Whether Insurers Must Defend PRP Notifications: An Expensive Issue Complicated By Conflicting Court Decisions

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) represents Congress' effort to provide the federal government with the statutory mechanism necessary to control the cleanup of toxic waste pollution and attach financial liability to responsible parties. The combination of CERCLA's unprecedented liability scheme and notoriously poor drafting, however, has generated a great deal of litigation from responsible parties seeking to avoid the potentially staggering liability for cleanup costs. In an overwhelming show of support for CERCLA,
the courts have responded by broadly construing CERCLA's provisions and the government's power to enforce them.4 With CERCLA's legitimacy beyond reproach, responsible parties continue to seek avoidance of cleanup costs by challenging an issue that began with CERCLA but has seen no uniform judicial answer: whether comprehensive general liability (CGL) insurance policies include liability for CERCLA-related costs?6

action); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3rd Cir. 1988), cert. denied, 109 S. Ct. 837 (1989) (CERCLA may impose successor liability on corporations which have either merged with or consolidated with a responsible party corporation); United States v. R. W. Meyers, Inc., 889 F.2d 1497 (6th Cir. 1989), cert. denied, 110 S. Ct. 1527 (1990) (overhead expenses from a government cleanup can be recovered in a section 107 cost recovery action); Eagle Picher Indus. v. United States EPA, 759 F.2d 922, 927 (D.C. Cir. 1985) (despite an exemption under section 101(14)(c), mining waste and fly ash can be "hazardous substances" if they fall under any of the criteria of that section); United States v. Mottolo, 695 F. Supp. 615, 628 (D.N.H. 1988) (Environmental Protection Agency is not required to give potentially responsible parties an opportunity to clean up a site before the agency undertakes response actions); United States v. Vineland Chemical Co., 692 F. Supp. 415, 423 (D.N.J. 1988) (section 122(a), which gives the Environmental Protection Agency the discretion whether to use section 122 procedures, is not subject to judicial review); United States v. Hardage, 733 F. Supp. 1424, 1438 (W.D. Okl. 1989) (indirect costs incurred by the Department of Justice including costs of office space, utilities, and supplies can be considered recoverable response costs); United States v. Charles George Trucking Co., 682 F. Supp. 1260, 1271 (D. Mass. 1988) (section 104 provides the Environmental Protection Agency with a right to enter privately owned property and commence response actions); United States v. Price, 577 F. Supp. 1103, 1113 (D.N.J. 1983) (the scope of liability under section 107 is applicable to section 106); United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) (section 107 should be broadly construed so as not to frustrate the recovery of cleanup costs); United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1986), aff'd in part, vacated in part, sub nom. United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), cert. denied, 109 S. Ct. 3156 (1989) (a lessee of a facility may be held responsible under section 107(a) as an owner/operator).

4. See cases cited supra note 3.


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A crucial aspect of this issue lies in the determination of insurers’ duty to defend Potential Responsible Party (PRP) notifications. Once notified of potential liability under CERCLA, insured PRPs have sought out their insurers for defense of CERCLA enforcement procedures and indemnification in the event of liability. Insurers have refused to defend PRP notifications for the same reasons insureds request defense; neither wishes to absorb the costs involved, and responsibility for defense may indicate re-

the past several years carriers providing [CGL] policies have been subject to unique court interpretations relative to finding defense and indemnification for cleanup costs and damages. . . . [O]f the sixty plus cases litigated to date there is no apparent trend favoring either the insurer or insured.

7. Potentially Responsible Parties (PRPs) are notified of their status pursuant to 42 U.S.C. § 9622(e)(1), CERCLA § 122(e)(1), which provides in part: “Whenever the President determines that a period of negotiation under this subsection would facilitate an agreement with potentially responsible parties for taking response action (including any action described in 9604(b) of this title) and would expedite remedial action, the President shall so notify all such parties . . . .” Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), § 122(e)(1), 42 U.S.C. § 9622(e)(1) (Supp. IV 1986).

8. 42 U.S.C. § 9622(e)(1), CERCLA § 122(e)(1). After the EPA investigates a toxic waste site and makes an official search for parties who are in some way responsible for the pollution, it notifies those parties considered “potentially” responsible while it continues to research the site. At the point of notification of potential responsibility, a party has three options: 1) do nothing and wait for the government to recover costs; 2) cleanup the site or join with other notified parties in a cleanup; or 3) litigate with the government in hopes of securing a more favorable result at some point in the future. M. Lathrop, Environmental and Toxic Tort Claims From the Insurers’ Perspective, in ENVIRONMENTAL AND TOXIC TORT CLAIMS 141, 157 (Commercial Law and Practice Course Handbook Series No. 495, 1989).

9. Cheek, Graham & Wardzinski, Insurance Coverage for Superfund Liability Defense and Cleanup Costs: The Need for a Nonlitigation Approach, 19 ELR 10203, 10203-04 (1989). See L. Silverman & P. Essig, supra note 3, at Westlaw screen 2 (“[C]ompanies in the industries that have borne the brunt of the new or expanded liabilities created by the courts and the legislatures have turned to the insurance companies that over the years have sold them [CGL] insurance policies . . . .”).

10. Id. See Cordes, Who Gets the Bill?: Determining Insurers’ Duty to Defend and Indemnify Against Hazardous Waste Clean-up Costs Under General Liability Policies, 18 ENVT. L. 931, 932 (1988) (the potential costs of CERCLA liability are so high that generators have found it in their best interest to fully litigate insurers’ liability, regardless of the cost of litigation). Insurers faced with the high cost of defending and indemnifying insureds will commonly seek declaratory judgements which determine the rights and liabilities of the parties without leaving the insurer responsible for wrongful refusal to defend. Comment, Insurer Liability in the Asbestos Disease Context - Application of the Reasonable Expectations Doctrine, 27 S.D.L. REV. 239, 240 (1982); Dahoney, The Liability Insurer’s Duty to Defend, 33 BAYLOR L. REV. 451, 482-83 (1981); see also Superfund Insurance Dilemma, supra note 5, at 738.
sponsibility for indemnification. Both insurers and insureds recognize that a court's decision whether to require defense of PRP notifications extends to the underlying undecided issue of spreading the burden of CERCLA cleanup costs.

The courts have not been able to produce a definitive answer to the issue of PRP notification defense for several reasons. First, courts tend to have varying interpretations of policy language because courts not only interpret the terms of insurance policies as a matter of law, but also have discretion as to the method of interpretation employed. Second, the interpretation of a CGL policy with respect to potential coverage for PRP notifications is inherently complex, because such notifications represent a form of liability that does not fit into the traditional categories established by pre-1980 policy language. Third, the courts' discretion may

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11. See infra notes 178-81 and accompanying text.
12. See also M. Pope & E. Rickert, Environmental and Toxic Tort Claims: Insurance Disputes at the Primary, Excess and Reinsurance Level, in ENVIRONMENTAL AND TOXIC TORT CLAIMS 287 (Commercial Law and Practice Course Handbook Series No. 495, 1989).
13. Hapke, Federal Circuit Court Decisions Contaminate Superfund Policy, 19 ELR 10393, 10393 (1989) ("Although CGL policies have existed for years, their application in the hazardous waste context has been anything but certain.").
15. S. Goldberg & J. Silberfeld, Jurisdiction Issues, and Procedural Problems, in INSURANCE LITIGATION AND COVERAGE ISSUES 237, 239 (Commercial Law and Practice Course Handbook Series No. 382, 1986) (All of these cases are decided under state law. There is no federal common law on insurance construction: a federal court in diversity jurisdiction will apply state law for policy interpretation in the same manner as a state court.).
16. T. Hamilton & K. Kowal, The 1986 Commercial Liability Policy Claims Made Form, in CURRENT PROBLEMS AND ISSUES IN LIABILITY INSURANCE 13 (Commercial Law and Practice Course Handbook Series No. 421, 1987); see Hapke, supra note 13, at 10393 (Post-1980 policies, such as claims-made policies, are more precise in defining the scope of coverage than traditional CGLs, and accordingly have not been the subject of significant litigation to date).
17. B. Ostrager & T. Newman, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 8.03 (2d ed. 1989) [hereinafter HANDBOOK] ("CERCLA created unique hybrid remedies consisting of both monetary relief and cleaning up the site, and in some cases, fines and
be affected by their awareness of the economic implications of
deciding which parties should bear the cost of defending the PRP
notifications. The magnitude of this policy decision is evident
from the contrast between the courts' virtual unanimity over issues
challenging CERCLA's legitimacy and the conflict currently exist-
ing in the state and federal courts over the insurers' duty to defend
PRP notifications. The courts have clearly viewed upholding
CERCLA as necessary to address the hazard and cost of toxic
waste pollution, but they disagree as to how that cost should be
spread.

This comment focuses on the way in which courts have pro-
duced conflicting interpretations of CGL policy language when
faced with the new form of liability presented by a PRP notifica-
tion, and the ramifications of the conflicting decisions upon insur-
ers. Section II examines the three components of the conflict: A)
rules of construction applicable to insurance policies; B) CERCLA;
and, C) the duty to defend under CGL policies. Section III reports
the way in which courts have interpreted the disputed CGL lan-
guage. Section IV analyzes the courts' methods of interpretation.
Section V discusses the ramifications of extending insurers' liability
to encompass PRP notifications. Finally, section VI recommends
that insurers take a nonlitigative approach to an insured's claim of
defense.

II. COMPONENTS OF THE CONFLICT

A. RULES OF CONSTRUCTION APPLICABLE TO INSURANCE
POLICIES

Courts' interpretations of policy language have varied in in-
surance disputes over CERCLA coverage because the rules of
construction, as applied to insurance policies, allow courts great

penalties which do not fall within the scope of coverage historically contemplated by the
CGL insurer.""); see Cordes, supra note 10, at 939 (while a major function of insurance
law is the regulation of risk distribution, courts' inexperience and unfamiliarity with the
interpretation of liability policies in the hazardous waste context makes it very difficult
for them to regulate effectively).
18. See M. LATHROP, supra note 8, at 163.
19. See supra cases cited at note 3; Gordon & Westendorf, Liability Coverage for
Toxic Tort, Hazardous Waste Disposal and Other Pollution Exposures, 25 IDAHO L.
REV. 567, 607-12 (1988-89). Hapke, supra note 13, at 10393 (to date, the state and lower
federal courts have been split in determining whether coverage should be required or
what scope the coverage should embrace).
20. See infra text accompanying notes 115-159.
The rules of construction are designed to give effect to the intent of the parties at the time the policy contract was made, and accordingly, courts should examine policy language to determine intent because it is considered "[t]he best evidence of what the parties to an agreement intended . . . ." This "plain meaning" rule provides that where the policy language is clear and unambiguous a court must enforce it as written and not impose a result different from that required by policy provisions.

After examining the policy language, however, a court may find it ambiguous where the language is reasonably susceptible to more than one interpretation. Each interpretation offered must be objectively reasonable; an ambiguity should not be held to exist solely on the basis of an assertion. Where an ambiguity exists, the court must look beyond the policy language to discern the parties' intent. Extrinsic evidence of the parties' intent at the time the policy was made is admissible, "not to vary or modify the terms of the agreement nor to add or to detract from its terms, but to aid in ascertaining the true intent of the parties."

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21. HANDBOOK, supra note 17, § 1.01.

22. Id. § 1.01[a]. See Eastern Associated Coal v. Aetna Cas. & Sur. Co., 632 F.2d 1068 (3d Cir. 1980) (The court's duty is to ascertain the intent of the parties as manifested in the language of the agreement. Courts should read insurance policy provisions so as to avoid ambiguities.).

23. HANDBOOK, supra note 17, § 1.01[a].

24. Id. ("As a general rule, the language of an insurance policy will be given its plain meaning and there will be no resort to rules of construction unless an ambiguity exists. . . . If the language of the policy is clear and unambiguous and the meaning of the contract can be discerned, a court will give effect to that meaning.").

25. Id. § 1.01[b] (the court makes this determination as a threshold question of law).

26. Id. § 1.02.

27. Id. ("A word or phrase is ambiguous when it is capable of more than a single meaning when 'viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.'") (citations omitted) (quoting Garza v. Marine Transp. Lines, Inc., 861 F.2d 23, 27 (2d. Cir. 1988)).


29. HANDBOOK, supra note 17, § 1.03[a]. See 3 G. CORBIN, CONTRACTS 542 (1960).

30. HANDBOOK, supra note 17, § 1.03[a] (citing Shell Oil Co. v. Accident & Cas. Ins. Co. of Winterthur, No. 278953, Dec'n Concerning Phase Issues, 9 (Cal. Super. Ct. San Mateo County Oct. 6, 1988) (the court may look to extrinsic evidence of custom and usage where it gives particular meaning to policy language). See, e.g., Eagle-Picher Indus., Inc. v. Liberty Mut. Ins., 682 F.2d 12, 18 (1st Cir. 1982) ("Given that the
If a court cannot determine the intent of the parties after consideration of extrinsic evidence, only then may other rules of construction be applied to resolve the ambiguity. The primary "other rule" of construction applicable to ambiguous insurance contracts is the contra-insurer rule. The contra-insurer rule requires that ambiguities in policy language be construed against the insurer. In cases involving ordinary consumers, the insurer, preparer of the form, is presumably responsible for creating the policyholder's expectations of coverage. Therefore, construing a policy strictly against the insurer serves as a consumer protection device.

A variation on the contra-insurer rule resolves ambiguities in accordance with the "reasonable expectations" of the insured. In theory, courts use the reasonable expectations rule to interpret the meaning of the policy language according to "what a reasonable person in the position of the insured would have understood it to mean." As a practical matter, when a court gives effect to the primary goal of contract interpretation is to ascertain the intentions of the parties, a district judge, sitting without a jury, might be well advised to admit provisionally all extrinsic evidence of the parties' intent ....") (citations omitted); cf. Fireman's Fund Ins. v. Fibreboard Corp., 182 Cal. App. 3d 462, 469, 227 Cal. Rptr. 203, 207 (Cal. App. 1st Dist. 1986) (the court frowned on insured's obvious insistence that policy language was ambiguous in order to introduce certain extrinsic evidence).

31. HANDBOOK, supra note 17, § 1.01(c).
32. Id. (the contra-insurer rule originated from the doctrine of contra-preferendum, which means "against the offeror").
33. Id. § 1.03(b).
34. Id. (the presumption that the insurer is responsible for insured's expectations because the insured has little or no control over the content of the contract forms the basis for the "contra-insurer" rule of construction; the rationale for the contra-insurer rule was summarized by the court in Mathews v. American Cent. Ins. Co., 154 N.Y. 449, 48 N.E. 751 (1897): "The policy, although of the standard form, was prepared by insurers, who are presumed to have had their own interests primarily in view, and hence, when the meaning is doubtful, it should be construed most favorably to the insured, who had nothing to do with the preparation thereof." Id. at 456-57, 48 N.E. at 752.
35. K. ABRAHAM, DISTRIBUTING RISK 103 (1986).
36. A Common Law Alternative, supra note 14, at 1184 ("The doctrine of reasonable expectations was created specifically as a tool for the interpretation of ambiguities within insurance contracts."). See Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 HARV. L. REV. 961, 967 (1970) (underlying the ambiguity doctrine is the idea that the objectively reasonable expectations of the insured will be enforced even if the policy does not necessarily read that way); see also Superfund Insurance Dilemma, supra note 5, at 746.
37. HANDBOOK, supra note 17, § 103(b)(2). See K. ABRAHAM, supra note 35, at 102.
38. HANDBOOK, supra note 17, § 103(b)(2)(A). But see Uniroyal Inc. v. Home
insured’s “reasonable expectations,” it essentially accepts the insured’s asserted expectations regardless of their reasonableness. Deciding to accept the insured’s “reasonable expectations” in this manner is often outcome determinative, a result clearly invited by the concept of contra-insurer rules. Because the contra-insurer rule was developed specifically to protect inexperienced insureds, its harsh results have been challenged when used in other contexts. Use of contra-insurer rules in business insurance has been refuted in several courts, primarily because in litigation between two commercial parties there is no need to protect the insured from his or her inexperience.

The initial interpretation of the policy language undertaken by courts in duty to defend PRP notification cases is crucial because application of the contra-insurer rule generally depends on initially finding the policy language ambiguous. However, the conflicting decisions of the state and federal courts demonstrate the confusion

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Ins. Co., 707 F. Supp. 1368, 1377-78 (E.D.N.Y. 1988) ("The best and most recent explanation is that the policy should be viewed as if by a reasonably intelligent business person who is familiar with the agreement and with the industry in question.").

39. HANDBOOK, supra note 17, § 1.03[b][2][A] (citing Grinnel Mut. Reins. Co. v. Wasmuth, 432 N.W.2d 495, 499 (Minn. Ct. App. 1988), (["T]he reasonable expectations of the insured may be given effect [e]ven if careful examination of the policy provision would negate that expectation.").

40. See infra text accompanying notes 168-179.

41. Because of the conclusive nature of applying contra-insurer rules, it is crucial that an actual ambiguity exist before the rules are used. See Fried v. North River Ins. Co., 710 F.2d 1022, 1025 (4th Cir. 1983) ("If there is no real doubt about what the parties to the contract intended, the rules of construction cannot be used to extend coverage beyond that reasonably and legitimately implied from the policy.").

42. HANDBOOK, supra note 17, § 1.03[c] (citing Halpern v. Lexington Ins. Co., 715 F.2d 191 (5th Cir. 1983) (under Louisiana law, contra-insurer rules will not be applied to produce an absurd result or when the insured or his broker provides the disputed policy language); see also Brokers Title Co., Inc. v. St. Paul Fire & Marine Ins. Co., 610 F.2d 1174 (3d Cir. 1979) (under Pennsylvania law, insured cannot avoid the effect of unambiguous language when the parties had relatively equal bargaining power); Fireman’s Fund Ins. Co. v. Fibreboard Corp., 182 Cal. App. 3d 462, 227 Cal. Rptr. 203 (1986) (the rule of strict construction against the insurer was not applicable where both parties were large corporate entities). But see Boeing Co. v. Aetna Cas. & Sur. Co., 784 P.2d 507, 113 Wash. 2d 869 (1990) (the court refused to alter its course of construing an insurance policy based on the fact that the policy was issued to a corporate giant rather than an individual).


44. HANDBOOK, supra note 17, § 1.01[b] (contra-insurer rules should be used only after an ambiguity is found that cannot be explained through extrinsic evidence).
that exists concerning whether the language in the duty to defend clause has a plain meaning or is ambiguous in the context of defending a PRP notification.45

B. CERCLA

CERCLA provides the legal foundation for shifting the responsibility for cleaning hazardous waste sites to responsible parties,46 as well as the funding for necessary federal action.47 In contrast to previous methods of determining liability,48 CERCLA

45. See infra notes 117-162 and accompanying text.
46. M. LATHROP, supra note 8, at 150 (CERCLA section 106(a) authorizes the EPA to seek an injunction in federal district court to force a responsible party to cleanup any site that presents an imminent and substantial danger to the public health or welfare or the environment, while CERCLA section 107 gives the EPA power to sue for reimbursement of cleanup costs from any responsible party it can locate).
47. Id. (CERCLA created a fund, commonly known as “Superfund,” to pay for necessary and authorized government responses. CERCLA section 104 authorizes the EPA to incur removal and remedial costs, which are undertaken with Superfund money. However, the EPA uses Superfund money with the expectation of receiving reimbursement through CERCLA section 107. Although the Superfund can be used for genuinely “orphaned” sites, the law requires that the EPA use the fund as little as possible. The goal is to place the ultimate burden for costs upon responsible parties.).
48. New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (quoting ANDERSON, MANDELBRAK & TALROCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 568 (1984)) (“CERCLA was designed “to bring order to the array of partly redundant, partly inadequate federal hazardous substances cleanup and compensation laws.””). Before CERCLA, the primary federal statute dealing with toxic waste pollution was The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992K, which regulated prospectively from “cradle to grave” as opposed to addressing pollution generated before its enactment. Hapke, supra note 13, at 10393. Prior to CERCLA’s enactment, applicable theories of recovery under state law were nuisance, trespass, negligence, strict liability or strict products liability. Harris, Toxic Tort Litigation and the Causation Element: Is There any Hope of Reconciliation, 40 SW. L.J. 909, 911 (1986) (“Each theory is fraught with difficulty in the toxic tort context for a number of reasons, most notably, the causation component of each theory of action is a common conundrum.”). In drafting CERCLA Congress noted the inadequacy of state tort law schemes stating:

Existing state tort laws present a convoluted maze of requirements under which a victim is confronted with a complex of often unreasonable requirements with regard to theories of causation, limited resources, statutes of limitations and other roadblocks that make it extremely difficult for a victim to be compensated for damages.

is very effective at designating responsible parties\textsuperscript{49} and enforcing actions for cleanups against those parties.\textsuperscript{50} CERCLA achieves this through retroactive application,\textsuperscript{51} strict liability,\textsuperscript{52} extensive

49. Anderson, \textit{Negotiations and Informal Agency Action: The Case of Superfund}, 85 \textit{Duke L.J.} 261, 288-94 (1985) (The EPA assigns enforcement personnel to search for responsible parties while “remedial investigation studies” and “feasibility studies” (RI/FS) are simultaneously taking place to ensure the most accurate information is used to designate responsible parties).

50. \textit{Id.} at 293-95 (Once the EPA notifies a party of its potential responsibility, the stage is set for the PRP to either engage in a voluntary settlement, force the government to order cleanup under CERCLA section 106, or have the government cleanup itself and recover costs under CERCLA section 107. Unless the PRP can establish one of the limited defenses it will be held liable in some manner).


Although CERCLA does not expressly provide for retroactivity, it is manifestly clear that Congress intended CERCLA to have retroactive effect . . . the statutory scheme itself is overwhelmingly remedial and retroactive. CERCLA authorizes the EPA to force responsible parties to clean up inactive or abandoned hazardous waste sites, CERCLA Section 106, 42 U.S.C. § 9606, and authorizes federal, state and local governments and private parties to clean up such sites and then seek recovery of their response costs from responsible parties, CERCLA Sections 104, 107, 42 U.S.C. Sections 9604, 9607. In order to be effective, CERCLA must reach past conduct.

\textit{Id.} at 732-33; United States v. Shell Oil Co., 605 F. Supp. 1064, 1072 (D. Colo. 1985) (CERCLA is “by [n]ature backward looking”); see, e.g., constitutionality of retroactive application addressed in United States v. Conservation Chemical Co., 619 F. Supp. 162, 214 (W.D. Mo. 1985) (“CERCLA is not an ex post facto law (U.S. Const. Art. I, section 9, clause 3) because the Constitution’s explicit prohibition against ex post facto lawmaking applies only to criminal laws which inflict punishment.”); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (The Court held that retroactive application of The Black Lung Benefits Act to compensate miners for disease contracted before the statute’s enactment was constitutional and justified as a measure to rationally spread costs. The Court stated that Congress should have considerable discretion in imposing liability so long as their approach is reasonable.); Department of Transp. v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A.2d 1151 (1980) (New Jersey Spill and Compensation Control Act held not to be impermissibly retroactive).

52. United States v. Miami Drum Serv., Inc., 1986 WL 15327 (S.D. Fla.) (“Every court to consider this issue has concluded that, unless one of the defenses under Section 107(b) of CERCLA applies, a party identified as responsible under Section 107(a) is strictly liable, regardless of fault, for response costs incurred by the government.”); see also New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (“Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise. Section 9601(32) provides that ‘liability’ under CERCLA ‘shall be construed to be the standard of liability’ under section 311 of the Clean Water Act, 33 U.S.C. section 1321, which courts have held to be strict liability . . . . ”); United States v. Ward, 618 F. Supp. 884 (F.D.N.C. 1985)
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Courts have held that Congress intended CERCLA to apply retroactively in response to the fact that much of the current and future toxic pollution costs were generated prior to CERCLA’s enactment. Accordingly, CERCLA addresses the need for the enormous funding necessary to cleanup toxic waste pollution by holding responsible parties strictly liable. CERCLA’s retroactive strict liability also reflects the congressional desire to hold polluters responsible for their pollution.

(CERCLA section 107(a)(3) was clearly intended to apply to generators of toxic waste pollution resulting from improper dumping regardless of knowing involvement of the generator); United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982) (Congress meant to hold generators strictly liable for reimbursement under section 107).

53. *Superfund Program: Notice Letters, Negotiations and Information Exchange*, 53 Fed. Reg. 5298, 5298-5300 (1988) [hereinafter *Superfund Program*] (There are several notification procedures used by the EPA to facilitate negotiation and information exchange including general notice letters and RI/FS special notice letters. The purpose of the general notice is to inform PRPs about their potential liability and begin information exchange and negotiation. Special notices are similar to general notices except that they are also used to invoke a statutory moratorium on certain EPA actions.).

54. CERCLA section 107(b) defenses, provides in part:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by-

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party . . . .

55. CERCLA, *supra* note 1, section 107(b). *See supra* note 51; *see also* 5 U.S. CODE & Cong. & Admin. News 6119-70 (1980) (legislative history shows Congress clearly intended CERCLA to address the improperly managed sites already in existence at the time of CERCLA’s enactment).

56. *See generally* Note, *Misery Loves Company: Spreading the Costs of CERCLA Cleanup*, 42 VAND. L. REV. 1469, 1470 (1989) (“Usually, a toxic waste site, such as a landfill, will have numerous PRPs: generators; transporters; current owners and their lessees; former owners and operators and their successor corporations; individual corporate officers; and even governmental agencies.”).

57. *See supra* note 52. Congress reaffirmed the application of strict liability in the SARA amendments. Additionally, PRPs may be jointly and severally liable under CERCLA for all response costs incurred by federal and state agencies, which may include investigation costs, litigation costs, salaries and expenses and future costs of removal or remedial action. *See United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983) (“[w]here the conduct of two or more persons liable under [section] 9607 has combined to violate the statute, and one or more of the defendants seeks to limit his liability on the ground that the entire harm is capable of apportionment, the burden of proof as to apportionment is upon each defendant.”).

58. *See M. LATHEROP, supra* note 8, at 158 (“[O]ften overlooked is the fact that
The EPA is authorized under CERCLA to issue administrative notices to PRPs to initiate the settlement process, which furthers the shifting of liability to responsible parties. "PRP notifications" serve to inform parties that they are potentially responsible for response costs under section 107 of CERCLA, as well as to define the scope of potential liability and explain why they have been identified as PRPs. Notifications are sent to PRPs as early as possible in the EPA's process of addressing a toxic waste site so that PRPs may gather adequate information about their potential liability and have sufficient time to conduct or finance a response action.

This settlement process is not a matter of traditional bargaining between parties wherein the PRPs and the government would seek a mutually satisfactory response to the designated toxic waste pollution. "Settling" with the government primarily involves formulating an acceptable proposal for cleanup of the pollution under the assumption of PRP liability. Although PRPs are designated as "potentially" responsible parties, it is not simply an accusation of fault as one might find in a traditional cause of action.

Congress intended those responsible for pollution, and presumably not their insurers, should bear the cost of Superfund cleanups."); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("[T]hose responsible for problems caused by disposal of chemical poisons [should] bear the costs and responsibilities for remedying the harmful conditions they created."); United States v. Miami Drum Serv. Inc., 1986 WL 15327 (S.D. Fla.) ("CERCLA is a rational measure to ensure that those parties who have economically benefitted from waste generation and inexpensive disposal pay now for its cleanup.").

59. See Gordon & Westendorf, supra note 19, at 569.
60. Superfund Program, supra note 53, at 5299.
62. Superfund Program, supra note 53, at 5301.
63. Id. at 5301. See M. LATHROP, supra note 8, at 153-54 (the EPA need not identify every party that may have contributed to the release, and is under no obligation to identify all responsible parties for the purposes of dividing costs among them).
64. Superfund Program, supra note 53, at 5301.
65. See infra notes 66-69 and accompanying text.
66. PRPs must submit a good faith proposal to the EPA within 60 days of notification or else the EPA may cleanup the pollution itself, typically at a higher cost, and then demand reimbursement under CERCLA section 107. See Cassel, Negotiating Better Superfund Settlements: Prospects and Protocols, 55 PEPPERDINE L. REV. 117, S135 (1989) ("Current EPA strategy ... is confrontational. Either the PRPs abide by what EPA wants or the Agency uses the Fund for cleanup.").
67. Pain, Mega-Party Superfund Negotiations, 12 ELR 15054 (1988) (the notifi-
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The EPA's goal is to obtain complete cleanup by the responsible parties or collect 100 percent of the costs from a government sponsored cleanup action. The strictness of CERCLA's settlement scheme in negotiating private party cleanups and settlements of hazardous waste cases works to effectuate that goal. However, some elements of the settlement scheme that are crucial to arriving at the EPA's goal do not translate effectively from their role in CERCLA to the context of insurance law. For example, CERCLA must attach retroactively in order to hold responsible parties liable for toxic waste, because toxic waste and its effects may not surface for many years after the actual polluting occurred. In terms of insurance, however, coverage is not designed for retroactive liability, such as newly discovered toxic waste problems that could not have been considered in the original risk assessment.

Although the use of strict liability in CERCLA's settlement process does not present a new standard of liability, the PRP notifications that initiate the settlements are a new form of attaching that liability. In the insurance context, PRP notifications are
problematic because their injunctive form and out-of-court processes are not covered under CGL language. Faced with the fact that PRP notifications defy definition under traditional policy language, yet represent great potential cost to the party responsible for defending them, courts are left in conflict over whether to incorporate PRP notifications into traditional CGL language.

C. THE DUTY TO DEFEND UNDER CGL POLICIES

The insurance policies involved in this conflict are comprehensive general liability policies (CGLs), which contain "duty to defend" clauses. Duty to defend policy language typically states: "The Company shall have the right and duty to defend any suit against the insured seeking damages . . . ." The key term interpreted by the courts to determine whether the insurer has a duty to defend is "suit." In defining "suit," some courts have interpreted the term in isolation, while others also look to surrounding

75. I. SULLIVAN & W. WRIGHTS, JR., Hazardous Waste Litigation: CGL Insurance Coverage Issues, in HAZARDOUS WASTE, TOXIC TORT, AND PRODUCTS LIABILITY INSURANCE PROBLEMS 301, 330 (Commercial Law and Practice Course Handbook Series No. 419, 1987) ("Traditionally courts have held that a lawsuit seeking injunctive relief against an insured is not covered by a CGL policy because it does not seek compensatory damages."). See infra notes 85-90 and accompanying text.

76. See In re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution, 675 F. Supp. 22, 25-26 n.2 (D. Mass. 1987) (CERCLA's inartful drafting makes the court's task of ascertaining the law's meaning more difficult and increases the likelihood that courts around the country will adopt differing approaches to the statute.).

77. Note, Developments in the Law: Toxic Waste Litigation, 99 HARV. L. REV. 1458, 1465-66 & n.5 (1986) (Congress hastily drafted and passed CERCLA, producing little legislative history and vaguely-drafted statutory provisions. This has produced a situation wherein the courts often find themselves ascertaining Congress' intentions for various CERCLA provisions.).


81. See infra notes 117-159 and accompanying text.
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Because the duty to defend clause requires a "suit . . . seeking damages," the term most often interpreted in conjunction with "suit" is "damages." Whereas suit has been defined as requiring some type of court proceeding, "damages" can be used to further require that a particular type of damages be sought in the court proceeding in order to qualify it as a suit.

1. Insurers' Interpretation of the Duty to Defend

Recently, insurers have approached litigation over the duty to defend clause by asserting that the plain meaning of the policy language indicates they need only defend insureds if they become defendants in a traditional lawsuit seeking damages. This argument seeks to eliminate the duty to defend PRP notifications in two ways. First, a PRP notification "inform[s] PRPs of their potential liability for future response costs" as well as facilitates exchange of information and informal negotiations between parties. However, because a PRP notification does not require a court proceeding, it is not equivalent to filing a traditional lawsuit. Second, PRP notifications, like CERCLA cleanup costs, are considered a form of injunctive or equitable relief, whereas

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82. See infra text accompanying notes 120-139.
83. See infra text accompanying notes 179-181.
84. Id.
85. See Gordon & Westendorf, supra note 19, at 609 ("The traditional view, held in a number of jurisdictions, regarded the assertion of a mere claim against the insured to be insufficient to trigger the duty."); cf. Hapke, supra note 13, at 10393 (editor's summary) (referring to policy terms "property damage" and "occurrence," the fact that they were drafted over a decade before CERCLA was enacted means they were obviously designed to address liability for which insureds had traditionally sought coverage).
86. Superfund Program, supra note 53, at 5300.
88. See HANDBOOK, supra note 17, at § 8.03[c][2], ("Equitable remedies are designed to either restore the status quo ante or to prevent threatened future injury, rather than to provide 'substitution and redress' in the form of money damages."); B. Roznowski, The Insurance Industry Perspective: Unique Coverage Issues, in ENVIRONMENTAL AND TOXIC TORT CLAIMS: INSURANCE COVERAGE IN 1989 AND BEYOND 363, 381 n.4 (Commercial Law and Practice Course Handbook Series No. 495, 1989) ("The basis for insurers' argument as to the damages issue is the long-standing recognition by courts that the costs of complying with equitable remedies, whether in the form of injunctive relief or restitution, are not damages even though a money judgement may be entered in connection therewith."); see also Bowen v. Massachusetts, 108 S. Ct. 2722, 2732
"damages" traditionally encompass only legal damages. Therefore, insurers conclude that the plain meaning of "suit" necessarily excludes PRP notifications from the duty to defend.

Historically, the distinction between legal and nonlegal damages has not been difficult to make in disputes over CGL policy language. Before 1980, when CGLs were written to include the (1988) (the ordinary meaning of "damages" is compensatory relief for an injury suffered, while reimbursement is essentially equitable); United States v. Price, 688 F.2d 204, 213 (3d Cir. 1982) (injunctions are equitable relief).


90. Hapke, supra note 13, at 10395. BLACK'S LAW DICTIONARY 351 (5th ed. 1979) ("Damages. A pecuniary compensation or indemnity which may be recovered in the court . . . ."). See Aetna Casualty & Surety Co. v. Hanna, 224 F.2d 499, 503 (5th Cir. 1955) (insurance policy covers payment for damages, not injunctive relief); Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., Inc., 842 F.2d 977, 985 (8th Cir. 1988) (In the insurance context "the term 'damages' is not ambiguous. . . . and . . . the plain meaning of the term 'damages' [as] used in the CGL policies refers to legal damages and does not cover cleanup costs.").

91. See AIU Ins. Co. v. Superior Ct. of Santa Clara, 213 Cal. App. 3d 1219, 1223, 262 Cal. Rptr. 182, 183 (1989) ("[U]ntil the recent spate of environmental pollution cases, no authority held that such liability insurance policies provide coverage for the
"duty to defend" clause, the insurer had prepared the contract to reflect the cost of those risks involved in a "suit" brought against the insured according to the traditional understanding of the terms in the clause. In fact, insurers prepared pre-1980 policies without CERLCA as a consideration in assessing the extent of the risks potentially covered by their policy language.

In order for the insurance system to function effectively, insurers must know the extent of the risks being insured by their policies. Insurance can spread the risk of liability among groups of insureds only where an accurate assessment of the risks has been made for the purposes of determining premium rates. Once the extent of the risks is determined, insurers must then be able to rely on standard terminology for defining those risks. If policy language can be subsequently redefined to expand coverage beyond what was planned by the insurer, then it nullifies the original risk assessment. Because the availability of insurance is premised on the degree of predictability and magnitude of the risk at the time the insurance contract is written, insurers cannot create effective insurance without some reliance on basic definitions within policy language.

At the time most of the currently disputed CGLs were written, CERCLA did not exist and insurers did not expect the courts to costs of compliance with governmental exercise of the police power, nor for the costs of responding to an injunction. Accordingly, the parties to these policies cannot reasonably have expected that there was such coverage.

92. See id. at 1228, 262 Cal. Rptr. at 191-92.
93. See Rosenbaum, supra note 89, at 10204; see also K. Abraham, supra note 35, at 76-79; Cheek, Graham & Wardzinski, supra note 9, at 10203.
94. See Rosenbaum, supra note 89, at 10204.
95. 1 J. JOYCE, TIME LAW OF INSURANCE § 17 (2d ed. 1917) (quoting Commonwealth v. Vrooman, 164 Pa. 306, 318, 30 A. 217, 219 (1894)) ("The conditions necessary to the business of insurance are: (a) the existence of a known danger to which all property owners are exposed, and against which they cannot effectually protect themselves; (b) the strong possibility that loss from this danger will fall upon but few of those who are exposed to it ... ").
97. Id.
98. See id. at 10-12; see also COUCH, 2 COUCH ON INSURANCE, § 15:4 (2d ed. 1984).
99. Insurers' need to rely on policy language in order to efficiently manage risks was recognized in United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31, 33 (6th Cir. 1988) (citing United States Fire Ins. Co. v. Kentucky Truck Sales, Inc., 786 F.2d 736, 739 (6th Cir. 1986) ("The court must give all terms their plain meanings and not rewrite an insurance contract to enlarge the risk." (emphasis added)).
impose major waste-related liabilities. While insurers are in the business of insuring against large risks for which individuals cannot prepare, such as catastrophic illness or hurricane damage, those types of risks are both known and beyond human control. In the case of liability for toxic waste pollution, however, Congress took a problem, seemingly beyond human control, and mandated its control through unprecedented liability reaching all parties similarly unprepared to absorb the cost of such liability.

Because insurers did not expect this kind of liability, the risk assessment that went into pre-1980 CGLs did not reflect the potential cost of toxic waste liability under CERCLA. Therefore, the risk of potential CERLCA liability was not spread among polluting insureds: "[F]rom the insurers' perspective, [insureds] are attempting to draw in carriers who have not agreed to bear the burden of cleanup costs, and who have not charged premiums commensurate with the environmental risks." Under these circumstances, insurers argue for interpretations of policy language consistent with traditional definitions to give effect to the coverage intended at the time the insurance contract was written.

2. Insureds' Interpretation of the Duty to Defend

In contrast, insureds have argued that "suit" is ambiguous and should be construed to include any effort to impose liability on the policyholder which is ultimately enforceable by a court. This argument effectively expands "suit" to include a PRP notification because it can be considered an effort to impose liability. Regarding "damages," insureds argue it is the effect of the PRP notifications, not their form, which should be considered by a court. This argument can be used to make the injunctive relief sought by the PRP notifications acceptable as "damages," essen-

100. See Hapke, supra note 13, at 10393 ("Liabilities imposed by CERCLA were not anticipated by either insurers or insureds at the time most policies were originally issued.").
101. Id. at 10393.
102. Cordes, supra note 10, at 934.
103. HANDBOOK, supra note 17, § 1.01[a] (insurers' argument reflects the well-settled rule of insurance policy construction that insurance contracts, like other contracts, should be interpreted to effectuate the intent of the parties at the time the contract was formed).
104. See infra text accompanying notes 149-58.
105. See infra text accompanying notes 149-58.
106. See infra note 182.
tially erasing the traditional distinction between legal and equitable relief.\textsuperscript{107} However, the state and federal courts that have interpreted the duty to defend clause have arrived at conflicting results, alternately limiting and expanding the scope of coverage to exclude or include liability for defense of PRP notifications, which neither insurers nor insureds have prepared to absorb.\textsuperscript{108}

III. RECENT JUDICIAL TREATMENT

Recent court decisions concerning the insurers’ duty to defend PRP notifications have been anything but consistent. The conflicting state and federal decisions can generally be broken down into two categories according to the method of construction used by the court: 1) courts interpreting the policies according to the plain\textsuperscript{109} or “traditional” meaning of the terms find no duty to defend;\textsuperscript{110} and 2) courts interpreting the policy language to be ambiguous\textsuperscript{111} find a duty to defend.\textsuperscript{112} Each method of interpretation is highly discretionary as both turn on each court’s perception of the terminology.\textsuperscript{113} The impact of this discretion is most apparent in light of the fact that the courts have interpreted virtually the same duty to defend policy language and consistently arrived at conflicting conclusions in direct correlation to the method of interpretation used.\textsuperscript{114}

\textsuperscript{107} See United States Aviex Co. v. Travelers Ins. Co., 125 Mich. App. 579, 589-90, 336 N.W.2d 838, 843 (1983) (the court rejected the insurer’s argument that injunctive order to clean up a site was not “damages,” because whether the government chose to have the insured clean up or cleaned up the site itself, the insured would incur similar costs).

\textsuperscript{108} See Abraham, supra note 43, at 960.

\textsuperscript{109} See HANDBOOK, supra note 17, § 101[a]; see also supra note 24 and accompanying text.


\textsuperscript{111} See supra notes 25-26 and accompanying text.


\textsuperscript{113} See supra notes 21-40 and accompanying text.

\textsuperscript{114} See infra text accompanying notes 161-164.
A. COURTS THAT HAVE FOLLOWED THE PLAIN MEANING OF THE POLICY LANGUAGE

In *Detrex Chemical Industries v. Employers Insurance of Wausau*, the United States District Court for the Northern District of Ohio addressed the issue of whether a PRP notification triggers the insurer's duty to defend. The parties’ dispute focused on the definition of “suit.” The insured argued for an interpretation of “suit” as including a PRP notification, which the insured represented as “[a] definable claim or contention [a]sserted that Detrex ha[d] some legal liability for damage . . . .” In contrast, the insurer contended that “suit” should be interpreted traditionally as “[t]he prosecution of some demand in a court of justice . . . .”

Faced with these opposing interpretations, the court looked to the language of the policy to determine the intended meaning. The court began its examination mindful that unambiguous language should be given its plain meaning. It reasoned that, although the insurance policies at issue did not define “suit,” language surrounding the duty to defend clause might indicate the term’s meaning. In a detailed examination of the duty to defend clause, the court found that, taken in context with the surrounding policy language, “suit” clearly required a court proceeding. The court based its conclusion on the fact that the language within the duty to defend clause referred to “allegations of the suit.” This indicated the traditional meaning of “suit” was intended by implication that

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117. *Id.*
118. *Id.* at 445.
119. *Id.*
120. The *Detrex* court focused solely on interpreting the policy language for its intended meanings and did not get sidetracked by the policy issue of the probable harsh ramifications on the insured after the PRP notification: “Merely because the PRP letters to Detrex informed it that it might be liable for cleanup costs, penalties, and punitive damages under CERCLA does not mean that [the] letters meet the attributes of a suit.” *Id.* at 446.
121. *Id.* at 442.
122. *Id.* at 446.
a "suit" must contain the traditional elements of "allegations" seeking damages.\textsuperscript{124}

Once the traditional definition of "suit" was established, the court discussed whether a PRP notification could be considered a suit.\textsuperscript{125} First, it determined that a PRP notification was a claim for potential future liability.\textsuperscript{126} It next compared the use of the terms "claim" and "suit" within the policy.\textsuperscript{127} The court found that the two terms were intended to describe distinct situations and further noted that the policy language's differentiation between "claim" and "suit" was clearly grounded in insurance law.\textsuperscript{128} Consequently, the court held that a "claim" was not intended to have the same meaning or effect as "suit" and, therefore, a PRP notification was not sufficient to trigger the insurer's duty to defend.\textsuperscript{129}

Similarly, in Technicon Electronics Corp. v. American Home Assurance Co.,\textsuperscript{130} the New York Supreme Court, Appellate Division, held that the PRP notification sent to the insured did "not constitute the institution of a 'suit'" for the purposes of triggering the insurer's duty to defend.\textsuperscript{131} The court found that the intended definition of "suit" was clear and unambiguous; "suit" indicated a legal proceeding in court.\textsuperscript{132} The court stated that the PRP letters merely informed the plaintiff of its potential liability under CERCLA, and was not the equivalent of the commencement of a formal legal proceeding within the meaning of the CGL policy.\textsuperscript{133}

\begin{footnotes}
\item[125.] Id. at 443-45.
\item[126.] Id.
\item[127.] Id. at 443.
\item[128.] Id. (quoting G. COUCH, COUCH ON INSURANCE section 51:43 (2d rev. ed.)) ("The mere fact that a claim has been asserted against the insured does not impose any duty of "defense" upon the insurer, since until an action has been brought against the insured there is, by definition no claim against which the insured is required to defend").
\item[129.] Id. at 445. \textit{Accord} Sharon Steel Corp. v. Aetna Cas. & Sur. Co., No. CIV C-87-2306 (Utah Dist. Ct. Salt Lake County Mar. 9, 1989).
\item[130.] 141 A.D.2d 124, 533 N.Y.S. 2d 91 (1988).
\item[132.] Id. at 146, 533 N.Y.S.2d at 105.
\end{footnotes}
The United States District Court for the Western District of Michigan in *Harter Corp. v. Home Indemnity Co.* conflicted with an earlier Michigan District Court by holding that a PRP notification did not trigger the defendant’s duty to defend because it did not qualify as a “suit” within the language of the duty to defend clause. Although both courts were bound by the same state law, they came to opposite results because the earlier court found the policy language ambiguous, while the court in *Harter* did not. The *Harter* court stated that, although it was a long standing principle of Michigan law to construe ambiguous policy language in favor of the insured, “[u]nambiguous language must be construed as written.” The court rejected the insured’s con-

137. See infra notes 147-150 and accompanying text.
138. Harter Corp., 713 F. Supp. at 233. The *Harter* court relied on the 6th Circuit which held that a court must not ignore applicable state law requiring that policy language be given its plain meaning. *Id.* (citing United States Fidelity & Guar. Co. v. Star Fire Coals, 856 F.2d 31, 33 (6th Cir. 1988) (“Courts should not use tortured logic to find ambiguity where none exist.”)) The *Harter* court examined the main cases relied upon in *Ex-Cell-O*, which were Detroit Edison Co. v. Michigan Mut. Ins. Co., 102 Mich. App. 136, 301 N.W.2d 832 (1980), and United States Aviex Co. v. Travelers Ins. Co., 125 Mich. App. 579, 336 N.W.2d 838 (1983), and found their reasoning unpersuasive. *Harter Corp.*, 713 F. Supp. at 233-34. The *Harter* court pointed out that although *Detroit Edison* discussed the duty to defend, it “[d]id not suggest that anything that arguably resembles a suit must be defended by the insurer,” and should not have been relied upon by *Ex-Cell-O* for such a proposition. *Id.* at 233. The *Harter* court also pointed out that *Aviex’s* holding that a “suit seeking damages” could include injunctive relief was not a definitive response to the entire issue because beyond the form of the damages there must still be some sort of court process to qualify as a suit. *Id.*
140. *Id.* at 232. The court’s holding that the plain meaning of a word should not be “perverted” to reach a given end is in accordance with case law against using the rules of construction in insurance policies to distort contract language or create ambiguities where none exist; see Wozniak v. John Hancock Mut. Life Ins. Co., 288 Mich. App. 612, 286 N.W. 99 (1939); Dieckman v. Moran, 414 S.W.2d 320, 321 (Mo. 1967) (Plain and unambiguous language should be given its plain meaning. Contra-insurer rules may apply where policy language is subject to different interpretations, but the
tention that a PRP notice was the equivalent of a "suit seeking damages," by responding that it could not construe the EPA's "threat" of liability to be a "suit" because "suit" clearly required some type of court proceeding. The court held that to find otherwise would "do violence" to the plain and ordinary meaning of the word.

While the courts discussed above found the policy language unambiguous, their opinions differ from those discussed below in more than just the results reached. The courts finding the policy language to include defense of PRP notifications have shorter opinions which never address the initial stages of discussion over whether the policy language is ambiguous. Because these opinions analyze directly under contra-insurer rules, one must assume that the courts initially found the policy language ambiguous.

B. COURTS THAT HAVE FOUND THE POLICY LANGUAGE AMBIGUOUS

In Fireman's Fund Insurance v. Ex-Cell-O Corp., the United States District Court for the Eastern District of Michigan held in a brief discussion that the insurer had a duty to defend insureds from their PRP notification. The insurer contended that, according to the plain meaning of "suit," it should have no duty to defend until the insureds become involved in a traditional lawsuit for monetary damages. The court, however, without discussing whether "suit" was ambiguous, decided it should have a broader construction than


141. Harter Corp. v. Home Indem. Co., 713 F. Supp. 231, 232 (W.D. Mich. 1989) (The insured reasoned that Michigan courts had reached opposite conclusions on this issue. The Harter court, however, did not take the other court's conclusions as a sign of ambiguous language, but simply faulty reasoning. The Harter court found the other courts' conclusion that a PRP notification was a "suit" to be against the plain meaning of the policy language.).

142. Id. at 233 (citing Detrex Chem. Indus. v. Employers Ins. of Wausau, 681 F. Supp. 438, 442 n.4 (N.D. Ohio 1987)) ("[T]he word suit cannot be defined without reference to a proceeding in a court of justice.").

143. Id. at 233.


146. Id.
that offered by the insurer. The court reasoned that coverage should not hinge on the form of action involved, but that a suit could be simply "an actual or threatened use of legal process to coerce payment or conduct by a policyholder."

Similarly, in Pepper's Steel and Alloys v. United States Fidelity and Guaranty Co., the United States District Court for the Southern District of Florida held the insurer had a duty to defend the insured from a PRP notification. The court primarily relied on Florida insurance law which dictated that a contract of insurance prepared by an insurance company must be liberally construed in favor of the insured. Without discussing possible interpretations of the policy language, the court held that any doubt regarding the duty to defend should be resolved in favor of the insured.

In United States Fidelity and Guaranty Co. v. Specialty Coatings Co., an Illinois state appellate court held the insurer had a duty to defend the insured from a PRP notification. The insurer contended it owed no duty to defend because according to the plain meaning of "suit," it was not required to defend until an actual complaint had been filed. The court, however, found the threat of available formal legal action inherent in the PRP notification a more compelling factor than whether a particular definition of "suit" was intended by the parties. It reasoned that the insured's potential liability would remain a consideration regardless of the insured's choice of response to the PRP notification. Choosing

147. Id. ("[I]nsurers construe their policies too narrowly . . . .").
148. Id.
152. Pepper's Steel, 668 F. Supp. at 1545. As demonstrated by the lack of discussion given to whether a PRP notification triggered defense once the contra-insurer rule was employed, application of the contra-insurer rule is often outcome determinative in coverage disputes. See Eagle-Picher Indus. Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982), cert. denied, 460 U.S. 1028 (1983) (multi-million dollar asbestos coverage dispute resolved against insurers by application of the contra-insurer rule).
155. Id. at 388, 535 N.E.2d at 1078.
156. Id. at 389, 535 N.E.2d at 1079.
157. Id. Accord American Motorists Ins. Co. v. Levelor Lorentzen, Inc., No. 88-
to seek voluntary compliance instead of forcing the government to
cleanup and then initiate a court action to compel reimbursement
would not eliminate the insured's potential liability for cleanup
costs. Therefore, the court considered the notification's attempt
at imposing a liability ultimately enforceable by a court the equiva-
lent of a "suit." 159

IV. ANALYSIS OF THE COURTS' INTERPRETATIONS

The courts in Harter, Detrex, and Technicon all found the
traditional understanding of the word "suit" apparent from the
policy language and did not incorporate PRP notifications into the
insurer's duty to defend. These courts followed the basic rules
of constructing insurance policies by looking to the language in the

EPA's letter of notification that Levelor was a [PRP] was sufficient to trigger the duty
to defend, since the letter forced Levelor to take legal action to defend its interests.").

158. Specialty Coatings, 180 Ill. App. 3d at 389, 535 N.E.2d at 1079. While neither
of the alternatives in dealing with the EPA after notification will eliminate the insured's
potential liability for cleanup costs, the court's reliance on this fact to expand defense
coverage is problematic. Even if the EPA eventually sought a cost recovery action
against the insured, that action would not necessarily be covered under the insured's
1988) (court held that the insurer did not have duty to defend or indemnify the insured
because CERCLA cleanup costs are not "damages" within CGL policy language);
(in coverage action against CGL insurers, CERCLA cost recovery claim not considered
"damages"). See infra note 180 and accompanying text.

159. Id. Accord Avondale Indus., Inc. v. Travelers Indem. Co., 697 F. Supp. 1314,
1322 (S.D.N.Y. 1988) (The court found that a PRP notification could have immediate
adverse consequences for the insured and concluded that the "administrative process is
part of a 'litigious process' that triggers the obligation to defend."). However, the
Specialty Coatings court's choice not to recognize the distinction between the form of a
PRP notification and the requirements of a "suit," does not comport with the 7th
Circuit's previous upholding of that distinction within the duty to defend clause. See
Fisher v. Hartford Accident & Indem. Co., 329 F.2d 352 (7th Cir. 1964) (applying
Illinois law) (Liability insurer's duty to defend is not triggered until suits are filed); Solo
Cup Co. v. Federal Ins. Co., 619 F.2d 1178, 1188-89 & n.7 (7th Cir.), cert. denied, 449
U.S. 1033 (1980) (Insurer's duty of defense was not triggered by administrative proposal);
(D. Idaho 1989) (Even though Gulf attempted to demonstrate that there was little
practical difference between the EPA's enforcement procedures and a civil litigation, the
Aetna court reasoned that "[f]he policies at issue state that the duty to defend is
triggered by a "suit" -not "claim," not "administrative proceeding," but suit . . . under
the plain meaning of the policy terms, no duty to defend has been triggered.") (emphasis
added).

160. See supra text accompanying notes 115-145.
policies to determine the meaning of the disputed term and ending their inquiry where it was apparent that "suit" had a plain meaning. In doing so, these courts interpreted "suit" according to its traditionally understood definition and gave effect to the insurers' asserted intent at the time the insurance policies were written.

Alternatively, the courts in Ex-Cell-O, Specialty Coatings, and Pepper's Steel found "suit" ambiguous and included notification of PRP status. Unlike Harter, Detrex and Technicon, these decisions appear to rely on equitable considerations instead of clear analytical interpretations of the policy language. The courts in Ex-Cell-O, Specialty Coatings, and Pepper's Steel chose not to discuss the initial question of whether the disputed term "suit" had a plain meaning, alternatively look to the policy language to determine its intended meaning, or discuss whether both asserted interpretations were reasonable before determining that "suit" was ambiguous. Their choice not to discuss these issues, however, does fall within the very broad judicial discretion allowed in construction of insurance policies. It is this broad discretion that makes litigating insurance coverage a tenuous proposition for both insurers and insureds.

Although both parties stand at risk, insurers face a greater risk of sweeping judicial decisions due to the historically accepted practice of construing policies against insurers. Contra-insurer construction may omit key facts in order to achieve the prescribed result. For example, by employing contra-insurer construction without discussing whether the insureds' expectations were reasonable, the courts in Ex-Cell-O, Pepper's Steel, and Special Coatings overlooked the fact that insureds' interpretations assumed coverage under pre-1980 policies for statutory liability that did not exist when the policy was made.

161. Following the basic rule of construction comports with the contractual nature of insurance policies. See All-Star Ins. Corp. v. Steel Bar, Inc., 324 F. Supp. 160, 163 (N.D. Ind. 1970) (The obligation to defend is "purely contractual ... [and] the obligation on the court is merely to interpret the language of the insurance contract.").

162. See supra notes 144-159 and accompanying text.

163. See Hapke, supra note 13, at 10401; Gordon & Westendorf, supra note 19, at 609.

164. In the interest of fairness to the parties, it is crucial that both conflicting interpretations be reasonable before an ambiguity is held to exist. See Producers Dairy Delivery Co. v. Sentry Ins., 41 Cal.3d 903, 226 Cal. Rptr. 558, (Cal. 1986) (a court must not find policy language ambiguous based on the unreasonable understanding of the insured).

165. See supra notes 144-159 and accompanying text.

166. Since CERCLA did not exist when pre-1980 policies were written nor any
Straying from the traditional approach of policy interpretation increases the likelihood that these courts have overlooked the intent behind the disputed policy language.\textsuperscript{167} For example, the court in \textit{Ex-Cell-O} made no examination of the policy language to attempt to ascertain the parties' intent before it concluded that "suit" should be broadened to include PRP notifications.\textsuperscript{168} It appears that the \textit{Ex-Cell-O} court skipped the major steps of policy construction and simply construed the policy against the insurer.\textsuperscript{169} Similarly, the court in \textit{Pepper's Steel} forewent any discussion of interpretations and explicitly opted for contra-insurer construction.\textsuperscript{170} Because looking at the policy language is the best evidence of what the parties intended, it seems unlikely that the method of policy construction these courts utilized could have effectuated the parties' intent from the time the policy was written.\textsuperscript{171}

Construing policy language against the insurer without initially interpreting that language may create the potential for abuse of judicial discretion.\textsuperscript{172} Instead of examining the policy language for apparent meanings or examining the reasonableness of the parties' interpretations, a court directly applying contra-insurer rules may choose the result it finds reasonable to create liability through construction.\textsuperscript{173} The courts in \textit{Ex-Cell-O} and \textit{Specialty Coatings comparable injunctive device for securing "potential" retroactive strict liability such as a PRP notification, insurers could not have intended defense coverage for CERCLA PRP notifications. See \textit{supra} notes 102-104 and accompanying text.

\textsuperscript{167} See \textit{A Common Law Alternative, supra} note 14, at 1183-84.
\textsuperscript{168} See \textit{supra} notes 144-148 and accompanying text.
\textsuperscript{169} The \textit{Ex-Cell-O} court did discuss United States Aviex Co. v. Travelers Ins. Co., 125 Mich. App. 579, 336 N.W.2d 838 (1983), and rely on its determination that the legal/equitable distinction should be irrelevant in CERCLA cases. The \textit{Ex-Cell-O} court did not, however, at any time mention the respective intents of the parties at the time the policy was written.
\textsuperscript{170} See \textit{supra} notes 149-152 and accompanying text.
\textsuperscript{171} See 1 J. Joyce, \textit{supra} note 95, § 45 (The rationale behind looking at the actual language as used within the policy is that it gives the best indication of the parties' intent. In this way a court will be far more likely to achieve the goal of giving effect according to the sense in which the parties understood the agreement when the policy was made. "[S]uch mutual intention controls as it existed at the time of contracting . . . .")
\textsuperscript{173} Id. See Casey v. Highlands Ins. Co., 100 Idaho 505, 600 P.2d 1387 (1979) (courts should rely on the traditional approach to avoid the danger that a court might create liability by construction of the contract terms or creation of a new contract for
seemed preoccupied with the costs involved in defense of PRP notifications and potential liability for CERCLA cleanup costs.\textsuperscript{174} While their focus on these costs and lack of focus on the policy language does not necessarily indicate an abuse of discretion in their decisions to expand insurers' coverage to include defense costs, it does indicate a belief that placing the costs on insurers is reasonable.\textsuperscript{175}

Another example of this belief is in the \textit{Specialty Coatings} court's focus on the fact that PRPs are potentially liable whether they defend their notifications, comply with EPA requirements, or wait for the EPA to cleanup.\textsuperscript{176} The court's interpretation of "suit" was clearly influenced by the seemingly inevitable costs that would be incurred by the insured.\textsuperscript{177} However, the court's assertion that a notification should qualify as a "suit" because a subsequent government action to compel reimbursement would necessarily trigger defense appears premature.

In an action compelling reimbursement pursuant to CERCLA section 107(a)(4)(A), the EPA has cleaned the site itself and brings a court action to recover cleanup costs. A section 107(a)(4)(A) action compelling reimbursement, unlike notification of PRP status, raises both the issues of insurers' duty to defend and duty to indemnify. Once indemnification becomes an issue, more language from the duty to defend clause is relevant to the determination of defense: "[T]he Company shall have the right and duty to defend any suit against the insured seeking damages ... \textit{even if any of the allegations of the suit are groundless, false or fraudulent} . . . ."\textsuperscript{178} While a reimbursement action would clearly provide the court action required to meet the attributes of a "suit," the insurer's duty to defend a "suit" may further depend on whether the "damages" alleged in the suit trigger indemnification. Although the expansive language requiring defense "\textit{even if any of the allegations of the suit are groundless} . . . ." has given insurers a duty to defend potentially broader than their duty to indemnify,\textsuperscript{179}

\textsuperscript{174}See supra notes 144-148, 153-159 and accompanying text.
\textsuperscript{175}See infra note 187.
\textsuperscript{176}See supra notes 153-159 and accompanying text.
\textsuperscript{177}See supra notes 153-159 and accompanying text.
\textsuperscript{178}See T. HAMILTON & K. KOWAL, supra note 16, at 48.
\textsuperscript{179}Id. ("Pursuant to this language, the insurer has a right and duty to defend
the fourth and eighth U.S. Circuits have, nevertheless, decided that where CERCLA cleanup costs do not trigger indemnification as "damages," neither do they trigger defense.\textsuperscript{180} Whether a CERCLA reimbursement action represents the necessary damages to trigger insurers' duty to indemnify under CGL language is currently unsettled and the Third, Fourth, and Eighth U.S. Circuits have decided it does not.\textsuperscript{181}

\textsuperscript{180} Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1354 (4th Cir. 1987) (applying Maryland law). After holding "damages" to encompass only legal damages and not equitable CERCLA cleanup costs pursuant to a 107(a)(4)(A) action, the court went on to address the issue of defense:

Armco has argued that the duty to defend is broader than Maryland Casualty's obligation to reimburse Armco for damages and that the district court erred in construing the terms \textit{in pari materia} [together in the same subject matter], with the effect of holding that Maryland Casualty had no duty to defend Armco . . . . The insurance contract provides that Maryland Casualty will defend any suit against Armco which alleges "such injury, . . . even if such suit is groundless, false, or fraudulent . . . ." Thus, the duty to defend arises only where there is an allegation of "such injury," which phrase refers to the liability of the insurance company to pay on behalf of Armco the sums which Armco will become legally obligated "to pay as damages because of injury to or destruction of property . . . ." It is clear that the duty to defend and the duty to reimburse are to be interpreted coterminously, and because we hold that the claim in the CCC litigation does not allege a claim for damages as defined in the policy, then a mere "possibility" of liability on behalf of Maryland Casualty does not arise.

\textsuperscript{181} Aetna Cas. & Sur. Co. v. Hanna, 224 F.2d 499, 503 (5th Cir. 1955) (insurer refused to defend or indemnify insured for a mandatory injunction and the court held that "[t]he obligation of the insurer to pay is limited to 'damages,' a word which has an accepted technical meaning in law . . . . This is a far cry from the cost to unsuccessful litigants of complying with an injunctive decree."). This distinction is particularly
As a practical matter, applying contra-insurer rules in the duty to defend PRP notification cases may have been inappropriate important in CERCLA actions for cleanup costs, which have been held to be equitable and therefore not applicable as "damages" within CGLs. See Continental Ins. v. Northeastern Pharmaceutical, 842 F.2d 977 (8th Cir. 1988) (applying Maryland law). The circuit court decided the insurer had no duty to defend because cleanup costs under CERCLA section 107(a)(4)(A) were equitable and therefore not covered under the insured's CGL policy "as damages." The court found the limited construction of "damages" to be consistent with the provision defining the insurer's obligation as a whole; "Continental did not agree to pay 'all sums which the insured shall become liable to pay.' Continental agreed to pay 'all sums which the insured shall become legally obligated to pay as damages.' The expansive reading of the term 'damages' urged by the state would render the term 'all sums' virtually meaningless." Id. at 986. The court also found a limited construction of the term "damages" to be consistent with the traditional distinction drawn between money damages and injunctive relief. Id. Lastly, the court found the limited construction of "damages" consistent with the statutory scheme of CERCLA section 107(a)(4), 42 U.S.C. § 9607(a)(4), which differentiates between cleanup costs and damages. Id. As in United States Fidelity & Guar. Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 535 N.E.2d 1071 (1989), where the court reasoned that it made little monetary difference whether a PRP incurred costs voluntarily or incurred them after refusing to comply with the government, the State in Continental Ins. attempted to argue that since there may be little difference between the dollar amount the insured may have to pay as cleanup costs under CERCLA section 107(a)(4)(A), and the dollar amount the insured may have to pay as damages under CERCLA section 107(a)(4)(C), that they should both be considered "damages" under the CGL policy. Continental Ins., 842 F.2d at 987. The circuit court in Continental Ins. clearly stated that while there might, in fact, be no practical difference between the costs, "[n]onetheless, the type of relief sought is critical to the insured and the insurer, because under CGL policies the insurer is liable only for legal damages, not for equitable monetary relief, such as cleanup costs." See Cordes, supra note 11. Since section 107(a)(4)(C) is limited to post-CERCLA damages, it is likely that the EPA will focus more on actions in equity under section 107(a)(4)(A) which can be applied retroactively)); Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987) (applying Maryland law) (equitable or injunctive relief is not applicable under policy as "damages"); Cincinnati Ins. Co. v. Milliken & Co., 857 F.2d 979 (4th Cir. 1988) (applying South Carolina law) (CGL policies generally do not extend coverage to claims for equitable relief. In the insurance context "damages" is not ambiguous, it means legal damages.); United States v. Nicolet, Inc., 857 F.2d 202, 209-10 (3d Cir. 1988) (CERCLA response cost action seeking reimbursement is regulatory and not a legal claim for "damages"); Travelers Ins. Co. v. Ross Electric of Washington, Inc., 685 F. Supp. 742 (W.D. Wash. 1988) (under Washington law, environmental cleanup costs claimed, or to be claimed from an insured, were not within coverage of policy where coverage was limited to "damages" because CERCLA costs are equitable rather than legal damages). See also Bowen v. Massachusetts, 108 S. Ct. 2722, 2731-32 (1988) (the Supreme Court found that although an equitable remedy may require an insured to pay money, "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages'); AIU Ins. Co. v. The Superior Court of Santa Clara County, 213 Cal. App. 3d 1219, 262 Cal. Rptr. 182, (1989) ("damages" as
because all of the parties involved in the duty to defend cases have been commercial entities. The commercial status of the insureds generally means that none of the parties involved suffered from a lack of bargaining power at the time the insurance policies were made and do not, therefore, need special court attention to protect their interests. The courts which have extended coverage have arguably overlooked the traditional and intended meaning of the language in favor of allocating the cost of defending PRP notifications to insurers. It seems implicit in the courts' decisions that they assume insurers can absorb the costs of defending the notifications and subsequent indemnification, which is not a practical

used in policies was unambiguous and did not include response or remedial costs); Wehner v. Syntex Corp., 618 F. Supp. 37 (E.D. Mo. 1984) (the type of relief available under CERCLA is equitable which excludes the possibility of jury trial). But see New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359 (D. Del. 1987) (injunctive and other equitable relief may constitute "damages" with in coverage); United States Aviex Co. v. Travelers Ins. Co., 125 Mich. App. 579, 336 N.W.2d 838 (1983) (the court discussed whether a suit seeking mandatory cleanup was covered under insured's CGL and decided that the remedy's injunctive nature should not prevent triggering the insurer's duty to defend a "suit seeking damages"); Aerojet-General Corp. v. San Mateo County Superior Court, 211 Cal. App. 3d 216, 257 Cal. Rptr. 621, (1989) (response costs constitute "damages" under CGLs).


184. These decisions reflect the judicial preference for using insurance as an injury compensation mechanism. See Abraham, Cost Internalization, Insurance, and Toxic Tort Compensation Funds, 2 VA. J. NAT. RESOURCES L. 123 (1982) (this article provides a general discussion of the pros and cons of this approach); Cheek, Graham & Wardzinski, supra note 9, at 10204 (one must remember that judges read the same polls that everyone else reads, and regardless of their duty to uphold the law and not dabble in popular notions as an excuse to find insurance coverage, they are human and may very well be influenced by socioeconomic, as well as legal, considerations).

long-term solution. While these decisions realistically assess the harsh ramifications of PRP notifications, they may be making unrealistic and inequitable expansions of coverage by focusing on addressing those ramifications instead of the policy language.

V. RAMIFICATIONS OF EXTENDING THE INSURERS' DUTY TO DEFEND

Extending the insurers' duty of defense to include PRP notifications forces insurers to absorb costs for which they have not prepared. As previously discussed, insurers did not assess the risks of CERCLA related claims into their pre-1980 CGLs and, therefore, the costs of defense and indemnification were not spread among insureds now designated as PRPs. Because the risks were


Relying on social policy to justify imputing an expectation of complete coverage to the insured is, in any event, legally insupportable. The only doctrinal basis for enforcing expectations in the fact of contrary policy provisions - the so-called reasonable expectations doctrine relied on in Keene, 667 F.2d at 1042 n. 12 - is reserved for situations in which the expectations enforced are strongly demonstrated, and the policy involved is a contract of adhesion.).

Id. at 1511 (citing Keaton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961, 967 (1970)).

186. See infra note 219 and accompanying text.


188. See supra notes 167-80 and accompanying text.

189. See Abraham, supra note 43, at 961 ("An unexpected judicial interpretation extending coverage beyond what was intended works like a mandatory retroactive price decrease. Insurers suffer an immediate financial loss, lose a measure of confidence in the fairness of the judicial system, and come to doubt their ability to predict future judicial developments."); Gordon & Westendorf, supra note 19:

Hazardous waste claims often have a number of common elements which make them uniquely expensive to defend, let alone indemnify. The activity causing the pollution, as well as the pollution itself, are often of long duration and the injury or damage alleged is often not detected until years after the initial dumping of wastes. Moreover, such claims often involve multiple plaintiffs, multiple defendants, multiple insurance carriers and coverage layers, and multiple policy periods. As a result, hazardous waste claims are extremely complex in nature and raise significant coverage questions.

Id. at 568.

190. See supra notes 102-05 and accompanying text.
not spread among insureds, insurers have no prepared funds with which to address CERCLA-related claims. Insurers must instead take the necessary funding from the same general insurance pool that encompasses the insurers' other planned commitments.

The funds necessary to defend a PRP notification can be formidable. Insureds may request reimbursement for investigation costs, or insurers may undertake the investigations themselves which typically include environmental consultation, formulating a remedial action and the implementation of those plans. These investigation costs often equal or exceed the amount ultimately necessary to cleanup the toxic waste pollution underlying the original claim against the insured. Similar costs result from judicial inconsistency regarding defense of PRP notifications. The conflict within the state and federal courts promotes litigation of the issue and there is already overwhelming evidence that the cost of this litigation has risen beyond the cost of initially complying with the settlement process. This is not only a detriment to insurers and insureds, but also wastes funds that could be used to cleanup toxic waste pollution. The financial losses involved when insurers litigate the issue of PRP notification defense and subsequently lose do not necessarily end with the costs of the litigation and defense. The courts which hold insurers liable for defense are likely to also hold insurers liable for indemnification.

191. See supra notes 102-05 and accompanying text; see also T. Hamilton & K. Kowal, supra note 16, at 38.


193. See infra note 197 and accompanying text.

194. HANDBOOK, supra note 17, § 8.04[a].

195. Id. (it is well settled that these costs are a part of the insurer's duty to defend) (citing Carter v. Aetna Cas. & Sur. Co., 473 F.2d 1071 (8th Cir. 1973); Daniels v. Horace Mann Mut. Ins. Co., 422 F.2d 87 (4th Cir. 1970); Royal Transit, Inc. v. Central Sur. & Ins. Corp., 168 F.2d 345, 348 (7th Cir.), cert. denied, 335 U.S. 884 (1948)). See T. Newman, Mega-Coverage Case Cost Sharing Proposals, in INSURANCE, EXCESS, AND REINSURANCE COVERAGE DISPUTES 587 (Litigation and Administrative Practice Course Handbook Series, PLI Order No. H4-5062, 1989) (Westlaw screen 2 of 9) ("It is no exaggeration to say that hundreds of millions, and sometimes billions, of dollars are at stake.").

196. See Cheek, Graham & Wardzinski, supra note 9, at 10203-04.

197. Id. See M. Lathrop, supra note 8, at 163 (enormous resources directed at litigating coverage cases may soar into the millions).

198. See Cheek, Graham & Wardzinski, supra note 9, at 10203-04.

199. See infra text accompanying note 200.

beyond its traditional meaning requires a court finding of ambiguity, such a finding may indicate a court's propensity to find further ambiguities in policy language controlling the duty to indemnify.\textsuperscript{201}

The insurers' options in attempting to avoid the costs associated with being held liable for defense are limited. Insurers cannot retroactively charge insured polluters to reflect the cost of defending PRP notifications,\textsuperscript{202} nor can they expect new policy-holders to make up for the loss.\textsuperscript{203} Insurers cannot escape further losses by post-hoc clarification of the language in their pre-1980 policies seeking to avoid the possibility of court-perceived ambiguities.\textsuperscript{204} The potential for court-perceived ambiguities and contra-insurer construction presents a considerable threat for insurers who have issued CGLs, because application of contra-insurer rules is often outcome determinative in coverage disputes.\textsuperscript{205} Many state courts have recognized the "reasonable expectations" form of contra-insurer policy construction,\textsuperscript{206} including the state courts of Michigan,\textsuperscript{207} New York,\textsuperscript{208} and Idaho,\textsuperscript{209} which are currently favorable to

\begin{footnotesize}

\textsuperscript{201.} See supra note 200.

\textsuperscript{202.} See Cheek, Graham & Wardzinski, supra note 9, at 10203.

\textsuperscript{203.} Id. (any company that tried to shift this kind of a burden to new policy holders would lose market shares as well as policyholders).

\textsuperscript{204.} Id.

\textsuperscript{205.} See supra notes 167-169 and accompanying text.

\textsuperscript{206.} See HANDBOOK, supra note 17, § 1.03[b] (citing decisions from 30 states including Alabama, Alaska, Arizona, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, Rhode Island, Texas and Wisconsin).


insurers. California case law strictly applying contra-insurer rules offers particularly harsh results for insurers.\footnote{210} One California court has gone as far as to hold that an implied contractual obligation to defend exists based solely upon the reasonable expectation of the insured,\footnote{211} and several courts have adopted this extreme position.\footnote{212}

It has been suggested that as a result of inconsistent and expansive court decisions over the insurers' duty to defend PRP notifications as well as to indemnify in the event of liability, there may be an insurance crisis.\footnote{213} Insurers have been withdrawing from offering pollution coverage specifically because the courts' interpretations of CGL language with respect to CERCLA have broadened their liability for coverage beyond what was intended under past policies.\footnote{214}

The inconsistency among state and federal court decisions has caused insurers to lose confidence in the judicial system and doubt their ability to predict future developments.\footnote{215} Insurers left with drawing from their general insurance pool to fund expanded coverage point out the impracticality of expecting this to be a long-term solution.\footnote{216} While the estimated costs of future cleanups is up

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\footnote{209} See \textit{Handbook, supra} note 17, § 1.03[b], although the court in Aetna Cas. & Sur. Co. v. Gulf Resources and Chem. Corp., 709 F. Supp. 958 (D. Idaho 1989), stated that the reasonable expectations doctrine is not applied in Idaho, one Idaho court has previously recognized it in its broadest capacity; Corgatelli v. Globe Life & Accid. Ins. Co., 96 Idaho 616, 533 P.2d 737 (1975) (plurality opinion) (invocation of the doctrine of reasonable expectations does not depend on presence of ambiguities).

\footnote{210} See \textit{infra} notes 211-12 and accompanying text.


\footnote{213} REES, supra note 192, at 420-23. See also W. MAHONEY, \textit{The Role of Insurance in Reducing Cost of Remedial Cleanup}, in \textit{Practical Approaches to Reduce Environmental Cleanup Costs} 251, 253 (Real Estate Law and Practice Course Handbook Series No. 317, 1989) (insurance companies who are willing to accept a transfer of the risk of pollution are dwindling in the direction of a legitimate crisis).

\footnote{214} REES, supra note 192, at 420-24.

\footnote{215} See Abraham, \textit{infra} note 43, at 960.

\footnote{216} See \textit{infra} note 217 and accompanying text.
to $700-800 billion, the entire industry's pool is limited at approximately $100 billion. The state and federal courts' conflicting decisions over PRP notifications are essentially a microcosm of the general judicial indecision over whether to include CERLCA liability within traditional CGLs, which leaves insurers at risk of further depleting the insurance pool with every PRP designation of an insured.

VI. RECOMMENDATION

Although relatively few state and federal courts have addressed the specific issue of insurers' duty to defend PRP notifications, the existing decisions are likely to be indicative of future conflicts and unexpected expansions of insurance coverage. Insurers have already suffered great financial loss as a result of courts finding a duty to defend where none was planned and in the litigation necessary to determine the issue. Because claims for defense of PRP notifications will only increase in the future and neither party involved can be assured of success given the current state of the law, insurers should seek a nonlitigative approach to an insured's claim for defense coverage.

Negotiation has been used in many disputes to avoid costly formal processes, and is clearly needed by insurers in order to avoid the various courtroom battles that typically result after an insured receives a PRP notification. Initially, insurers should attempt to gather their insured PRPs together with other PRPs of the same site to discuss common issues. Involvement at the beginning of the CERCLA settlement is crucial so insurers can have an impact on the decisions concerning required cleanup measures and apportionment of liability, if possible, amongst the various PRPs. Currently, most large CERCLA cases generate a "PRP steering

218. See Gordon & Westendorf, supra note 19, at 569-70; Cheek, Graham & Wardzinski, supra note 9, at 10203.
219. Cheek, Graham & Wardzinski, supra note 9, at 10203-05.
220. Id.
221. Rees, supra note 192, at 425 ("The inevitability of the claims in the future cannot be questioned. There are extensive lists of hazardous waste sites, and there seems to be little doubt that many of these sites require immediate cleanup or containment.").
222. See Anderson, supra note 49, at 328.
223. See United States v. Shell Oil Co., 605 F. Supp. 1064, 1083 n.9 (D. Colo. 1985) (PRPs may be held jointly and severally liable for the costs of cleaning up a site where the contribution is clearly divisible). See generally Superfund Program, supra note 53.
committee” which is established to deal with the EPA.\textsuperscript{224} A committee of this type can be used to reduce the cost of negotiating with the EPA and increase bargaining power by acting as a single large entity. Also, by joining together on common issues, information and ideas can be exchanged at far less expense than if each party were to research alone.\textsuperscript{225}

The PRPs and their insurers could work through the committee under a reservation of rights so that none of the parties would jeopardize their positions on coverage issues should group negotiation prove unsuccessful. However, PRPs have another general concern over reserving their rights in that they fear the appearance of liability from immediate negotiation with the EPA. Their concern is genuine because the EPA is under no obligation to find all the PRPs involved with a site, or to ensure costs are divided fairly among those that are located.\textsuperscript{226} To counter this, insurers might attempt to formulate an agreement with the EPA, short of acquiescing to a voluntary cleanup, that the parties designated as potentially responsible would begin an immediate research and cost study before they agree to any settlement procedures.

In the past the EPA has ignored the voluntary efforts of some PRPs when making settlement decisions concerning both voluntary and non-negotiating PRPs.\textsuperscript{227} Insurers might stress this fact to get extra time to research the site or attempt an agreement with the EPA to take action against the non-negotiating PRPs before voluntary participants. Insurers should also press the EPA for greater disclosure of information than it has been willing to allow in the past.\textsuperscript{228} Such actions on the insurer’s part would make immediate involvement far more attractive to PRPs and increase their overall willingness to negotiate.

Although negotiating with PRPs may not seem attractive to insurers who have not prepared for these defense costs, the goal of this negotiation is to avoid the far greater costs of unpredictable litigation. Unless the courts adopt a uniform stance on the duty to defend issue, insurers would be wise to develop a finely tuned set of attorneys to deal specifically with negotiations between insured PRPs and the EPA.\textsuperscript{229}

\textsuperscript{224} Cheek, Graham & Wardzinski, supra note 9, at 10205.
\textsuperscript{225} See Pain, supra note 67, at 15054.
\textsuperscript{227} See Pain, supra note 67, at 15054.
\textsuperscript{228} Id.
\textsuperscript{229} See generally R. Marzulla, Superfund ’91 - Congress’ Chance to Clean Up Its
CONCLUSION

As a result of the conflicting decisions among the state and federal courts over the duty to defend PRP notifications, insurers are left without any set legal foundation to rely upon in coverage disputes. Although insurers are currently favored in a small majority of the courts' decisions, the discretionary nature of insurance law may impact any given court's decision regardless of these precedents.

As demonstrated by the courts in *Ex-Cell-O*, *Pepper's Steel*, and *Specialty Coatings*, a court may not follow the rules of insurance contract interpretation in their entirety. Given the complex and economically charged nature of CERCLA, courts have several issues facing them as they interpret coverage under CGLs, issues they may not be able to separate from the interpretive task at hand. Because of this situation, insurers might better serve their economic needs by disregarding the traditional emphasis on litigating coverage issues, and opting for immediate negotiation with insured PRPs and the EPA.

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