. 1987); United States v. Conservation Chem. Co., 653 F. Supp. 152, 194 (W.D. Mo. 1986); *see also* Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 Va. L. Rev. 1151, 1168-89 (1981).

100. F. Kessler, G. Gilmore & A. Kronman, Contracts 632 (3d ed. 1986), (quoting Keeton, *supra* note 96, at 962). *See, e.g.*, Moulton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So. 2d 95, 99 (Ala. 1977) (identifying clear intent of pollution exclusion clause, but holding language ambiguous); Searle v. Allstate Life Ins. Co., 38 Cal. 3d 425, 445, 696 P.2d 1308, 1320-21, 212 Cal. Rptr. 466, 478-79 (Sup. Ct. 1985) (Bird, C.J., dissenting in part, concurring in part) (arguing term "sanity" is ambiguous in insurance policy).

101. The purpose of the CGL policy has always been to provide coverage on behalf of the insured to an injured third party. R. Cushman & C. Stamm, *supra* note 44, § 1.5, at 8. Since they were first released in 1940, standard general liability insurance policies have been revised in 1943, 1955, 1966, 1973, and 1986 in an attempt by the insurance industry to, among other things, clarify how far this duty to provide coverage extends. *See* General Liability Insurance 1973 Revisions, *supra* note 37, at 3 (discussing policy revisions, 1940-1973); Tinker, *supra* note 37, at 221. The 1973 revisions to the CGL policy in part were made in response to a "changing society, reflecting, for example, recent efforts to reduce industrial pollution." General Liability Insurance 1973 Revisions, *supra* note 37, at 3; *see also supra* notes 42, 44 and accompanying text. The 1986 revisions completely remove any liability for environmental pollution. *See* 50 Fed. Reg. 33,903 (1985); *see also* Chesler, Rodburg & Smith, *supra* note 50, at 13 n.27 (insurance industry's revisions of CGL policy in reaction to possible pollution liability). The courts have not yet tackled this policy version; its interpretation and impact on the insurance industry are therefore outside the scope of this Note.

Since 1973, the CGL's have contained "Exclusion (f)" (hereinafter the "pollution exclusion clause"), which states:

> (f) [It is agreed that 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 land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental (emphasis in original).

Sample CGL policy (available in the files of the Fordham Law Review); Reichenberger, *supra* note 42, at 14.

The pollution exclusion clause was intended to limit insurance coverage in order to give certainty to insurance liability. *See infra* notes 82, 85-88 and accompanying text. Insurers did not want to be liable for gradual pollution which could reach catastrophic proportions. *See* Note, *supra* note 49, at 1242. In addition, insurers did not want to condone or encourage chemical companies to dump wastes; they hoped that by denying coverage for this gradual pollution they would provide an incentive for businesses to take precautions to protect the environment. *Id.* at 1253 n.82.

never intended to cover the reimbursement claims being brought by the EPA.[102]

It is wrong for courts to impose this interpretation of the CGL policy on insurers.[103] When dealing with a sophisticated insured, the public policy rationale for construing the document against the insurer disappears.[104] Moreover, interpreting the CGL to cover cleanup costs carries the policy into unknown and unforeseeable realms,[105] for the possible liability of an insured under CERCLA is "so huge as to defy the measurement essential to insurability."[106]

Nevertheless, some opinions state that when a "new" situation develops, such as EPA claims for cleanup costs, technical definitions of insurance policies should give way to considerations of public policy.[107] Their authors thus look beyond the insurance policy and find coverage, regardless of the carefully drafted CGL policy language,[108] so that injured parties are not left uncompensated.[109] Advocates of this position attempt to

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102. *See* General Liability Insurance 1973 Revisions, *supra* note 37, at 3.

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

Sample CGL policy (available in the files of the Fordham Law Review); *see also* Riehl v. Travelers Ins. Co., 772 F.2d 19, 20 (3d Cir. 1985) (quoting language of CGL policy).

103. *See* Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 986 (8th Cir.) (en banc) (contract language clearly limits the term "damages"), *cert. denied*, 57 U.S.L.W. 3230 (1988); Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1354 (4th Cir. 1987) (insurance contract uses term "damages" in legal sense), *cert. denied*, 108 S. Ct. 703 (1988).

104. *See supra* note 91 and accompanying text. *Cf.* MGIC Indemnity Corp. v. Central Bank of Monroe, 838 F.2d 1382, 1387 (5th Cir. 1988) (equitable rationale behind notice provision "does not apply nearly so forcefully where both the insured and the insurer are sophisticated businesses, which are expected to be conversant with the terms of their contracts.").

105. Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 986 (8th Cir.) (en banc), *cert. denied*, 57 U.S.L.W. 3230 (1988); Cheek, *supra* note 85, at 169; *cf.* Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1845) (courts should award only such damages in breach of contract as fairly and reasonably may have been contemplated by the parties at the time of contract).

106. Cheek, *supra* note 85, at 169.

107. *See* cases cited *supra* note 94; *see also* Spurgeon, *supra* note 50, at 399.

108. Insurers specifically tailored the term "damages" to exclude equitable relief in order to provide certainty as to their liability. Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 986 (8th Cir.) (en banc), *cert. denied*, 57 U.S.L.W. 3230 (1988); Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1352-53 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); General Liability Insurance 1973 Revisions, *supra* note 37, at 3.

109. *See* Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 662 F. Supp. 71, 76 (E.D. Mich. 1987) (broadly interpreting policy to cover each "exposure of the environment to a pollutant"); Lansco, Inc. v. Department of Envtl. Protection, 138 N.J. Super. 275, 283, 350 A.2d 520, 524 (App. Div. 1975) (insured should receive coverage for any injury "not

justify this view in the name of promoting public welfare,[110] concluding that there should be "a virtual per se rule favoring satisfaction of fundamental interests [such as preserving the environment] over protection of the ability [of insurers] to engage in market activities."[111]

These courts and legal theorists rely on faulty reasoning. Public policy, however persuasive, should not determine the interpretation of a legal contract,[112] for "it is a great step, and a dangerous one, for courts to begin to construe insurance policies to encompass costs of compliance with injunctive and reimbursement relief."[113] In order to preserve the element of certainty in meeting demands for coverage, insurers intentionally omit coverage for these types of equitable relief.[114] By overlooking these intentional omissions, courts deny insurers the freedom to determine the terms of a legally binding contract.[115]

C. *Judicial Misinterpretation of CGL Policies Has Contributed to an Insurance Crisis*

Whatever justification underlies these holdings, it seems clear that judicial findings of CGL coverage stem from a need to find liable for the cleanup of toxic wastes those with the deepest pockets.[116] Because many

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specifically excluded"), *aff'd* 145 N.J. Super. 433, 368 A.2d 363 (1976); *see also* Spurgeon, *supra* note 50, at 389.

110. Note, *Adjudicating Asbestos Insurance Liability: Alternatives to Contract Analysis*, 97 Harv. L. Rev. 739, 756 (1984); *cf.* New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1365 (D. Del. 1987) (mem.) (under Delaware law, insurance policy language should be given its ordinary and usual meaning to maximize benefit to insured).

111. Note, *supra* note 110, at 756 (footnotes omitted). It is also believed that because contract doctrine has not reached solid conclusions as to insurers' liability for asbestos-related diseases and other "new" issues, a court must "consider the effect of its decision not only on the parties to the insurance contract, but also on other parties who are substantially affected by any liability rule that is adopted." *Id.* at 757-58. Such a manipulative approach, however, is dangerous, because it renders the terms of the CGL policy practically meaningless, at the expense of the insurance industry.

112. *See* Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1353 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); *see also* Aetna Casualty & Sur. Co. v. Hanna, 224 F.2d 499, 503 (5th Cir. 1955); Ladd Constr. Co. v. Insurance Co. of N. Am., 73 Ill. App. 3d 43, 50, 391 N.E.2d 568, 574 (1979).

113. *Armco*, 822 F.2d at 1353; *see* Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 986 (8th Cir.) (en banc), *cert. denied*, 57 U.S.L.W. 3230 (1988).

114. *See supra* note 48.

115. Freedom of contract should be restrained only in exceptional circumstances. Olsen v. Nebraska *ex rel.* Western Reference & Bond Ass'n, Inc., 313 U.S. 236, 237 (1941); *see* Scarborough v. Travelers Ins. Co., 718 F.2d 702, 709 (5th Cir. 1983).

Moreover, the business of insurance is specifically excluded from the Sherman Antitrust Laws under the McCarran-Ferguson Act, 15 U.S.C. § 1013 (1982). This exemption was intended to enable insurers to underwrite risks accurately, unhampered by artificial ratemaking regulations. Freedom of contract has therefore been legislatively preserved in the insurance industry. Note, *The Business of Insurance: Exemption, Exemption, Who Has the Antitrust Exemption*, 17 Pac. L.J. 261, 266-67 (1985). *See* 15 U.S.C. § 1013(b) (1982 & Supp. 1988).

116. *See* 50 Fed. Reg. 33,905 (1985); M. Katzman, *supra* note 3, at 4-5; *cf.* 17 Env't Rep. (BNA) 609 (1986) (EPA in search of deep pocket).

of the polluting insureds have gone bankrupt and are unable to pay cleanup expenses,[117] many courts and legal theorists presently view the insurance companies as the most viable source for toxic waste cleanup expenses.[118] As is evidenced by the recent insurance crisis,[119] however, insurance companies, at best, offer only a temporary solution to the courts' search for cleanup funds, as insurance coverage for companies with potential for toxic waste liability has virtually vanished from the market.[120]

Judicial misinterpretation of insurance policies and the finding of coverage for EPA response costs has helped to stimulate an insurance crisis[121] unanticipated by CERCLA's proponents.[122] Congress corrected this in its implementation of SARA indicating that, contrary to many judicial opinions and legal theorists, Congress never intended insurers to bear the brunt of CERCLA liability.[123]

One of SARA's provisions directs the President to appoint a study

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117. *See* Combustion Equip. Assoc., Inc. v. United States Envtl. Protection Agency, 838 F.2d 35, 36 (2d Cir. 1988); Wall Tube & Metal Prods. Co. v. Tennessee, 831 F.2d 118 (6th Cir. 1987); *cf.* Schroeder, *The Toxic Waste Battle is Boiling Over*, Bus. Wk., Aug. 3, 1987, 73, 74 ("specter of many manufacturers and insurance companies going belly-up could even bring pressure on the federal government to divert taxpayer money to pay for cleaning up hazardous waste sites nationwide").

118. *See supra* note 116.

119. In early 1986, in response to estimates of the magnitude of future liability claims, insurers announced drastically sharp increases in premiums in several commercial liability lines and completely withdrew coverage in others. *See* Priest, *Modern Tort Law and its Reform*, 22 Val. U.L. Rev. 1, 2-3 (1987); Farrell, *The Insurance Crisis: Now Everyone Is In A Risky Business*, Bus. Wk., March 10, 1986, at 88; *see also* 17 Env't Rep. (BNA) 791 (Sep. 26, 1986) (statement of Dennis R. Connolly, a vice president of Johnson & Higgins, insurance brokerage firm) (imposition of strict liability applied on retroactive basis "has been a major reason for the elimination of environmental liability insurance"); *cf.* N.Y. Times, March 5, 1988, 52, col. 1 (five-year trend in increasing automobile insurance rates believed to continue as long as the tort liability system continues to produce large awards for claimants); *see also infra* notes 122-27 and accompanying text.

120. *See supra* note 101.

121. *See supra* note 119 and accompanying text.

122. *See* Superfund Amendments and Reauthorization Act of 1986, H.R. Rep. No. 253(I), 99th Cong., 2nd Sess. 1, 109, *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 2891 (hereinafter "SARA House Report").

123. In its creation of CERCLA, Congress intended that polluters pay for the cleanup of toxic wastes according to the amount of their hazardous waste contribution. *See* Environmental Emergency Response Act, S. Rep. No. 848, 96th Cong., 2nd Sess., 1, 92, *reprinted in* 1 A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund) Public Law 96-510, at 308, 320; CERCLA House Report, *supra* note 2, at 6137.

In its early enforcement of CERCLA, however, the EPA often could not locate responsible polluters, or discovered that the polluters had become insolvent. *See* SARA House Report, *supra* note 122, at 2857; Wall Tube & Metal Prods. Co. v. Tennessee, 831 F.2d 118, 120 (6th Cir. 1987). The courts then began applying joint and several liability against any found polluter. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1043-44 (2d Cir. 1985); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 580 (D. Md. 1986). Those found liable for cleanup costs then turned to their insurers for coverage, and some courts held the insurers liable for coverage. *See* cases cited *supra* note 50; *infra* note 124 and accompanying text.

group to examine the availability of insurance for environmentally related liabilities.[124] The House report shows that legislators were aware of the growing unavailability of insurance for businesses that "use, generate, treat, or dispose of hazardous substances."[125] It cites as partly responsible for the lack of insurance "judicial trends regarding policy interpretations that have called upon old policies to pay for claims that were not envisioned at the time policies were written, and unpredictable and changing statutory liabilities."[126]

Thus, the manipulation of CGL policies to cover EPA cleanup costs has created a no-win situation for insurance companies that have been forced to provide coverage to polluting insureds. This burden has expanded beyond potential polluters, resulting in increased premiums to other insureds, such as automobile owners, and has resulted in a scarcity of liability insurance for environmentally related activities.[127] In the end, the cleanup costs do get paid, but the consequence of this judicially mandated payment, as explained in the following section, is the unplanned and unfair treatment of insurance companies and of all insureds.

D. *The Problem of CGL Coverage for Toxic Waste Cleanups Requires a Legislative Solution*

Neither Congress, in its creation of CERCLA, nor the courts, have analyzed sufficiently the consequences on society of judicial misinterpretation of CGL policies. Courts that find coverage under CGL policies for EPA response costs in effect determine that every insured American ultimately will bear the cost of toxic waste cleanup.[128] Forcing insurers to cover the highly unpredictable risks associated with CERCLA liability[129] puts insurers in the role of risk-preventers[130] and denies them the ability to spread risks reasonably among similar policies.[131] Therefore, they are forced to spread the costs of risks among all insureds through premiums for other types of insurance.[132]

Because not every American obtains insurance,[133] this spreading of

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124. *See* 42 U.S.C.A. § 9651(g) (Supp. 1988); Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, 1707 (1986).

125. SARA House Report, *supra* note 122, at 2891.

126. *Id.*

127. *See supra* notes 101, 119 and accompanying text; *see also supra* note 37.

128. *See supra* note 119 and accompanying text.

129. *See* CERCLA House Report, *supra* note 2, at 6123; Schroeder, *supra* note 117, at 73; N.Y. Times, Jun. 11, 1985, at 1, col. 2.

130. *See* Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1353 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); *supra* note 88 and accompanying text.

131. Abraham, *supra* note 99, at 1187; Taylor, *supra* note 78, at 1.

132. *See* N.Y. Times, Jun. 11, 1985, at 1, col. 2 (sweeping changes in insurance coverage predicted to spread to individual automobile insurance due to rise in court-ordered damage awards for pollution, product liability, and personal injury); Farrell, *supra* note 119, at 88 (professions, businesses and government suffering from inflating insurance costs and decreasing benefits); *supra* note 37.

133. For example, an estimated 37 million Americans were without health insurance

costs through premiums for all insurance ultimately penalizes only those citizens who purchase insurance. Society at large also suffers when businesses, municipalities, and professionals, unable to afford the high cost of insurance, cut services rather than operate with inadequate insurance coverage.[134] In contrast, courts that refuse to find coverage under CGL policies for EPA response costs ultimately determine that it is unfair to spread the costs of pollution to all insureds.[135] These courts, in effect, are requesting a congressional solution to this national problem of fairly distributing toxic waste cleanup costs.

Arguably, the United States government is the best risk-bearer and risk-spreader. Although it is an unpopular notion, the government's power to spread costs equally through its taxation power probably offers the fairest approach to the problem of catastrophic toxic waste cleanup costs. Through direct federal taxation, historically a major instrument of social and economic policy,[136] Americans would share the burden of toxic waste cleanup according to their ability to pay.[137] This ultimately would result in a fairer solution than does placing the entire burden of cleaning up toxic wastes on the insurance industry and, indirectly, only on insurance consumers.

Toxic waste cleanup represents a national problem and should be paid for by the nation as a whole, rather than by a portion of the population. In addition, Congress, with its expertise and resources, is a much better fact-finding body than the courts.[138] Therefore, the complicated analysis of how best to assess and deal with toxic waste problems should be left in

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in the mid-1980's. *See* Cahan, *The Real Health Care Catastrophe: More than 30 Million Uninsured*, Bus. Wk., Feb. 9, 1987, at 29.

134. For instance, fewer doctors now deliver babies, and cities have had to shut down social services in order to lessen their exposure to liability. *See* Farrell, *supra* note 119, at 88.

135. *See supra* note 49.

136. According to one author, the goals of taxation are "to transfer resources from the private to the public sector; to distribute the cost of government fairly by income classes . . . and among people in approximately the same economic circumstances . . . ; and to promote economic growth, stability and efficiency." J. Pechman, Federal Tax Policy 5 (5th ed. 1987). *See also* R. Musgrave & P. Musgrave, Public Finance In Theory and Practice 210-11 (1973) (listing similar goals of taxation).

137. *See* R. Musgrave & P. Musgrave, *supra* note 136, at 210-11; J. Pechman, *supra* note 136, at 5; *cf.* New York *ex rel.* Cohn v. Graves, 300 U.S. 308, 313 (1937) ("A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits.").

138. Courts generally acknowledge Congress' superior fact-finding ability. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981) (great weight is accorded to the decisions of Congress, with its competence in the area of raising and regulating armies and navies); Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980) ("The choice we are urged to make [concerning the grant or denial of patents on micro-organisms] is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot."); Katzenbach v. McClung, 379 U.S. 294, 301 (1964) (Congress conducted lengthy hearings on Title II of the Civil Rights Act of 1964, and thus was best situated to determine that a connection existed between discrimination and the movement of interstate commerce).

the hands of Congress alone. Although CERCLA and SARA represent an attempt by Congress to deal with the toxic waste issue, the confusion over the statutes' application indicates that Congress must do more than it has to clean up the environment. It must clarify the statutes and oversee their effective implementation. Provision of a superfund alone will not result in a clean environment, and, as has been demonstrated in this Note, this important issue requires too much fact-finding and oversight to be left in the hands of the courts.

CONCLUSION

Analysis of the applicable provisions of CERCLA and the language and purpose of the CGL policies leads to the logical conclusion that CGL policies do not cover EPA claims for recovery of cleanup costs under CERCLA. It is very easy to become outraged at the state of the environment and to hold those perceived to have the deepest pockets liable for cleaning it up; it becomes particularly easy to allow public policy concerns to overshadow apparently purely contractual issues. The courts, however, have a duty to maintain objectivity in their approach to the problem of suits concerning toxic waste.

As has been done consistently in the Fourth Circuit, courts must look to the form of relief sought in the EPA complaints and find that these claims for equitable relief are not covered by CGL policies. By forcing insurance companies to reimburse insureds for equitable relief, the courts do violence to the intent of the CGL policies. By ignoring the language of CGL policies, individual courts determine, without a congressional directive, who they think should bear the costs of cleaning up toxic wastes.

It is clear that the courts have not contributed to the certainty of CERCLA litigation. What is needed is a congressional effort to determine the fairest means of spreading the cost of toxic waste cleanup throughout society in order to spare the insurance industry and all insureds from the devastating burden of shouldering the costs alone.

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