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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 Drums4

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.


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

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.


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 . . . deemed necessary to protect the public health or welfare or the environment.


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 policies¹⁰ 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 1980¹⁶ to combat the specific problem

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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.
of inactive hazardous waste sites. 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 and gives that party an opportunity to clean up the site voluntarily. Should the liable party fail to comply with the cleanup request, CERCLA authorizes the EPA to implement response actions and to seek from the responsible party compensation for its response costs. Due to its sovereign interest in the general public health and welfare, 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, and broad-based liability intended to cover any and all parties who at any time handled the hazardous waste.

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 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).


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).


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. A monumental piece of legislation, 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. Due to this time constraint, the bill was passed under a suspension of the rules, during which bills must be adopted without amendment. There was, therefore, little debate during CERCLA's

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 incidence 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).


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

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 policies, 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


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).


31. See infra notes 119-26 and accompanying text.
cleans up and then, pursuant to CERCLA section 107, sues the insured polluter for recovery of its cleanup costs. In turn, the insured polluter seeks coverage for the EPA's cleanup costs under its CGL policy. 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; the CGL policy only covers claims for "property damage" as defined in the CGL policy, 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. 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


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).


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).


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 standardi-
ization, while benefitting the insurance industry, continues to allow insur-
ers to meet the needs of individual insureds through attachments to
policies.\footnote{38}

Insurers began issuing standardized CGL policies to businesses in
1940,\footnote{39} when toxic waste had not yet become an issue.\footnote{40} The CGL poli-
cies at issue in the cases discussed in this Note were written before insur-
ers had any reason to plan for the costs of cleaning up the environment.\footnote{41}
As a result, these standardized CGL policies generally cover property
damage\footnote{42} or bodily injury\footnote{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.\footnote{44} For example, costs expended by an insured to

\footnotesize
38. See Obrist, \textit{supra} note 37, at 38.
39. See General Liability Insurance 1973 Revisions, \textit{supra} note 37, at 3; Tinker, \textit{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. \textit{See} CERCLA House
Report, \textit{supra} note 2, at 6120; M. Katzman, \textit{supra} note 3, at 1.
41. \textit{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
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.
Cir.) (en banc), \textit{cert. denied}, 57 U.S.L.W. 3230 (1988); \textit{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. \textit{See}
Tinker, \textit{supra} note 37, at 224-25. The 1973 revisions also clarified the "loss of use" cover-
age, 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 cover-
Revisions}, in \textit{General Liability Insurance 1973 Revisions} 38 (F. Bardenwerper & D.
Hirsch eds. 1974); \textit{infra} note 44 and accompanying text.
44. \textit{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, \textit{supra} note 3, at 85.
For example, Environmental Impairment Liability ("EIL") policies are claims-made poli-
cies that identify a specific retroactive date from which point on coverage will apply for
accidental occurrences. \textit{See} Parker, \textit{The Insurance Crisis and Environmental Protection},
28 Env't 14, 17 (Apr. 1986); M. Katzman, \textit{supra} note 3, at 85.
The claims-made policy is used to relieve insurers of claims brought long after the
original occurrence, \textit{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.\textsuperscript{45} As long as it is clear that the event occurred unexpectedly and unintentionally\textsuperscript{46} during the effective period of the CGL policy\textsuperscript{47} and is not excluded,\textsuperscript{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.\textsuperscript{49} In policy period. This reduces the difficulty of predicting the number of claims that will be made since there is an applicable termination date. \textit{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. \textit{See} Arness & Eliason, \textit{Insurance Coverage for "Property Damage" in Asbestos and Other Toxic Tort Cases}, 72 Va. L. Rev. 943, 947 (1986).

\begin{itemize}
  \item \textsuperscript{45} \textit{See} Obrist, \textit{supra} note 37, at 40.
  \item \textsuperscript{46} \textit{Id.}; \textit{see supra} note 44.
  \item \textsuperscript{47} \textit{See} Arness & Eliason, \textit{supra} note 44, at 947.
  \item \textsuperscript{48} The CGL policy provides a number of exclusions from its coverage. \textit{See} Obrist, \textit{supra} note 37, at 13-26. For discussion of the environmental pollution exclusion, see \textit{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. \textit{See} Tinker, \textit{supra} note 37, at 264; \textit{see also} R. Cushman & C. Stamm, \textit{supra} note 44, § 1.1, at 3.

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. § 960456 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


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.


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


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).


63. See supra note 7 and accompanying text.


66. See supra note 13.


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


72. See 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).


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 because insurers require certainty as to the extent of their liability. 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. 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. If these parties were assured that insurance would cover their expenditures, they most likely would lose their incentive to monitor costs, thus destroying the required element of certainty. 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. 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, insurers never were intended to be risk preventers or the policemen of insureds. 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." The CGL policy was not created to serve as an
"all-risk liability policy." The duty of risk elimination is contrary to the purpose of insurance, insurance principally is designed to "spread, over time and usually over a risk group, risks that cannot otherwise economically be managed."

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.

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. 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. 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.

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

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 (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. 1350 (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.
interpreting insurance policies as contracts of adhesion originated in order to protect parties negotiating at a disadvantage. To courts that adopt this approach, the plain language of the CGL policy is irrelevant. 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.”

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

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, 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).

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. Arnco, Inc., 822 F.2d 1348, 1353 (4th Cir. 1987), cert. denied, 108 S. Ct. 703 (1988); supra notes 13, 74 and accompanying text.

relevant, it should not be enforced even against those who knew of its restrictive terms at the time of contracting.\textsuperscript{98}

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


\textsuperscript{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, \textit{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 \textit{General Liability Insurance 1973 Revisions, supra} note 37, at 3 (discussing policy revisions, 1940-1973); Tinker, \textit{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.” \textit{General Liability Insurance 1973 Revisions, supra} note 37, at 3; see also \textit{supra} notes 42, 44 and accompanying text. The 1986 revisions completely remove any liability for environmental pollution. See \textit{50 Fed. Reg. 33,903} (1985); see also Chesler, Rodburg & Smith, \textit{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:

\begin{quote}
(f) [It is agreed that the insurance does not apply to \textit{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)].
\end{quote}

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

The pollution exclusion clause was intended to limit insurance coverage in order to give certainty to insurance liability. \textit{See infra} notes 82, 85-88 and accompanying text. Insurers did not want to be liable for gradual pollution which could reach catastrophic proportions. \textit{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. \textit{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

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).


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.


justify this view in the name of promoting public welfare, 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." These courts and legal theorists rely on faulty reasoning. Public policy, however persuasive, should not determine the interpretation of a legal contract, 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." In order to preserve the element of certainty in meeting demands for coverage, insurers intentionally omit coverage for these types of equitable relief. By overlooking these intentional omissions, courts deny insurers the freedom to determine the terms of a legally binding contract.

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. Because many


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.


114. See supra note 48.


of the polluting insureds have gone bankrupt and are unable to pay cleanup expenses,\footnote{117} many courts and legal theorists presently view the insurance companies as the most viable source for toxic waste cleanup expenses.\footnote{118} As is evidenced by the recent insurance crisis,\footnote{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.\footnote{120}

Judicial misinterpretation of insurance policies and the finding of coverage for EPA response costs has helped to stimulate an insurance crisis\footnote{121} unanticipated by CERCLA’s proponents.\footnote{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.\footnote{123}

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


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”);

120. See supra note 101.

121. See supra note 119 and accompanying text.


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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{128} Forcing insurers to cover the highly unpredictable risks associated with CERCLA liability\textsuperscript{129} puts insurers in the role of risk-preventers\textsuperscript{130} and denies them the ability to spread risks reasonably among similar policies.\textsuperscript{131} Therefore, they are forced to spread the costs of risks among all insureds through premiums for other types of insurance.\textsuperscript{132}

Because not every American obtains insurance,\textsuperscript{133} this spreading of

\textsuperscript{125} SARA House Report, supra note 122, at 2891.
\textsuperscript{126} Id.
\textsuperscript{127} See supra notes 101, 119 and accompanying text; see also supra note 37.
\textsuperscript{128} See supra note 119 and accompanying text.
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{131} Abraham, supra note 99, at 1187; Taylor, supra note 78, at 1.
\textsuperscript{132} See N.Y. Times, Jun. 11, 1985, at 1, col. 2 (swiping 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.
\textsuperscript{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. 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. 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, Americans would share the burden of toxic waste cleanup according to their ability to pay. 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. Therefore, the complicated analysis of how best to assess and deal with toxic waste problems should be left in
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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