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I. AN INTRODUCTION TO HAZARDOUS WASTE CLEANUP COSTS AND INSURANCE POLICY CONSTRUCTION

In 1983, the federal government took a drastic step in the handling of hazardous waste accidents: it bought up all the homes in a town contaminated by the toxic chemical dioxin.[1] The government appropriated thirty-six million dollars to facilitate the evacuation of the residents of Times Beach, Missouri, after the town was polluted by dioxin mishandling.[2] The eventual cleanup cost to the federal government topped ninety-six million dollars.[3] When the federal government and the state of Missouri sought reimbursement from the parties responsible for the pollution, the polluters turned to their comprehensive general liability (CGL) insurance policies for indemnification.[4] However, their insurance companies claimed that the CGL policies did not cover cleanup costs.[5]

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1. *See* Robert Reinhold, *U.S. Offers to Buy All Homes in Town Tainted by Dioxin*, N.Y. TIMES, Feb. 23, 1983, at A1.

2. *Contaminated Town is Relegated to History*, N.Y. TIMES, Apr. 14, 1985, at 26 (discussing Times Beach, Missouri's ruin by toxic waste and subsequently disincorporation by the last Board of Aldermen). In 1971, Independent Petrochemical Corporation (IPC) assisted one of its customers, Northeastern Pharmaceutical and Chemical Company (NEPACCO), in removing over 20,000 gallons of waste containing dioxin. *See* Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 654 F. Supp. 1334, 1339 (D.D.C. 1986). IPC hired an independent contractor who removed the waste, blended it with waste oils and subsequently used the mixture as a dust suppressant in various areas throughout Missouri. *Id.* The spraying of this toxic dust suppressant led to personal injury claims and property damage. *Id.* at 1339-40.

3. Jonathan Moses & Wade Lambert, *Insurers Lose Round in Environmental Cleanup*, WALL ST. J., Sept. 16, 1991, at B2 (presenting a current estimate of the costs).

4. *Independent Petrochemical Corp.*, 654 F. Supp. at 1339-40. The federal government sued pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). 42 U.S.C. §§ 9601-9675 (1988 & Supp. II 1990).

5. *Independent Petrochemical Corp.*, 654 F. Supp. at 1341.

Thus, the groundwork was laid for protracted and complex litigation between the insured and the insurer that eventually led to a split between two federal circuits.[6]

The issues in the litigation that arose from the Times Beach disaster have been aggressively contested in the Eighth Circuit in *Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co.*[7] (NEPACCO) and in the District of Columbia Circuit in *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*[8] (IPC). These two circuits considered both Missouri insurance contract law and the applicable provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), under which the government proceeded in its suit for reimbursement.[9]

The Eighth Circuit held that the insured party was liable for reimbursement of the cleanup costs.[10] The court based this holding on two main grounds. First, the court reasoned that CERCLA itself creates legal and equitable causes of action and that the government's action for reimbursement lay in equity.[11] Second, since the government proceeded in equity, there could be no coverage under a CGL policy because those policies cover only damages that are legal remedies.[12]

In contrast, the District of Columbia Circuit refused to find that the CERCLA provisions provided a meaningful distinction between legal and equitable relief.[13] Therefore, the court concluded that the CGL policy covered reimbursement of the cleanup costs.[14] Thus, the two circuits disagree on the central issue of whether cleanup cost reimbursement constitutes damages compensable under a CGL insurance contract.

Interpretation of CGL policies has been a matter of state construction.[15] Several states have addressed this issue, generally siding with

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6. These circuits are the District of Columbia Circuit and the Eighth Circuit. *See* Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 944 F.2d 940 (D.C. Cir. 1991) (finding that according to Missouri law, CGL insurance policies cover cleanup costs); Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977, 985 (8th Cir. 1988) (en banc) (holding that under Missouri law cleanup costs are equitable, not legal "damages" and thus are not covered by CGL policies).

7. 842 F.2d 977 (8th Cir. 1988).

8. 944 F.2d 940 (D.C. Cir. 1991).

9. *Id.* at 943-47; *Continental*, 842 F.2d at 983-87.

10. *Continental*, 842 F.2d at 987.

11. *Id.* at 986-87.

12. *Id.* at 983-84.

13. *See Independent Petrochemical Corp.*, 944 F.2d at 947. *Accord* AIU Ins. Co. v. FMC Corp., 799 P.2d 1253, 1273-75 (Cal. 1990) (en banc) (noting that the legislative history of CERCLA does not provide adequate insight as to the differences between the so-called damages clause and the cleanup clause).

14. *AIU Ins. Co.*, 799 P.2d at 1273-75.

15. *See, e.g.*, Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. 430, 431-32 (D.

the insured in favor of coverage for hazardous waste cleanup costs.[16] However, as *IPC* and *NEPACCO* illustrate, the question is far from settled on the federal level.[17] *NEPACCO* stands for the proposition that under CGL policies, the term "damages" does not include cleanup costs.[18] In contrast, *IPC* validates the expectancy of the insured and attaches an expansive meaning to the term "damages."[19] Some state courts have continued to rely on the *NEPACCO* holding;[20] therefore, it is critical to analyze the reasoning behind that decision and what impact the *IPC* ruling will have upon *NEPACCO*'s apparent persuasive effect. Further, the split in the circuits gains importance since it is unlikely that the United States Supreme Court will resolve this issue.[21] This fact, coupled with the reality that these costs represent a potential

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Md. 1986) *aff'd*, 822 F.2d 1348 (4th Cir. 1987), and *cert. denied*, 484 U.S. 1008 (1988) (applying Maryland law regarding insurance contract construction).

16. *See, e.g., AIU Ins. Co.*, 799 P.2d 1253 (Cal. 1990) (en banc); Spangler Constr. Co. v. Industrial Craneshaft & Eng'g Co., 388 S.E.2d 557 (N.C. 1990); Boeing Co. v. Aetna Casualty & Sur. Co., 784 P.2d 507 (Wash. 1990); United States Fidelity & Guar. Co. v. Specialty Coatings Co., 535 N.E.2d 1071, (Ill. App. Ct. 1989), *appeal denied*, 545 N.E.2d 133 (Ill. 1989).

17. Several federal courts have found that CGL policies, when interpreted with respect to the governing state law, cover response or cleanup costs that are sought by governmental entities. These costs constitute the type of damages intended to be covered as indicated by the policy's language. *See Independent Petrochemical Corp.*, 944 F.2d at 945-47 (construing CGL policies according to Missouri law); New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359 (D. Del. 1987) (construing CGL policies according to Delaware law).

For the opposite conclusion, finding no insurer liability or duty to defend, see Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977, 984-87 (8th Cir. 1988) (en banc) (construing Missouri law); Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1327-30 (4th Cir. 1986) (construing Maryland law).

18. *Continental*, 842 F.2d at 985.

19. *Independent Petrochemical Corp.*, 944 F.2d at 945.

20. *See, e.g.*, AIU Ins. Co. v. FMC Corp., 262 Cal. Rptr. 182, 187-89 (Cal. Ct. App. 1989), *rev'd*, 799 P.2d 1253 (Cal. 1990) (reasoning that the *NEPACCO* holding indicates that the plain meaning of damages within the insurance context is unambiguous and does not include equitable relief); Grisham v. Commercial Union Ins. Co., 927 F.2d 1039 (8th Cir. 1991) (construing Arkansas law); Travelers Ins. Co. v. Ross Elec. of Wash., Inc., 685 F. Supp. 742, 744-45 (W.D. Wash. 1988); Verlan, Ltd. v. John L. Armitage & Co., 695 F. Supp 950, 954 (N.D. Ill. 1988).

21. "The Supreme Court is not going to touch this with a 10-foot pole," noted an attorney whose firm represents many policy holders. Barnaby J. Feder, *Business and the Law; The Insurer's Role In Waste Cleanup*, N.Y. TIMES, Feb. 7, 1991, at D2. The reason is that the CGLs are interpreted according to state law, and furthermore, the United States Supreme Court has refused to hear similar matters relating to asbestos damage. *Id.*

liability of five hundred billion dollars, underscores the significance of determining whether federal courts will adhere to *NEPACCO* or choose to follow the holding in *IPC*.[22]

This Comment focuses on two central issues: First, whether "damages" within typical CGL policies include equitable as well as legal relief; and second, whether the language of CERCLA creates a distinction between these two types of relief that could prove dispositive to the "damages" question.

Specifically, Section II of this Comment briefly describes CERCLA and its main purposes. Attention is given to the language contained in section 9607(a)(4)(A) and section 9607(a)(4)(C).[23] Insurers have relied on this language to support their contention that a distinction exists between injunctive relief and damages.[24] Section III introduces the concept and purpose of CGL policies and analyzes the various treatments states give to the terms.

Section IV discusses the unique holding in *NEPACCO* and focuses on the reasoning used by the court to find that the insurer was not liable for reimbursement costs. The decision had a persuasive effect that permeated numerous, important hazardous waste cases during the late 1980s and early 1990s. Section V describes the recent *IPC* decision and analyzes whether that holding will have a settling effect on the uncertainty and confusion that the *NEPACCO* decision caused in this high stakes area of the law. Section V also analyzes the potential impact and significance of *IPC* since that decision was rendered by a "foreign" circuit. Section VI concludes that despite the creative arguments offered by the insurance companies in *NEPACCO*, the holding in *IPC* is more persuasive because it comports more closely with the spirit, purpose and expectations inherent in CGL policies.

II. CONGRESSIONAL ACKNOWLEDGMENT OF THE HAZARDOUS WASTE PROBLEM—CERCLA

The Resource Conservation and Recovery Act (RCRA)[25] was enacted to regulate matters associated with the transportation and disposal of hazardous wastes.[26] However, it was not designed to adequately ad-

22. *Id.* Dennis J. Block and Johnathan M. Hatt, *The SEC's 'Caterpillar' Order: Trends in MD & A Disclosure*, N.Y.L.J., July 2, 1992, at 5 (presenting a current estimate for Superfund cleanup costs).

23. 42 U.S.C. § 9607 (1988).

24. *See, e.g.*, AIU Ins. Co. v. FMC Corp., 262 Cal. Rptr. 182, 184-85 (Cal. Ct. App. 1989), *rev'd*, 799 P.2d 1253 (Cal. 1990).

25. 42 U.S.C. §§ 6901-6992 (1988 & Supp. II 1990).

26. *Id.*

dress the problem of pre-existing hazardous waste.[27] Consequently, Congress commenced hearings to fashion legislation that would provide a framework to determine the obligations of the parties responsible for creating waste problems.[28] Congressional motivation was due in part to the heightened public awareness of the devastating effects of hazardous waste as graphically illustrated by the Love Canal chemical landfill tragedy.[29] The Love Canal disaster resulted in an abnormally high incidence of birth defects and cancer among the local residents.[30] This disaster, coupled with other examples of spills and improper disposal practices, firmly placed the issue on the national agenda.[31]

Congress responded to these concerns by passing CERCLA in 1980. While the RCRA dealt with the handling and disposal of hazardous waste, CERCLA was formulated to provide for the cleanup of existing hazardous waste sites.[32] In order to accomplish this goal, Congress empowered the Environmental Protection Agency (EPA) to utilize CERCLA to determine the parties responsible for the pollution.[33] Once these parties were identified, CERCLA placed joint and several strict liability on them retroactively.[34] Liability ranged from repaying the United States Government for costs associated with cleaning up the site[35] to damages for the injury and destruction of natural resources.[36]

In addition to placing liability on the responsible parties, CERCLA was also charged with providing funds for the cleanup effort.[37] Congress created this pool of money by establishing the Hazardous Sub-

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27. 42 U.S.C. § 6902(a) (1988).

28. *See* Stephen Mountainspring, Comment, *Insurance Coverage of CERCLA Response Costs: The Limits of "Damages" in Comprehensive General Liability Policies*, 16 ECOLOGY L.Q. 755 (1989) (citing SAMUEL S. EPSTEIN ET AL., HAZARDOUS WASTE IN AMERICA 7 (1982) (regarding the historical factor leading to the passage of CERCLA).

29. *Id.*

30. *Id.*

31. *Id. See also* Jonathan Friendly, *President Asks 5-Year Extension of Toxic Waste Cleanup Program*, N.Y. TIMES, Feb. 23, 1985, § 1, at 6. CERCLA was enacted in "response to intense public concern about the health hazards from toxic chemicals buried at thousands of sites." *Id.*

32. 42 U.S.C. §§ 9601-9675 (1988 & Supp. II 1990).

33. *Id.*; *see also* United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 737 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

34. *See* AIU Ins. Co. v. FMC Corp., 799 P.2d 1253, 1275 (Cal. 1990) (en banc).

35. 42 U.S.C. § 9607(a)(4)(A); *see, e.g., AIU Ins. Co.*, 799 P.2d at 1260 (CERCLA authorizes recovery of cleanup costs).

36. 42 U.S.C. § 9607(a)(4)(c).

37. *Id.* at § 9611.

stance Superfund (Superfund).[38] While Superfund provided a starting point for facilitating the cleanup of polluted sites, it was not intended to be the sole source of funds.[39] Clearly, the Superfund coffers would have to be replenished through actions filed against the responsible parties under the authority of CERCLA.[40] The choice of which CERCLA subsection to proceed under has become a significant issue in the hazardous waste litigation battle.[41]

A. *Clauses of Controversy—CERCLA Sections 9607(a)(4)(A) and 9607(a)(4)(C)*

Section 9607(a)(4)(A) of Title 42 states that liability exists for "all costs of removal or remedial action incurred by the United States Government or a State."[42] In essence, this subsection permits the EPA to sue the responsible parties for reimbursement of governmental cleanup or response costs.[43]

Section 9607(a)(4)(C) provides that the responsible party shall be liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release."[44] On its face, this subsection appears to be limited to damages caused by the responsible party through the improper or inadequate handling of hazardous waste. Many courts[45] and commentators[46] recognize that Congress provided

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38. *Id.*

39. The Superfund was originally funded at $1.6 billion. 42 U.S.C. § 9631 (1988).

40. *See id.* at § 9611.

41. *See id.* at § 9607(a)(4)(A) (providing a cause of action for governmental recovery of cleanup or response costs), § 9607(a)(4)(C) (creating an action for damages resulting from the release of toxins).

42. 42 U.S.C. § 9607(a)(4)(A).

43. *See id.*

44. *Id.* at § 9607(a)(4)(C).

45. *Compare* Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977, 986-88 (8th Cir. 1988) (emphasizing the fact that Congress allowed for separate causes of action and that creates a choice for the government to sue for damages or cleanup costs which necessarily vary in their respective measurements of liability) *with* Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 944 F.2d 940, 947 (D.C. Cir. 1991). The court in *IPC* reasoned that other courts, including a Supreme Court holding, indicate that the forms of relief granted under CERCLA merge and do not distinguish between cleanup costs and damages. *Id.* at 947.

46. *Compare* Lonnie A. Jones, Comment, *Insurance Coverage For Hazardous Waste Cleanup: The Comprehensive General Liability Insurance Policy Defined*, 39 CATH. U.L. REV. 195 (1989) (concluding that cleanup costs, an economic loss, are not equivalent to property damage and therefore are not covered under a standard CGL insurance policy) *with* Stephen Mountainspring, Comment, *Insurance Coverage of CERCLA Response Costs: The Limits of "Damages" in Comprehensive General Liabil-*

two separate causes of action under these subsections. Depending on their interests, parties have either used the distinction to highlight statutory intent for a clear separation between damages and response costs, or argued that these clauses are, in effect, interchangeable.[47]

B. Construing the Clauses

There has been considerable debate and disagreement regarding the relationship between Parts (A) and (C) of Section 9607(a)(4). While some courts have exploited the distinction,[48] others have sought to minimize the language.[49] The debate is important because CGL policies have been construed to provide coverage for "legal damages" only.[50] Thus, the question becomes whether an action brought against a responsible party under Section 9607(a)(4)(A) for reimbursement of cleanup costs constitutes damages.

1. Construing the Language Liberally

The camp that imposes liability on the insurers under a CERCLA Section 9607(a)(4)(A) cause of action discount congressional intent regarding the language and the existence of a separate "damages" subsection.[51] Proponents point to *Pennsylvania v. Union Gas Co.*,[52] in which the United States Supreme Court stated that CERCLA "clearly

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ity Policies, 16 ECOLOGY L.Q. 755 (1989) (asserting that the term "damages" is ambiguous and that fact, coupled with insurance contract law, indicates that if a term is ambiguous then it will be construed most favorably to the meaning that the purchaser of the policy ascribed to it).

47. *See supra* note 41.

48. *See Continental*, 842 F.2d at 986-88; Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. 430, 432-35 (D. Md. 1986); Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1328-29 (4th Cir. 1986).

49. *See Independent Petrochemical Corp.*, 944 F.2d at 947; AIU Ins. Co. v. FMC Corp., 799 P.2d 1253, 1273-75 (Cal. 1990) (en banc); New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1365-66 (D. Del. 1987); United States Aviex Co. v. Travelers Ins. Co., 336 N.W.2d 838, 842-43 (Mich. Ct. App. 1983).

50. *See* Aetna Casualty & Sur. Co. v. Hanna, 224 F.2d 499, 503 (5th Cir. 1955); Travelers Ins. Co. v. Ross Elec. of Wash. Inc., 685 F. Supp. 742, 744 (W.D. Wash. 1988); Desrochers v. New York Casualty Co., 106 A.2d 196, 198 (N.H. 1954). *But see* Village of Morrisville Water & Light Dept. v. United States Fidelity & Guar. Co., 775 F. Supp. 718, 728 (D. Vt. 1991); AIU Ins. Co. v. FMC Corp., 799 P.2d 1253, 1266 (Cal. 1990) (en banc).

51. *See supra* note 49 and accompanying text.

52. 491 U.S. 1 (1989).

permits suits for money damages against states in federal court."[53] The Court broadly reasoned that Section 9607 provides "liability in damages" and did not distinguish cleanup costs from damages.[54] Thus, while this case dealt with reimbursement to Pennsylvania for cleanup costs expended to remedy a hazardous waste release, it is significant that the Court was not compelled to comment or differentiate between the two clauses.[55]

The California Supreme Court also addressed the matter of the CERCLA statutory language in *AIU Insurance Co. v. FMC Corp.*[56] Whereas the United States Supreme Court chose to omit any discussion regarding the particular construction of Section 9607(a) in *Pennsylvania*,[57] the California Supreme Court elected to directly focus on the purported distinction between Sections 9607(a)(4)(A) and (a)(4)(C).[58]

In *AIU Insurance Co.*, the California Supreme Court held that the insured would be covered by his CGL policy and that the policy's coverage of "damages" included reimbursement of cleanup costs sought under CERCLA Section 9607(a)(4)(A).[59] The court discounted the significance of the separate CERCLA clauses[60] and reversed the court of appeal, which had in part relied on the distinction.[61] The court observed that the difference between the two clauses and the differing types of recovery are not "clearly laid out in the statute itself nor fully explained in its sparse legislative history."[62] Therefore, the court reasoned that without a clear statutory directive the matter would be left to judicial

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53. *Id.* at 13.

54. *Id.* at 12. *See also* Hudson Ins. Co. v. American Elec. Corp., 748 F. Supp. 837, 843 (M.D. Fla. 1990) (recognizing "that CERCLA is a broad, wide-ranging regulatory and remedial regime"); Cannons Eng'g Corp. v. United States, 899 F.2d 79, 87 (1st Cir. 1990) (Congress did not intend to handcuff government negotiators in CERCLA cases by insisting that the EPA allow polluters to pick and choose which settlements they might prefer to join).

55. *Pennsylvania*, 491 U.S. at 23.

56. 799 P.2d 1253, 1273-75 (Cal. 1990) (en banc).

57. *Pennsylvania*, 491 U.S. at 23.

58. *AIU Ins. Co.*, 799 P.2d at 1261-63.

59. *Id.* at 1259.

60. *Id.* at 1261-63 (observing that various state court decisions have held that the injunctive costs fit within a broad definition of "damages" envisioned by CERCLA). *See also* United States Aviex Co. v. Travelers Ins. Co., 336 N.W.2d 838, 843 (Mich. App. 1983) (question of coverage which hinges on the "mere fortuity" of which recovery mechanism the Government will select in enforcing CERCLA is unreasonable).

61. AIU Ins. Co. v. FMC Corp., 262 Cal. Rptr. 182 (1989), *rev'd*, 799 P.2d 1253 (Cal. 1990) (en banc).

62. *AIU Ins. Co.*, 799 P.2d at 1270. The court acknowledged that statutory distinctions exist between 42 U.S.C. § 9607(a)(4)(A) (providing for response costs) and § 9607(a)(4)(C) (the "damages" remedy), but the court concluded that "Congress clearly intended considerable overlap between the two forms of recovery." *Id.*

interpretation.[63] Accordingly, the court adopted the view that the lack of a clear directive would "unreasonably make coverage hinge on the 'mere fortuity' of which recovery mechanism . . . the government selects in enforcing CERCLA."[64]

The court's viewpoint received further support in *United States v. Cannons Engineering Corp.*,[65] in which the First Circuit evaluated the language and intent of CERCLA. The court noted that an overriding goal was to expedite "remedial measures for hazardous waste sites."[66] The emphasis on quick response, to avoid the threat of uncontrolled hazardous waste, indicates congressional intent to provide broad remedies, rather than to force choices between different types of relief.[67]

An additional argument made by commentators[68] and courts[69] is that because CERCLA was never intended to be an insurance statute, it should not be construed to override or preempt state law controlling insurance matters.[70] Moreover, some courts maintain that since CERCLA was not in existence when most CGL policies were entered into,[71] the technical differences between the clauses would not be dis-

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63. CERCLA does not define the term "damages" and thus it is subject to judicial interpretation which can necessarily lead to ambiguity. For an example of a clear statutory directive see Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (noting that the Securities Exchange Act of 1934 carefully defines the term "sale" for purposes of the Act and that this statutory definition serves to prevent alternative definitions and constructions of the term for purposes regarding the Act).

64. *AIU Ins. Co.*, 799 P.2d at 1263.

65. 899 F.2d 79 (1st Cir. 1990).

66. *Id.* at 89.

67. *Id. See also supra* notes 54-55 and accompanying text (adhering to a liberal and expansive reading of CERCLA).

68. Stephen Mountainspring, Comment, *Insurance Coverage of CERCLA Response Costs: The Limits of "Damages" In Comprehensive General Liability Policies*, 16 ECOLOGY L.Q. 755, 779 (1989) (noting that CERCLA does not define the relationship between the insurer and the insured; therefore it "should not be used to define the term 'damages' for the purpose of interpreting the scope of coverage of an insurance policy").

69. Hudson Ins. Co. v. American Elec. Corp., 748 F. Supp. 837, 843-44 (M.D. Fla. 1990). The court observed that 42 U.S.C. § 9672(a) itself clearly indicates that CERCLA should not be "construed to affect either the tort law or the law governing the interpretation of insurance contracts of any state." *Id.*

70. *See supra* notes 62-63.

71. CERCLA was enacted in 1980 and CGL insurance policies were widely sold to hazardous waste producers and handlers in the 1960s and 1970s. *See, e.g.*, Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co. Inc., 842 F.2d 977, 979 (8th Cir. 1988) (where NEPACCO was covered by three CGL policies from 1970 to 1972); Inde-

positive as to whether the insurer or the insured would be liable under the statute.[72] Rather, the scope of liability would be determined based on the intent of the parties at the time the CGL was formed.[73]

2. Construing the Language Literally

Insurance companies[74] and commentators[75] contend that the language Congress employed indicates congressional intent to create a distinction between law and equity.[76] They maintain that the selection of which CERCLA provision to proceed under is crucial to the issue of CGL policy coverage.[77] In support of this distinction,[78] proponents[79] rely on the recent United States Supreme Court decision, *Bowen v. Massachusetts*.[80] Though outside the hazardous waste and insurance context, *Bowen* dealt specifically with whether a federal district court had jurisdiction to review a decision made by the Secretary of Health and Human Services disallowing state reimbursement under Medicaid for certain services.[81] The Secretary stressed that jurisdiction was improper because the suit was not an action "seeking relief other than money damages."[82] In rejecting this argument, the Court acknowledged that even the "monetary aspects of the relief sought by the State are not 'money damages' as that term is used in Section 702."[83] The Court re-

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pendent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 944 F.2d 940, 942-43 (D.C. Cir. 1991) (IPC was covered by 67 CGLs from 1971 to 1983).

72. AIU Ins. Co. v. FMC Corp., 799 P.2d 1253, 1271 (Cal. 1990) (en banc) (reasoning that the intent of the parties at the time that they mutually agreed to enter into the insurance contract was the dispositive issue and that the later adopted technical "niceties of statutory language" could not enter into the respective party's intent).

73. *Id.*

74. *See* C.C. Grisham v. Commercial Union Ins. Co., 927 F.2d 1039, 1041 (8th Cir. 1991); Continental, 842 F.2d at 986-88; Mraz v. Canadian Universal Ins. Co., Ltd., 804 F.2d 1325, 1329 (4th Cir. 1986); Verlan, Ltd. v. John L. Armitage & Co., 695 F. Supp. 950, 954 (N.D. Ill. 1988); Maryland Casualty Co. v. Armco, 643 F. Supp. 430, 434 (D. Md. 1986).

75. *See* Lonnie A. Jones, Comment, *Insurance Coverage For Hazardous Waste Cleanup: The Comprehensive Liability Insurance Policy Defined*, 39 CATH. U.L. REV. 195, 209-10 (1989) (contending that the language in CERCLA is indicative of a separation between an equitable remedy and a legal remedy).

76. *See supra* notes 74-75.

77. *Id.*

78. *See* Jones, *supra* note 75.

79. *See* Jones, *supra* note 75.

80. 487 U.S. 879 (1988).

81. *Id.* at 882.

82. *Id.* at 891.

83. *Id.* at 893. Section 702 of the Administrative Procedure Act prohibits a court from dismissing an action seeking relief "other than money damages." The Section goes on to specify when that prohibition may take place. 5 U.S.C. § 702 (1988).

lied on the plain meaning of the language and maintained that the action lay in equity and was not an action for money damages.[84] Insurers have similarly relied on the law-equity distinction that was found by the Court in *Bowen* and argue that this distinction should be applied to CERCLA's "equitable" and "legal" clauses.[85]

The New Jersey Appellate Division spoke to this distinction within the context of hazardous waste and insurance in *CPS Chemical Co. v. Continental Insurance Co.*[86] The court acknowledged the distinction but held that the insurer must indemnify CPS under a CGL policy.[87] The court creatively distinguished the act of paying the state, which was viewed as "damages," from the state itself performing the remedial action.[88] The court likened damages to medical bills "designed to restore an accident victim to health."[89] While the court recognized that a legal action or an equity action was envisioned, the court finessed the issue in a carefully constructed opinion.

A more faithful allegiance to this distinction was evident in *Mraz v. Canadian Universal Insurance Co.*[90] While the Fourth Circuit did not use the terms "legal" and "equity," in *Mraz*, the opinion focused on the differences between the "response" provision in section 9607(a)(4)(A) and the "damages" clause in section 9607(a)(4)(C).[91] In *Mraz*, the government cleaned up the polluted site and proceeded under section 9607(a)(4)(A). The court held that the insurer did not have to indemnify Mraz under a CGL insurance policy because the complaint prayed for

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84. *Bowen*, 487 U.S. at 897-98 (noting that Congress when enacting the statutory language used the term "money damages" and that there was no indication that those words would be the "functional equivalent of a broader concept such as 'monetary relief.'").

85. *See supra* note 74 and accompanying text (noting insurer who propounded that distinction).

86. 536 A.2d 311 (N.J. Super. App. Div. 1988).

87. *Id.* at 315. The suit was not brought under CERCLA, but was grounded in state law, specifically the Spill Compensation and Control Act, N.J. Stat. Ann. Section 58:10-23.11 *et seq.* (West 1992) and the Water Pollution Control Act, N.J. Stat. Ann. 58:10A-1 *et seq.* (West 1992). *CPS Chemical Co.*, 536 A.2d at 312.

88. *Id.* at 316.

89. *Id.* The court reasoned that CPS merely had an obligation to pay money and not to take any remedial action. Thus, CPS was never enjoined to perform a task (other than payment). *Id.* Therefore, the action was based on legal grounds and not in equity.

90. 804 F.2d 1325 (4th Cir. 1986) (construing Maryland law and rendered two months after Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. 430 (D. Md. 1986)).

91. *Id.* at 1328-29.

recovery of the costs incurred by the government.[92] The court's inquiry characterized the response costs as an economic loss and not property damage that was outside the scope of the CGL policy.[93]

As the cases indicate, the weight assigned or attributed to CERCLA's statutory language varies according to the position of the party.[94] The insurers assert that the law-equity distinction is clearly delineated and the distinction must be regarded as a significant factor in determining the ultimate question of liability under a CGL contract.[95] In contrast, the insured parties downplay the language.[96] They maintain that the ultimate question of liability under a CGL policy should be answered by analyzing the terms of the policy and the intent of the parties.[97]

III. THE COMPREHENSIVE GENERAL LIABILITY POLICY

The CGL form of insurance coverage has been in existence for over a century and is widely used.[98] The clauses and terms are generally standardized[99] and the insurer typically places limitations upon the covered risk by inserting exclusion provisions.[100] CGL's are the preferred form

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92. *Id.* at 1329.

93. *Id.*

94. *See* AIU Ins. Co. v. FMC Corp., 799 P.2d 1253, 1270-71 (Cal. 1990) (noting that state law, not CERCLA, is dispositive on the issue of insurance policy interpretation). *But see Maryland Casualty Co.*, 643 F. Supp. at 434 (finding CERCLA's distinction between §§ 9607(a)(4)(A) and (a)(4)(C) to provide the party a choice to proceed in either a legal fashion or in an equity manner).

95. *See supra* notes 74-75 and accompanying text (maintaining that CERCLA's statutory language plainly displays Congressional intent to create a distinction between a damages action and an injunctive measure).

96. *See AIU Ins. Co.*, 799 P.2d at 1270-71; New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1365-66 (D. Del. 1987) (holding that "damages" may refer to economic damages or cleanup costs).

97. *See AIU Ins. Co.*, 799 P.2d at 1264; Krombach v. Mayflower Ins. Co., 785 S.W. 2d 728, 731 (E.D. Mo. 1990).

98. Stephen Mountainspring, Comment, *Insurance Coverage of CERCLA Response Costs: The Limits of "Damages" In Comprehensive General Liability Policies*, 16 ECOLOGY L.Q. 755, 758 (1989).

99. *See infra* text accompanying note 103.

100. These exclusion provisions are utilized by insurers in order to narrow their scope of risk based on business considerations and premiums charged. Within the context of hazardous waste coverage various exclusions have been inserted into the CGL policies. *See, e.g.*, Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 750 F. Supp. 1340, 1348 (E.D. Mich. 1990) (pollution exclusion clause precluding the insured from coverage if the pollutants release is not sudden and accidental); Gerrish Corp. v. Universal Underwriters Ins. Co., 754 F. Supp. 358, 361-62 (D. Vt. 1990), *cert. denied*, 112 S. Ct. 2939 (1992) (CGL contained exclusionary language that precluded coverage of specific type of pollutant unless the release was sudden or accidental); Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co., 528 A.2d 76, 77 (N.J. Super. Ct. 1987) (coverage did not include damages to the insured's own property).

of coverage for hazardous waste producers and handlers.[101] The resolution of the issue of coverage under an insurance contract centers upon the language utilized in the insurance policy. This Section analyzes the specific CGL policy language that has spawned much of the controversy regarding hazardous waste litigation.

A. The "Damages" Clause

During the period of time that dioxin was improperly disposed of in Times Beach, both IPC and NEPACCO were covered by CGL policies.[102] A representative sample of a CGL policy coverage provision specifically addressing damages states: "[T]he company will pay on behalf of the insured all sums which the insured shall become *legally obliged to pay as damages* because of bodily injury or property damage to which this insurance applies, caused by an occurrence . . . ."[103]

The present debate centers on the phrase "legally obliged to pay as damages."[104] The responsibility of construing the language is vested within each state.[105] Most judicial interpretation starts with the premise that the plain meaning of the policy is dispositive.[106] The rationale behind this premise is best understood by analyzing the relationship between the parties. Insurers enjoy several advantages over the in-

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101. *See* Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 944 F.2d 940, 942 (D.C. Cir. 1991); Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977, 977 (8th Cir. 1988), *cert. denied*, 488 U.S. 821 (1988); *Gerrish*, 754 F. Supp. 358; *AIU*, 799 P.2d at 1259; *Broadwell*, 528 A.2d at 78.

102. *Continental Ins. Cos.*, 842 F.2d 977; *Independent Petrochemical Corp.*, 944 F.2d 940; *see supra* text accompanying note 65.

103. Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 654 F. Supp. 1334, 1340 (D.D.C. 1986) (emphasis added).

104. *Id.* at 1341.

105. Hudson Ins. Co. v. American Elec. Corp., 748 F. Supp. 837, 843 (M.D. Fla. 1990) (citing Miller v. National Fidelity Life Ins. Co., 588 F.2d 185, 186-87 (5th Cir. 1979) (stating that the McCarran-Ferguson Act "precludes the application of federal laws if, as a result, laws of a state regulating insurance would be invalidated, impaired or superseded")).

106. *See, e.g.*, Avondale Indus. v. Travelers Indem. Co., 887 F.2d 1200, 1206 (2d Cir. 1989) (noting that New York gives the terms of an insurance policy "a natural and reasonable meaning"); Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977, 985 (8th Cir. 1988) (stating that "under Missouri law [t]he rules of construction applicable to insurance contracts require that the language used be given its plain meaning"); AIU Ins. Co. v. FMC Corp., 799 P.2d 1253, 1264 (Cal. 1990) (en banc) (finding that California law interprets the terms in an insurance policy in their "ordinary and popular sense").

sured.[107] For example, the language is usually crafted and fixed by the insurer because it is within the insurer's area of expertise.[108] In addition, they assess the risk and decide what premiums should be charged.[109] The relationship is best characterized as one of patently unequal bargaining positions or adhesion.[110] Therefore, many states adhere to a posture that if the terms within a CGL policy are ambiguous, they will be construed in the manner most favorable to the hypothetical layman who purchased the policy.[111] If, however, the terms manifest an unambiguous technical meaning, then those terms are construed technically.[112]

The insurers argue that "damages" is an unambiguous term that has a recognized technical meaning within the context of a CGL policy.[113] Further, they assert that their notion of a technical meaning is reinforced by the usage of the word "legally" preceding damages.[114] Insurers conclude that this construction indicates that there is a distinction between legal costs and equitable costs.[115] The insurers conclude that legal costs are compensable items under the provision and that equita-

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107. *AIU Ins. Co.*, 799 P.2d at 1265.

108. *Id.*

109. *Id.*

110. *See* ROBERT E. KEETON, BASIC TEXT ON INSURANCE LAW 350 (1971) (where the very title Comprehensive General Liability Insurance conveys to the buyer an expectation of full and complete coverage).

111. *See* Gerrish Corp. v. Universal Underwriters Ins. Co., 754 F. Supp. 358, 367-68 (D. Vt. 1990); New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp 1359, 1362 (D. Del. 1987); Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. 430, 431 (D. Md. 1986); *AIU Ins. Co.*, 799 P.2d at 1265. In *AIU*, the court recognized that in some instances ambiguities in insurance policies need not be strictly construed against the insurer if the insured possessed legal sophistication and substantial bargaining power. It is noteworthy that while the court acknowledged that FMC possessed these qualities, it refused "to depart from ordinary principles of interpretation." *AIU Ins. Co.*, 799 P.2d at 1265.

112. *See, e.g.*, Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., Inc., 842 F.2d 977, 985 (8th Cir. 1988) (Missouri law states that "[i]f the language is unambiguous the policy must be enforced according to such language"); Aetna Casualty & Sur. Co. v. Hanna, 224 F.2d 499, 503 (5th Cir. 1955) (construing Florida law to indicate that since an insurance policy is a contract, its unambiguous terms will be deemed in effect and govern coverage issues).

113. *See Continental Ins. Co.*, 842 F.2d at 985 (recognizing that outside of the insurance context the term could be considered ambiguous, but stating, "In the insurance context, however, the term 'damages' is not ambiguous, and the plain meaning of the term 'damages' as used in the insurance context refers to legal damages and does not include equitable monetary relief.").

114. *Id.* at 985-86. *See also* Mraz v. Canadian Universal Ins. Co., Ltd., 804 F.2d 1325, 1327 (4th Cir. 1986); *Aetna Casualty & Sur. Co.*, 224 F.2d at 503; *Maryland Casualty Co.*, 643 F. Supp. at 434-35.

115. *Maryland Casualty Co.*, 643 F. Supp. at 434-35.

ble costs are excluded.[116] They reason that because cleanup costs constitute equitable relief, such costs fall outside of the coverage provided by the CGL.[117]

On the other hand, proponents of the insureds' position do not agree that the term "damages" is limited to a technical meaning.[118] They argue that this difference of opinion demonstrates that the term is ambiguous and consequently must be construed in favor of what the insured understood it to mean when the contract was formed.[119] This argument rests on the unequal nature of the relationship between the parties, as well as the expectations created by the terms "comprehensive" and "general."[120] Therefore, if the insurer wishes to unambiguously exclude equitable costs, he could draft the language in that manner or add an exclusionary provision for greater clarity.[121] However, if the language is ambiguous and exclusions are absent, most courts protect the insureds' expectation of coverage instead of finding a technical meaning.[122] Thus, it is necessary to analyze whether damages should be afforded a plain or technical meaning.

B. Damages—A Plain Meaning

The insurers, and the courts sympathetic to their viewpoint, choose to construe "damages" as an unambiguous term with an accepted technical meaning within the context of the insurance policy.[123] This posi-

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116. *Id.*

117. *Id.*

118. *See* Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 944 F.2d 940, 945-46 (D.C. Cir. 1991) (adhering to a "common and ordinary understanding of damages"); Village of Morrisville Water & Light Dep't v. United States Fidelity & Guar. Co., 775 F. Supp. 718, 724-25 (D. Vt. 1991); AIU Ins. Co. v. FMC Corp., 799 P.2d 1253, 1262-63 (Cal. 1990) (en banc); United States Aviex Co. v. Travelers Ins. Co., 336 N.W.2d 838, 842-43 (Mich. App. 1983).

119. *Village of Morrisville Water & Light Dep't*, 775 F. Supp. at 724-25. *See also AIU Ins. Co.*, 799 P.2d at 1267-68. The court relied on California Civil Code § 1636 which mandates that the "mutual intention of the parties at the time the contract is formed governs interpretation." *Id.* at 1264.

120. *See* KEETON, *supra* note 110.

121. *See supra* note 100 and accompanying text.

122. *See supra* note 111 and accompanying text.

123. *See* Grisham v. Commercial Union Ins. Co., 951 F.2d 872 (8th Cir. 1991); Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d. 977 (8th Cir. 1988); Travelers Ins. Co. v. Ross Elec. of Wash., Inc., 685 F. Supp. 742 (W.D. Wash. 1988); Verlan, Ltd. v. John L. Armitage & Co., 695 F. Supp. 950 (N.D. Ill. 1988); Maryland Casualty Co. v. Armco Inc., 643 F. Supp. 430 (D. Md. 1986).

tion is challenged by the insured parties who assert that "damages" is ambiguous both inside and outside of the insurance policy context and thus should be construed according to its plain meaning as understood by the buyer of the policy.[124] The insureds, and the courts ruling in their favor, have put forth various arguments in support of their contention.

The first argument maintains that the term "damages" is not defined in the CGL policies.[125] Some of the CGLs did include language that purported to define "damages," but courts have noted that this language should not be viewed as a limitation.[126] These courts characterized the wording as simply indicating that the term "damages" may include certain items.[127] The policies that were sold to IPC in fact did not include any definitive language regarding the term "damages."

The term "damages" remains largely undefined in the CGL policy context, and its interpretation has been subjected to a state-by-state analysis.[128] The current debate between insurers and their insureds, and the resultant disagreement among courts regarding a consensus definition of "damages," is indicative of the ambiguity inherent in the term.[129] It can be argued that if the courts cannot agree upon a universal definition of "damages," then the term is ambiguous and open to various interpretations. Therefore, the insureds maintain that since "damages" is a term susceptible to more than one plain interpretation, then the

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124. Some states describe the buyer of the policy as an "ordinary businessman." *See* Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1206-07 (2d Cir. 1989) (construing New York law). Other states are more liberal in their characterization. *See* Krombach v. Mayflower Ins. Co., 785 S.W.2d 728, 731 (E.D. Mo. 1990) (construing Missouri law and characterizing the buyer as "the average lay person"); AIU Ins. Co. v. FMC Corp., 799 P.2d 1253, 1264 (Cal. 1990) (construing California law and describing the buyer as a layman).

125. Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 944 F.2d 940, 943 (D.C. Cir. 1991).

126. See *AIU Ins. Co.*, 799 P.2d at 1259 n.3; New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1365 (D. Del. 1987).

127. *See New Castle County*, 673 F. Supp. at 1365-66. *See also* Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 944 F.2d 940, 943 (D.C. Cir. 1991). The policies that were sold to IPC did not include any definitive language regarding the term "damages." *Id.*

128. Hudson Ins. Co. v. American Elec. Corp., 748 F. Supp. 837, 841 n. 4 (M.D. Fla. 1990) (some jurisdictions in analyzing damages issues "rest solely on the interpretation of state law").

129. *Compare* Travelers Ins. Co. v. Ross Elec. of Wash., Inc., 685 F. Supp. 742, 745 (W.D. Wash. 1988) ("Since the term 'damages' has an 'accepted technical meaning in law,' it should be given effect according to its plain meaning; that is, legal damages, not including equitable relief."); *with New Castle County*, 673 F. Supp. at 1365-66 ("[A]n ordinary definition of the word 'damages' makes no distinction between actions at law and actions in equity.").

meaning adopted must be the one "most favorable to the insured."[130]

In *United States Aviex Co. v. Travelers Insurance Co.*,[131] Michigan recognized the obligation to defend the insured under the CGL policy rested on the definition of "damages."[132] In *Aviex*, the insurer sought declaratory judgment regarding its obligation to reimburse the insured for corrective measures the insured was compelled to undertake by the Michigan Department of Natural Resources.[133] The CGL policy did not define "damages," but it did include language excluding any damages to "property owned by the insured."[134] Although the court found the insurer's position persuasive, the court nevertheless found that coverage existed.[135] The court rejected the insurer's viewpoint because it interpreted "damages" too narrowly.[136] The court concluded that the state could have sued for "traditional 'damages,'" which would have been covered, rather than compel the polluter to engage in a cleanup of the site.[137] Therefore, it was a "merely fortuitous" choice by the state and should not impact coverage.[138] Predictably, this reasoning met with pointed criticism by insurers.[139]

The issue of coverage was more fully explored in *New Castle County v. Hartford Accident and Indemnity Co.*[140] The County moved for a declaratory judgment seeking indemnification for the remedial steps that it was compelled to undertake to clean up the pollution. The court agreed with the County and adopted a broader definition of "damag-

130. Krombach v. Mayflower Ins. Co., 785 S.W.2d 728, 731 (E.D. Mo. 1990).

131. 336 N.W.2d 838 (Mich. App. 1983).

132. *Id.* at 842.

133. *Id.* at 840.

134. *Id.* The CGL policies purchased by NEPACCO and IPC did not contain the exclusion noted in *Aviex*. *See* Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 944 F.2d 940, 943 (D.C. Cir. 1991); Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977, 979-80 (8th Cir. 1988).

135. *Aviex*, 336 N.W.2d at 842-43.

136. *Id.* (rejecting the analysis offered in Aetna Casualty & Sur. Co. v. Hanna, 224 F.2d 499 (5th Cir. 1955) that found a cause of action for damages was a "legal" action).

137. *Id.*

138. *Id.* at 843. The court relied on Michigan's statutory language that provided the State with the means to recover "injuries done to the natural resources of the state." *Id.*

139. Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. 430, 433 (D. Md. 1986) ("To adopt the reasoning of the *Aviex* decision is to adopt no reasoning at all.").

140. 673 F. Supp. 1359 (D. Del. 1987).

es."[141] While the policies did include language purporting to define the term, the court characterized those descriptions as being of little help.[142]

The *New Castle* court recounted that Delaware adheres to the ordinary, usual meaning of the terms in an insurance policy whenever possible.[143] It is significant that the *New Castle* court used the definition found in *Webster's Dictionary*,[144] whereas the insurers often point to a definition of damages as stated in *Black's Law Dictionary*.[145] The court noted that the common definition does not recognize the distinction "between actions at law and actions in equity."[146] Thus, the court concluded that according to Delaware law, which adheres to a plain meaning as understood by the insured, the definition provided by *Webster's* better reflected the insured's expectations.[147]

The California Supreme Court also addressed the issue of damages in *AIU Insurance Co.*, holding that a technical meaning does not exist within CGL policies.[148] The court stated that California law construes insurance "policy language according to the mutual intentions of the parties and its 'plain and ordinary' meaning, resolving ambiguities in favor of coverage."[149] Based on this pro-insured premise, the court reasoned that the court of appeal erred when it departed from this narrow inquiry. The court of appeal sought to explore public policy considerations and found that a technical meaning existed.[150]

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141. *Id.* at 1364-65 (relying on *Aviex* analysis).

142. *Id.* at 1365. *See also supra* note 126 and accompanying text.

143. *New Castle County*, 673 F. Supp. at 1365 (citing Johnson v. Tally Ho, Inc., 303 A.2d 677, 679 (Del. Super. Ct. 1973)).

144. *Id.* "The estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 571 (1971).

145. *See, e.g.*, Aetna Casualty & Sur. Co. v. Hanna, 224 F.2d 499, 503 (5th Cir. 1955) (relying on the definition found in BLACK'S LAW DICTIONARY 499 (3d ed.) to indicate that a technical meaning for damages was accepted at law).

146. *New Castle County*, 673 F. Supp. at 1365. *See also* AIU Ins. Co. v. FMC Corp., 799 P.2d 1253, 1266 (Cal. 1990) (en banc) ("California has generally abandoned the traditional distinction between courts of equity and courts of law . . . ."); Village of Morrisville Water & Light Dep't v. United States Fidelity & Guar. Co., 775 F. Supp. 718, 728 (D. Vt. 1991) (stating that "Vermont has abolished the antiquated distinction between legal and equitable claims").

147. *New Castle County*, 673 F. Supp. at 1365-66.

148. 799 P.2d 1253, 1259 (Cal. 1990) (en banc).

149. *Id. See also* Krombach v. Mayflower Ins. Co., Ltd., 185 S.W. 2d 728, 731 (Mo. Ct. Spec. App. 1990) (construing Missouri law).

150. *AIU Ins. Co.*, 799 P.2d at 1262. The Supreme Court followed a decidedly narrow inquiry because it concluded that Congress and the Legislature had already made the "relevant public policy determinations." Thus, the court viewed its task as deter-

In contrast to the stance taken by the lower court, the California Supreme Court steadfastly adhered to this premise even when confronted with evidence that the insured was considerably more informed than a typical party purchasing a CGL policy would be.[151] The intent factor proved dispositive to the court. Therefore, it held that the relevant inquiry remained whether evidence existed at the time of contracting that the insurer had cause to believe that the insured "understood policy language in any technical or restrictive manner."[152] This analysis considers the mind set of the insured and the court concluded that the denial of insurance coverage based on whether the plaintiff proceeded in equity rather than law would not be a factor weighed by the insured at the time of contracting.[153]

The decision rendered in *Federal Insurance Co. v. Susquehanna Broadcasting Co.*[154] underscores the fact that many states ascribe varying interpretations to the term "damages."[155] In *Susquehanna*, the court refused to be drawn into a debate as to whether CERCLA response costs were equitable or legal in nature.[156] Further, the court found that the term "damages" has a technical meaning which should be recognized within the CGL policy context.[157] Nonetheless, the court found that Pennsylvania law mandates that "where an injury is reparable, damages consist of the cost of repair or restoration."[158] Therefore, the court held that the CERCLA response costs sought would constitute

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mining whether coverage existed based on the policy's language and not grounded in public policy concerns. *Id.*

151. *Id.* at 1265. FMC Corp. operates a subsidiary that drafts identical CGL policies to those it purchased from AIU. *Id.*

152. *Id.* This approach is in sharp contrast to Pennsylvania where the term damages had a technical meaning. *See* Federal Ins. Co. v. Susquehanna Broadcasting Co., 727 F. Supp. 169, 174 (M.D. Pa. 1989) (recognizing approaches such as the one adhered to in *AIU* where the buyer's reasonable expectations are taken into account, but dismissing that mode of inquiry because it found that a technical meaning existed).

153. *AIU Ins. Co.*, 799 P.2d at 1266-67 (citing Aerojet-General Corp. v. Superior Court, 257 Cal. Rptr. 621 (Cal. Ct. App. 1989) (holding that the insureds would suffer an "unexpected, if not incomprehensible shock" if coverage was denied simply because the action was brought in equity as opposed to in law)).

154. 727 F. Supp. 169 (M.D. Pa. 1989).

155. *Susquehanna*, 727 F. Supp at 173-74 (dismissing other states' interpretations and using Pennsylvania law to determine response costs are recoverable as an item of damages).

156. *Id.*

157. *Id.* at 174.

158. *Id.* (citing Kirkbride v. Lisbon Contractors, Inc., 560 A.2d 809, 813 (Pa. Super. Ct. 1989) (en banc)).

damages, and were compensable under the CGL policies.[159] This case bolsters the argument that the term itself is ambiguous and should be afforded a plain meaning.[160]

C. *Damages—A Technical Meaning*

The proponents of a technical meaning found support for their contention that damages are afforded an unambiguous meaning within the insurance context from a series of older cases outside the hazardous waste scenario. For example, in *Desrochers v. New York Casualty Co.*,[161] the court examined the issue of whether a comprehensive personal liability policy, which provided coverage for damages, included equitable relief.[162] In *Desrochers*, the insured was ordered to spend the sums necessary to remove an obstruction that caused flooding of adjoining land. The court held that the costs resulting from compliance with the injunction did not constitute the type of damages covered under the policy.[163] The court reasoned that "[d]amages are recompense for injuries sustained . . . and are remedial, not preventative."[164] The court found no connection between costs associated with compliance with the injunction and actual damages. While the court asserted that a reasonable man in the position of the insured would not interpret equitable costs as constituting damages, the court did not elaborate further upon this assertion.[165]

The distinction between equitable and legal claims was further advanced in *Aetna Casualty and Surety Co. v. Hanna.*[166] The underlying litigation arose when boulders and other objects upset from Hanna's property landed on adjoining property due to the effects of storms and

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159. *Id.* (citing Lutz v. Chromatex Inc., 718 F. Supp. 413, 417 (M.D. Pa. 1989)). The court noted that a limitation on amounts recovered exists. That figure must be less than the value of the property. *Id.* (citing Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977, 989 (8th Cir. 1988) (en banc) (Heaney, J., concurring and dissenting) (stating the record clearly showed that the cost of cleaning up was less than the value of the government's interest in the property and therefore was the proper measure of damages)). *See also* Jack L. Baker Cos. v. Pasley Mfr. and Distrib. Co., 413 S.W.2d 268, 273 (Mo. 1967) (citing Curtis v. Fruin-Calnon Contracting Co., 253 S.W.2d 158, 164 (Mo. 1952) (stating "where damaged property can be restored to its former condition at a cost less than the diminution in volume, the cost of restoration is the proper recovery")).

160. *See supra* note 130 and accompanying text.

161. 106 A.2d 196 (N.H. 1954).

162. *Id.* at 198. The comprehensive personal liability policy was essentially similar to comprehensive general liability policies.

163. *Id.*

164. *Id.* (citing 1 THEODORE SEDGWICK ON DAMAGES §§ 2, 29 (9th ed.)).

165. *Id.* at 199.

166. 224 F.2d 499 (5th Cir. 1955).

high tides.[167] The subsequent action was injunctive and did not include money damages.[168] The Hannas requested Aetna's defense, but Aetna refused, noting that injunctive relief was not covered under the terms of the policy.[169] Subsequently, the Hannas were found liable.[170] Instead of complying with the order, the Hannas ignored it. The case was transferred to the "law side of the Court,"[171] where they were assessed noncompliance damages. Thereafter, the Hannas commenced an action in district court in order to recover, among other things, the two thousand dollars they spent to satisfy the mandatory injunction.[172] The district court awarded the Hannas damages in the amount of $6872.75, and Aetna appealed.[173]

On appeal, the circuit court reversed the lower court's decision with direction to dismiss the Hannas' suit and enter final judgment for Aetna.[174] The district court fashioned its holding on the premise that the determinative issue regarding coverage was whether the injury created an obligation by law for the insured as opposed to which remedy the injured sought to elect.[175] The circuit court disagreed and proceeded to explain that the language of the contract must be strictly read to determine whether coverage exists.[176] The court analyzed the language and noted that the contract did not contain any reference to covering mandatory injunction costs.[177] The *Hanna* court asserted that damages has an "accepted technical meaning in law" which does not include injunctive relief.[178] Further, the court recounted Florida law as addition-

167. *Id.* at 500.
168. *Id.* at 500-01.
169. *Id.* at 501. Accordingly, the Hannas employed counsel and undertook their own defense. *Id.*
170. *Id.*
171. *Id.* at 506. Modernly, this distinction between an equity side and a legal side has largely faded, if not totally abolished, thus reducing the argument's effectiveness. *See* Village of Morrisville Water & Light Dep't v. United States Fidelity & Guar. Co., 775 F. Supp. 718, 725 (D. Vt. 1991) ("Vermont has abolished the antiquated distinction between legal and equitable claims . . . ."); AIU Ins. Co. v. FMC Corp., 799 P.2d 1253, 1266 (Cal. 1990) (en banc) ("California has generally abandoned the traditional distinction between courts of equity and courts of law.").
172. *Hanna*, 224 F.2d at 502.
173. *Id.*
174. *Id.*
175. *Id.* at 502-03.
176. *Id.* at 503.
177. *Id.*
178. *Id.* The court relied on damages as defined in the third edition of *Black's Law*

al evidence of the lack of coverage.[179] The court noted that the measure of damages is calculated by subtracting the value of the land before the injury and the value after the injury. The court concluded that it was entirely possible that the presence of the Hanna boulders may have in fact made the land more valuable, thus pointing out the significance of choosing the appropriate cause of action and illustrating the distinction between a cause of action grounded in law versus equity.[180]

While these cases breathed life into the ancient distinction between law and equity, the court in *Maryland Casualty v. Armco* applied this "black letter" law to CERCLA and CGL policies.[181] In an action brought against a hazardous waste handler and disposer, the EPA proceeded under the so-called cleanup provision in CERCLA Section 9607(a)(4)(A).[182] Armco dumped waste at a site and caused hazardous substances to leak into local tributaries. Armco then hired an outside contractor to dispose of the wastes. The contractor, however, performed the task improperly, which led to even more problems.[183]

The court applied Maryland law, which adheres to the rule that ambiguous language within an insurance policy should be construed against the insurer.[184] The court granted Maryland Casualty's motion for summary judgment and sided with the notion that damages have a technical "black letter" meaning within the insurance context and that equitable relief under Section 9607(a)(4)(A) fell outside that narrow definition.[185]

Dictionary in order to conclude that damages had an accepted technical meaning in law.

179. *Hanna*, 224 F.2d at 503.

180. *Id.* at 502-03. This notion relied on by insurers was also recognized by the court in *AIU*. AIU Ins. Co. v. FMC Corp., 799 P.2d 1253, 1273 (Cal. 1990) (en banc). However, the *AIU* court rejected its application and noted that "recovery of tort damages is not invariably limited by the value of damaged property." *Id.*

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

182. *Id.* at 431. The court recounted that the EPA complaint specified that § 9607(a)(4)(A) would be used and thus Armco would be "strictly liable for 'all costs of removal or remedial action incurred by the United States Government or a state.'" *Id.* (quoting 42 U.S.C. § 9607(a)(4)(A)). The facts surrounding the underlying action were typical of many hazardous waste problems. *Id.*

183. *Id.*

184. *Id.* The court applied Maryland law because the contracts in question were signed in Maryland. *Id. See also supra* note 111 and accompanying text.

185. *Armco*, 643 F. Supp. at 435. The court and the insurer acknowledged that the government could have brought suit under the "damages" provision of CERCLA, Title 42, § 9607(a)(4)(C) of the United States Code. However, the government elected not to bring a "damages" suit. This government strategy provides further support for the court's conclusion that the existence of different, specific remedies indicates that the insurer is only "obligated to defend or indemnify real law suits, not hypothetical ones." *Id.* at 434.

Initially, the court seemed to be persuaded by a recommendation in a companion case, *United States v. Conservation Chemical Co.*,[186] which suggested a jury trial would be inappropriate because of the equitable nature of the action.[187] This viewpoint bolstered the notion that a clear division existed between equitable and legal proceedings. However, the proponent of the recommendation wavered and adopted the opposite holding set forth in *United States Aviex Co. v. Travelers Insurance Co.*,[188] which effectively blurred the legal/equity distinction. The *Armco* court reviewed the *Aviex* decision critically. The court concluded that the *Aviex* court failed to recognize that the nature of the complaint is important to the insurer. In effect, the *Aviex* court ignored the insurer's right to view the complaint and assess whether an obligation exists to defend and indemnify.[189]

The *Armco* court rejected another *Aviex* argument that the costs of cleanup were in "essence" governmental claims for money, as opposed to the traditional equity actions that seek purely injunctive relief.[190] The court concluded that the *Aviex* logic would unreasonably subject insurers to potential areas of coverage that were outside the terms of the policy.[191] Instead, the court sided with *Hanna*, and recognized that a line has to be drawn between coverage and noncoverage.[192] The court acknowledged that as "[a]rbitrary as it may appear, Maryland Casualty is entitled to the benefit of its bargain."[193]

It is settled that the issue of whether "damages" is afforded a plain or technical meaning is a matter of state law. Against this backdrop, it is imperative to analyze the application of Missouri insurance contract law that was implemented by the Eighth Circuit and the District of Columbia Circuit Courts.

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186. No. 82-0983-CV-W-5 (W.D. Mo.). Maryland Casualty was not a party in this action but its insured Armco was a defendant. Maryland Casualty sought a declaratory judgment and elected to bring the action in Maryland under diversity jurisdiction. The court then applied Maryland law in *Maryland Casualty*. *Id.*

187. *Armco*, 643 F. Supp. at 432-33 (a special master was appointed and delivered this recommendation which the judge then approved).

188. 336 N.W.2d 838, 843 (Mich. App. 1988) (rejecting a narrow interpretation of "damages").

189. *Armco*, 643 F. Supp. at 434.

190. *Id.* at 434-35.

191. *Id.* at 435.

192. *Id.*

193. *Id.*

IV. *NEPACCO*—AN INSURER'S VICTORY

As expected, the devastation of Times Beach, Missouri produced much litigation.[194] The high profile status of the disaster made the outcome of the litigation even more significant to both insurers and insureds.[195] This Section analyzes the methodology the Eighth Circuit used on rehearing, en banc, to arrive at a five to three decision, reversing the previous holding which concluded that CGL policies cover cleanup costs.[196]

A. Facts and Procedural History

NEPACCO was a producer of the chemical hexachlorophene. Production of hexachlorophene produced several hazardous substances including the substance dioxin. In July 1971, NEPACCO dumped eighty-five fifty-five-gallon drums in a trench. Some of those drums leaked and broke open, leaving a strong odor at the site for several months. Later in 1971, NEPACCO consulted IPC to dispose of more dioxin-contaminated waste. IPC in turn hired Russell Bliss, an independent contractor, to remove the waste. Bliss was unaware of the toxic nature of the waste, and he mixed it with waste oil. He sprayed this mixture as a dust suppressant in various areas of Missouri.[197] Subsequently, the EPA discovered large levels of dioxin in the soil at the first dumpsite. This led to a cleanup effort and the eventual evacuation of Times Beach.[198]

The EPA sought to recover the cleanup costs from NEPACCO and

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194. Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 654 F. Supp. 1334, 1339-40 (D.D.C. 1986) (Fifty-seven Civil actions involving over 1600 claimants have been filed in other courts against IPC).

195. Wade Lambert & Jonathan Moses, *Insurers Lose Round Over Cleanup Costs*, WALL ST. J., Sept. 16, 1991, at B7 (presenting a current estimate of the costs); Barnaby J. Feder, *Business and the Law: The Insurer's Role In Waste Cleanup*, N.Y. TIMES, Feb. 7, 1991, at D2 ("By some estimates, more than $500 billion is at stake.").

196. Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., Inc., 842 F.2d 977 (8th Cir. 1988) (en banc) (affirming in part and reversing in part the district court's decision).

197. *Id.* at 979.

198. In an ironic twist, the EPA recently reassessed its position as to the toxicity of dioxin. Dr. Vernon N. Houk, the Assistant Surgeon General and Director of the Center for Environmental Health and Injury Control at the Center for Disease Control went so far as to say that "[g]iven what we now know about this chemical's toxicity and its effects on human health, it looks as though the evacuation [of Times Beach] was unnecessary." Keith Schneider, *U.S. Backing Away From Saying Dioxin Is A Deadly Peril*, N.Y. TIMES, Aug. 15, 1991, at A1.

other responsible parties under CERCLA Section 9607(a)(4)(A).[199] NEPACCO had previously purchased CGL policies which were in force during the period when the pollution and accompanying damage occurred.[200] Therefore, NEPACCO, which was liable under Section 9607(a)(4)(A), sought defense and indemnification from its insurer based on the CGL policy. The insurer brought suit seeking a declaratory judgment that the terms of the policy did not require it to defend NEPACCO.[201] The district court granted summary judgment for the insurer[202] and the matter was heard on appeal by the circuit court which affirmed in part and reversed on the crucial damages construction issue.[203]

B. The NEPACCO *Rehearing En Banc*

Circuit Judge McMillian, who dissented in the first *NEPACCO* hearing at the circuit level, spoke for the majority upon rehearing. First, the court noted that Missouri law governed the inquiry regarding the construction of terms within a CGL policy.[204] Therefore, the primary issue before the court was whether to construe the term "damages" technically and thus preclude coverage by Continental under the CGL policy, or whether to construe it ambiguously and therefore obligate Continental to indemnify.[205]

1. Missouri's Law Regarding Insurance Policy Interpretation

The CGL policies purchased by NEPACCO contained standard form

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199. *Continental*, 842 F.2d at 980.

200. *Id.* at 979. During the period when the hazardous wastes were improperly disposed of by Bliss, NEPACCO was covered by three CGL insurance policies. Two of the policies contained pollution exclusion provisions that did not factor into the court's discussion and analysis of the damages issue. *Id.*

201. Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 811 F.2d 1180, 1183 (8th Cir. 1987).

202. *Id.* at 1184.

203. *Id.* The court reversed on the damages issue and concluded that the CGL policies did not include cleanup costs. *Id.* at 1192. However, this opinion was withdrawn and vacated upon the granting of rehearing en banc. Continental Ins. Co. v. Northeastern Pharmaceutical & Chem Co., 842 F.2d 977, 979 n.2 (8th Cir. 1988).

204. *Continental*, 842 F.2d at 985 (agreeing with the district court that Missouri law governs the interpretation of the CGL policies because the "state has the most significant relation with the negotiation and terms of the insurance contract").

205. *Id.* at 983.

language and did not define the term "damages."[206] Missouri case law is well settled regarding ambiguity and steadfastly construes "any ambiguity in the policy . . . against the insurance company."[207] Further, case law indicates that the terms used in the policy must be afforded their plain meaning, which should be consistent with the reasonable expectations and intent of the parties.[208] However, in the event of a conflict between the technical definition of a term and the meaning that would be understood by the average layman, the layman's understanding will govern the contract unless it plainly appears that the technical meaning was intended.[209] Therefore, Missouri case law is premised upon finding policy coverage and abhorring forfeiture.[210]

Against this backdrop, which could be fairly characterized as pro-insured, the *NEPACCO* court analyzed the term "damages" present in the CGL policy and concluded that it had a technical meaning.[211] The court conceded that outside of the insurance context the term is ambiguous and noted that a lay "dictionary definition does not distinguish between legal damages and equitable monetary relief."[212] Despite this acknowledgment, the court elected to follow *Armco*, which held that inside the insurance context, "damages" is afforded a technical unambiguous meaning.[213] It is significant that the *Hanna* decision, which was outside of the hazardous waste scenario, was the basis of the *Armco* decision and played a major role in the *NEPACCO* holding.

The *NEPACCO* court subscribed to the notion that under "black letter insurance law," claims rooted in equity do not constitute "damages" claims that are recognized under CGL policies.[214] Thus, the court concluded that there was no ambiguity in the language. However, the court

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206. *Id.* at 979-80 (policies define property damage, but do not define "damages").

207. Kissel v. Aetna Casualty & Sur. Co., 380 S.W.2d 497, 507 (Mo. 1964).

208. Robin v. Blue Cross Hosp. Serv., Inc., 637 S.W.2d 695, 698 (Mo. 1982); *see also* Krombach v. Mayflower Ins. Co., 785 S.W.2d 728, 731 (E.D. Mo. 1990).

209. Greer v. Zurich Ins. Co., 441 S.W.2d 15, 27 (Mo. 1969); *see also* Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1207 (2d Cir. 1989) (New York law viewed the policy buyer as an "ordinary businessman" and still found that he would reasonably expect the CGL policy to cover damages).

210. *Krombach*, 785 S.W.2d at 731 (citing Western v. Royal Indem. Co., 577 S.W.2d 623, 626 (Mo. 1979) (en banc)).

211. Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., Inc., 842 F.2d 977, 987 (8th Cir. 1988) (en banc).

212. *Id.* at 985 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 571 (1971)).

213. *Id.* at 985-86. *Accord* Federal Ins. Co. v. Susquehanna Broadcasting Co., 727 F. Supp. 169, 173 (M.D. Pa. 1989); Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. 430, 432 (D. Md. 1986).

214. *See Continental*, 842 F.2d at 986 (citations omitted); Aetna Casualty & Sur. Co. v. Hanna, 224 F.2d 499, 503-04 (5th Cir. 1955); Desrochers v. New York Casualty Co., 106 A.2d 196, 198-99 (N.H. 1954).

also cited cases that reached the opposite conclusion regarding the meaning of damages in CGLs.[215] In these cases, the courts reasoned that sufficient ambiguity existed and that according to state insurance law interpretation, ambiguities must be construed in favor of the insured.[216] Recognizing that different courts might differ in their definition of "damages," the Eighth Circuit may have been overly conclusory in stating that "black letter insurance law" is clear on the subject.

The *NEPACCO* court further argued that the CGL policy language was intended to limit liability by excluding equitable claims.[217] This notion presupposes the conclusion that "damages" only has one definition within the insurance context. The disagreement among the various courts dealing with this question suggests that legal experts think otherwise, to say nothing of the layperson who purchased the policy.[218]

2. The Significance of CERCLA Providing a Cause of Action for Cleanup Cost Recovery and a Separate Cause of Action for Damages

The *NEPACCO* court sought to buttress its argument that damages should be afforded a technical meaning, as the *Hanna* court suggested, by focusing on the choices of causes of action provided under CERCLA.[219] The court reasoned that the different CERCLA clauses allow a plaintiff to choose a cause of action based on favorable calculations and not "mere fortuity" as the *Aviex* holding suggested.[220] The potential for large variations in eventual liability led the court to con-

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215. *See* New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1365-67 (D. Del 1987); United States Aviex v. Travelers Ins. Co., 336 N.W.2d 838, 843 (Mich. Ct. App. 1983); Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co., 528 A.2d 76, 82-83 (N.J. Super. Ct. App. Div. 1987).

216. *See, e.g., New Castle County*, 673 F. Supp. at 1365.

217. *Continental*, 842 F.2d at 986 (stating that an expanded "reading of the term 'damages' . . . would render the term 'all sums' virtually meaningless").

218. *Compare New Castle County*, 673 F. Supp. at 1365 (reasoning that "this court finds that the 'legal, technical' interpretation of the word 'damages' . . . is inappropriate under Delaware law") *with* Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. 430, 432 (D. Md. 1986) (stating that black letter insurance law mandates that "damages" are not an equitable form of relief and are not covered under CGL policies).

219. 42 U.S.C. § 9607(a)(4)(A), (a)(4)(C).

220. *Continental*, 842 F.2d at 986-87 (noting that an action in damages is limited to a figure equal to or less than the value of the property whereas an action for cleanup costs could potentially far exceed the value of the property).

clude that the two separate CERCLA clauses suggest a statutory recognition of the distinction between legal damages and equitable cleanup costs.[221]

Next, the *NEPACCO* court recounted Missouri law governing the calculation of damages. In *Jack L. Baker Cos. v. Pasley Manufacturing and Distributing Cos.*,[222] the court stated that the measurement of damages to real property is the lesser of either the difference in value prior to and after the injury occurred, or the cost of rehabilitating the land to its pre-damaged state.[223] Based on this definition, the court in *NEPACCO* reasoned that an action for damages served as a cap on recovery and that the "mere fortuity" argument failed to recognize the distinction between cleanup costs and damage to natural resources.[224] Therefore, the court concluded that CERCLA provided alternative causes of action, and that the choice of the clause under which to proceed might impact the size of the award, thereby indicating whether the insurer or the insured was liable under the CGL policy.[225]

3. The Impact of the *NEPACCO* Decision

NEPACCO was an important holding that served to legitimize the *Armco* decision. Without the *NEPACCO* court's support, *Armco* could have been isolated, with its persuasive value muted.[226] However, the high profile nature of Times Beach,[227] coupled with the history of Missouri insurance contract law favoring coverage and adhering to a non-technical meaning of insurance policy terms, made *NEPACCO* a holding that was embraced by insurers and might have led to unlikely decisions in states where insurance contract law was decidedly pro-insured.[228]

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221. *Id.* at 987.

222. 413 S.W.2d 268 (Mo. 1967).

223. *Id.* at 273-74. Note, however, that this case did not deal with a hazardous waste scenario.

224. *Continental*, 842 F.2d at 987. *See also*, Verlan, Ltd. v. John L. Armitage & Co., 695 F. Supp. 950, 955 (N.D. Ill. 1988) (to date, "most government actions have sought recovery of response costs, rather than damages").

225. *Continental*, 842 F.2d at 987.

226. The *Armco* holding was the first to apply the *Hanna* reasoning to the hazardous waste and CGL policy question. As the dissent in *NEPACCO* indicated, the Maryland laws governing insurance policy interpretation are "inconsistent with established Missouri law." *Continental*, 842 F.2d at 989 (Heaney, J., concurring and dissenting). The dissent characterized Maryland law as adhering to the narrow and technical definitions of "damages." *Id.* (Heaney, J., concurring and dissenting).

227. *Contaminated Town is Relegated to History*, N.Y. TIMES, Apr. 14, 1985, at 26 (discussing the Times Beach, Mo., community that was ruined by toxic waste and subsequently disincorporated).

228. *See, e.g.*, Grisham v. Commercial Union Ins. Co., 927 F.2d 1039, 1042 (8th Cir. 1991). The district court noted that Arkansas law is substantially similar to Missouri

Armed with the *NEPACCO* result, many insurers sought to obtain declaratory judgments in order to confirm that they had no duty to defend or indemnify a hazardous waste producer or handler.[229]

The *NEPACCO* holding also dealt with the issue of who would pay for the cleanup costs incurred by the government once insurers were excused from liability. The insured parties had far fewer resources to shoulder the burden of reimbursing the government than their insurers.[230] With the indemnification issue settled in *NEPACCO*, the question of who will pay back the government becomes more troubling. CERCLA was intended to provide the government with a mechanism to remedy hazardous waste problems and hold responsible parties liable.[231] Parties in violation would be penalized, which would replenish the government's coffers and allow regulating efforts to continue.[232] Prudently, the hazardous waste producers and handlers sought to limit their risk by purchasing insurance. The *NEPACCO* holding frustrated that effort and rendered the once insured, liable.[233]

The most damaging effect associated with the *NEPACCO* holding may be a decline in government cleanup of hazardous waste sites.[234] The financial constraints felt by the federal government are well documented, and necessarily impact the ability of the EPA to undertake cleanup efforts, especially in light of the real possibility that the liable party

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law regarding insurance policy interpretation and therefore, adopted a construction favoring the insured party. Thus, the court followed the *NEPACCO* holding that "damages" was a technical term. *Id.*

229. *See, e.g.*, United States Fidelity & Guar. Co. v. Morrison Grain Co., 734 F.Supp. 437, 438 (D. Kan. 1990); Travelers Indem. Co. v. Allied-Signal, Inc., 718 F. Supp. 1252, 1252 (D. Md. 1989); Verlan, Ltd. v. John L. Armitage & Co., 695 F. Supp. 950, 951 (N.D. Ill. 1988); Travelers Ins. Co. v. Ross Elec. of Wash., Inc., 685 F. Supp. 742, 743 (N.D. Wash. 1988).

230. Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977, 979 (8th Cir. 1988) (en banc) (NEPACCO ceased doing business in 1974). *But see* Barnaby J. Feder, *Business and the Law; The Insurer's Role In Waste Cleanup*, N.Y. TIMES, Feb. 7, 1991, at D2 (noting that if insurers are liable, bankruptcies would become commonplace).

231. *See supra* note 54 and accompanying text.

232. *See* Stephen Mountainspring, Comment, *Insurance Coverage of CERCLA Response Costs: The Limits of "Damages" In Comprehensive General Liability Policies*, 16 ECOLOGY L.Q. 755 (1989).

233. *See Continental*, 842 F.2d at 979.

234. The insureds would be hard pressed to be able to afford these costs, thus placing the costs back on the government. *See Continental*, 842 F.2d at 979 (NEPACCO ceased operations and had no resources to compensate the government).

(according to *NEPACCO*) may never be able to repay the government.[235] Some have argued that the insurers never intended to insure this kind of massive potential liability and that the insurance industry could not weather a storm as violent as liability for hazardous waste cleanup costs.[236] In contrast, it seems likely that the insured parties will not be able to reimburse the government to any meaningful degree. It also strikes a note of unfairness because the parties now liable acted prudently, by procuring insurance to limit their risk.[237]

V. *IPC*—DISMANTLING *NEPACCO*

While the Eighth Circuit was considering the *NEPACCO* case, the District of Columbia Circuit Court was hearing *Independent Petrochemical Corp. v. Aetna Casualty and Surety Co.*[238] Both cases arose from the Times Beach, Missouri dioxin disaster and share substantially relevant facts.[239] Each circuit court faced the identical task of construing Missouri insurance contract law, yet the circuits disagreed in their holdings. This Section analyzes the District of Columbia's Circuit Court holding and explores its persuasive value as a "foreign" circuit disagreeing with a "home" circuit's interpretation of state law.

A. Facts and Procedural History

IPC is in the business of marketing petrochemicals in Missouri. In 1971, IPC assisted NEPACCO in the removal of waste products. IPC hired Russell Bliss who improperly disposed of the waste leading to contamination that was cleaned up by the United States Government and the State of Missouri.[240] In 1983, Missouri sued IPC to recover its cleanup expenditures under Section 9607(a)(4)(A).[241] Two weeks prior to that action, IPC brought an action for declaratory judgment in the District of Columbia District Court.[242] IPC sought a ruling that would

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235. *Id.*

236. Wade Lambert & Jonathan Moses, *Insurers Lose Round Over Cleanup Costs*, WALL ST. J., Sept. 16, 1991, at B7.

237. *See supra* note 233 and accompanying text. *See also* Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 654 F. Supp. 1334, 1339 (D.D.C. 1987) (IPC's parent company, Charter Oil Company filed for Chapter 11 bankruptcy protection).

238. *Independent Petrochemical Corp.*, 654 F. Supp. at 1339.

239. NEPACCO was covered by three CGL policies, two of which contained pollution exclusion clauses. *Continental*, 842 F.2d at 979. The IPC policies did not contain these clauses.

240. *Independent Petrochemical*, 654 F. Supp. at 1339.

241. Missouri v. Independent Petrochemical Corp., No. 83-2670-C, 1984 WL 2921 (E.D. Mo. 1984).

242. *Independent Petrochemical Corp.*, 654 F. Supp. at 1342. IPC selected the Dis-

find that its CGL insurance policies covered the cleanup costs sought by Missouri and the United States.[243]

The district court wrestled with the complex issue of cleanup costs, and in a Memorandum Decision dated May 2, 1986, the court found that Missouri law required the insurers to indemnify IPC for the cleanup costs, finding that the cleanup costs constituted damages.[244] This clear victory for the insured parties dissolved in 1988 when the Eighth Circuit held that Missouri law did not recognize cleanup costs as damages covered under CGL insurance policies.[245] In an abrupt reversal, the District of Columbia district court yielded to the precedent set by the "home circuit" and granted the insurers partial summary judgment.[246] The insureds appealed the ruling and the District of Columbia Circuit Court reversed on the critical issue of damages and affirmed on other grounds.[247]

B. The IPC *Reasoning*

The *IPC* court took special care to justify its refusal to defer to the "home circuit's" opinion.[248] The court recognized that if it reached a result different from the *NEPACCO* court, that result would create a split among the circuits that could only be settled by the United States Supreme Court.[249] That eventuality was unlikely because the interpretation of insurance policies has been an area subject to state law construction rather than federal guidelines.[250] The court acknowledged these factors, but elected not to defer to the Eighth Circuit's assessment of Missouri law.[251] Armed with a directive from *Abex Corp. v.*

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trict of Columbia as the forum for litigation because of past favorable holdings regarding trigger of coverage issues. *See* Keene Corp. v. Insurance Co. of North Am., 667 F.2d 1034, 1045-46 (D.C. Cir. 1981) (recognizing coverage based on the multiple-trigger theory).

243. The United States action against IPC was based on 42 U.S.C. § 9607(a) and IPC was found jointly and severally liable for cleanup cost reimbursement. *See* United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987).

244. *Independent Petrochemical Corp.*, 654 F. Supp. at 1359.

245. Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., Inc., 842 F.2d 977, 979 (8th Cir. 1988) (en banc).

246. *Independent Petrochemical Corp.*, 654 F. Supp. at 1339.

247. Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 944 F.2d 940, 948 (D.C. Cir. 1991).

248. *Id.* at 944.

249. *Id.*

250. *See supra* note 21 and accompanying text.

251. The damages issue had not been dealt with by the Missouri Supreme Court

Maryland Casualty Co.,[252] the court refused to be charged with "blind adherence" to the *NEPACCO* court.[253] Instead the court proceeded to analyze Missouri law because it felt that the Eighth Circuit "clearly misread state law."[254]

The District of Columbia Circuit Court was in complete accord with the Eighth Circuit's description of Missouri insurance law construction.[255] This view maintains that a technical meaning of a term within an insurance policy that conflicts with a layperson's understanding of that term will not be applied "unless it plainly appears that the technical meaning is intended."[256] The *IPC* court noted that an initial inquiry must be made to determine whether "damages" is susceptible to more than one plain interpretation.[257] The *NEPACCO* court did not make this inquiry, but instead concluded that "damages" is afforded a technical meaning and that meaning was plainly intended.[258] The District of Columbia Circuit refused to adopt the conclusory position taken by the Eighth Circuit and noted that the term "damages" was undefined in the policy.[259] Further, the *IPC* court noted that for a technical meaning to attach, it must be "consistent with the reasonable expectations, objectives and intent of the *parties*."[260] Based on this understanding, the court cited a broad definition in a layperson's dictionary which could be considered to be reflective of a plain meaning of damages.[261]

The *IPC* court further noted that the burden lay with the insurer to show that the parties intended to be bound by the technical meaning of a term.[262] States that follow this pro-insured posture, such as Missouri,

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and the *IPC* court termed Missouri law on this matter "unsettled." *Independent Petrochemical Corp.*, 944 F.2d at 944.

252. 790 F.2d 119 (D.C. Cir. 1986).

253. *Independent Petrochemical Corp.*, 944 F.2d at 945 ("Deference is one thing, blind adherence quite another.").

254. *Id.*; *see* Abex Corp. v. Maryland Casualty Co., 790 F.2d 119, 125-26 (D.C. Cir. 1986) (permitting the court to not follow another circuit's holding if that court "ignored clear signals emanating from the state courts" or "clearly misread state law").

255. *Independent Petrochemical Corp.*, 944 F.2d at 945-46.

256. Krombach v. Mayflower Ins. Co., 785 S.W.2d 728, 731 (E.D. Mo. 1990).

257. *Independent Petrochemical Corp.*, 944 F.2d at 945. According to Missouri law, if the term is susceptible to more than one plain meaning, then the meaning "most favorable to the insured must be adopted." *Krombach*, 785 S.W.2d at 731.

258. Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977, 985 (8th Cir. 1988) (en banc).

259. *Independent Petrochemical Corp.*, 944 F.2d at 942.

260. *Krombach*, 785 S.W.2d at 731 (emphasis added).

261. *Independent Petrochemical Corp.*, 944 F.2d at 945 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 571 (1971)). *See also* New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1365 (D. Del. 1987) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 571 (1971)).

262. *Independent Petrochemical Corp.*, 944 F.2d at 946.

find that a "[t]echnical meaning is the exception rather than the rule."[263] The approach taken by the Eighth Circuit, simply declaring that "damages" was unambiguous within an insurance context, was at best conclusory and at worst in conflict with state law.[264] Therefore, the *IPC* court invoked the so-called "*Abex* exception" because the *NEPACCO* court "clearly misread state law."[265]

The District of Columbia Circuit relied on the premise that the layperson's understanding of a term is controlling when it countered the insurer's assertion that a broad interpretation of "damages" renders the rest of the clause as surplusage.[266] The court maintained that it was reasonable for a layperson buying an insurance policy to surmise that the term "damages" includes response costs, which would essentially serve to place the injured party in the "position he would have been in had the injurious action not occurred."[267] Yet, the court stated that the same layperson would ordinarily understand that damages do not include fines or penalties.[268] Thus, the court rejected the insurer's contention that a broad definition of "damages" would result in open-ended liability.[269]

The *NEPACCO* court was also persuaded by the insurer's argument that the statutory construction of CERCLA itself provided evidence that damages and cleanup costs were not similar causes of action.[270] The *IPC* court dismissed this contention by noting that the Supreme Court

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263. *Id. See also* AIU Ins. Co. v. FMC Corp., 799 P.2d 1253, 1268 (Cal. 1990) (en banc) (noting that California law "interprets policy language in its 'ordinary and popular' sense unless the parties expressed an intent otherwise").

264. *Independent Petrochemical Corp.*, 944 F.2d at 946.

265. *Id.* at 945.

266. *Id.* at 947.

267. *Id.*

268. The court based this observation on definitions found in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 852, 1668 (1971) and BLACK'S LAW DICTIONARY 632, 1133 (6th ed.).

269. *Independent Petrochemical Corp.*, 244 F.2d at 947. That possibility was expressed in other cases that contended that an overly expansive interpretation could cause insurers to be under an obligation to defend against most, if not all, suits. *See* Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977, 985-86 (8th Cir. 1988) (en banc); Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. 430, 434 (D. Md. 1986)

270. *Continental*, 842 F.2d at 986-87 (noting that CERCLA provided in 42 U.S.C. §§ 9607(a)(4)(A) and 9607(a)(4)(C) for recovery of cleanup costs by governments and "recovery of damages for injury, destruction or loss of natural resources," respectively, and that some cases have ignored the distinction).

seemed to reject the notion that CERCLA provided a clear distinction between cleanup costs and damages.[271] Furthermore, the court noted that several other courts characterize the cost of restoration as an appropriate method of calculation in natural resource damages actions.[272]

C. *The Impact of* IPC

In order to assess the impact of the *IPC* holding, it is necessary to recognize what the District of Columbia Circuit court sought to accomplish and what it did not. The court noted that the matter of insurance policy construction was governed by each state's particular rules of interpretation.[273] The danger inherent in the *NEPACCO* holding was that it appeared to correctly recount Missouri law,[274] but then "borrowed" Maryland insurance contract rules in the application stage of its analysis.[275] Therefore, the *NEPACCO* court acknowledged that Missouri views technical terms within insurance policies critically, but it nonetheless applied a technical meaning.[276]

The *IPC* holding could serve to re-establish the traditional distinction between technical meaning states and non-technical meaning states and thus provide the insured party with a greater level of certainty. Naturally, before the potential persuasive impact of *IPC* can be realized, the decision and its foundations must be considered.

1. The District of Columbia Circuit as a "Foreign" Circuit

The *IPC* court acknowledged that it was a "foreign" circuit about to challenge a "home" circuit's interpretation of state law.[277] The court noted that because of fears regarding forum shopping the predominate assumption must be to defer to the expertise of the "home" circuit.[278] However, the District of Columbia Circuit elected not to defer, basing its decision on the *Abex* exception.[279]

The *IPC* posture was strengthened by the district court's decision in

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271. *Independent Petrochemical*, 944 F.2d at 946-47.

272. *Id.* at 947. *See also* Federal Ins. Co. v. Susquehanna Broadcasting Co., 727 F. Supp. 169, 174 (M.D. Pa. 1989) (quoting Kirkbride v. Lisbon Contractors, Inc., 560 A.2d 809, 813 (Pa. Super. Ct. 1989) (en banc) ("where an injury is reparable, the damage is the cost of repair or restoration . . . .").

273. *Independent Petrochemical Corp.*, 944 F.2d at 942.

274. Continental Ins. Cos. v. Northeastern Pharmaceutical & Chemical Co., Inc., 842 F.2d 977, 985 (8th Cir. 1988) (en banc), *cert. denied*, 488 U.S. 821 (1988).

275. *Id.* at 985-86.

276. *Id.*

277. *Independent Petrochemical Corp.*, 944 F.2d at 944.

278. *Id.* at 944-45.

279. *See supra* note 255 and accompanying text.

Jones Truck Lines v. Transport Insurance Co.[280] In that case, the facts again were based on Russell Bliss' spraying of dioxin in Times Beach, Missouri.[281] This action reached the court under diversity jurisdiction and the defendant insurance company sought summary judgment on the grounds that cleanup costs did not constitute damages under a CGL policy.[282] Whereas, in 1988, the District of Columbia court deferred to the recent *NEPACCO* holding,[283] the Pennsylvania court did not defer, but instead proceeded to describe and apply Missouri law.[284] This was a significant decision by the court because, less than eight months later, another Pennsylvania district court declared that under Pennsylvania law "damages" had a legal meaning and not an equitable meaning.[285]

The *Jones Truck* court undertook this review of Missouri law without the benefit of a Third Circuit case which discussed the precedential value of a "home" circuit's interpretation of state law within that circuit.[286] Nonetheless, the court relied on the *Abex* case and then proceeded to review Missouri law in much the same manner as the *IPC* court and the *NEPACCO* court.[287] The *Jones Truck* court reached the same conclusion as the District of Columbia Circuit Court and noted that the Eighth Circuit's characterization of damages being afforded a technical meaning was not based on Missouri case law, but was lifted from the Fourth Circuit's application of Maryland substantive law principles.[288] Therefore, the court denied the insurer's motion for summary judgment.[289]

In contrast, the court in *Grisham v. Commercial Union Insurance Co.*,[290] dealing with a damages issue within a CGL policy, refused to entertain the insured party's contention that damages could reasonably

280. Civ. A. No. 88-5723, 1989 WL 49517 (E.D. Pa. May 10, 1989).
281. *Id.* at *1.
282. *Id.* at *1, *2.
283. Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 654 F. Supp. 1334 (D.D.C. 1986).
284. *Jones*, Civ. A. No. 88-5723, 1989 WL 49517, at *7.
285. *See* Federal Ins. Co. v. Susquehanna Broadcasting Co., 727 F. Supp. 169, 173 (M.D. Pa. 1989) ("[I]t is well established that damages are a legal remedy.").
286. *Jones*, Civ. A. No. 88-5723, 1989 WL 49517, at *5.
287. *Id.*
288. *Id.* at *8. *See also*, Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 944 F.2d 940, 945 (D.C. Cir. 1991).
289. *Jones*, Civ. A. No. 88-5723, 1989 WL 49517, at *11.
290. 927 F.2d 1039 (8th Cir. 1991).

be susceptible to other meanings and thus be considered ambiguous.[291] Instead, the court embarked on a decidedly narrow inquiry and followed that Circuit's precedent set by *NEPACCO*.[292] The court construed Arkansas law and concluded that because it was substantially similar to Missouri insurance contract law[293] the only issue was "whether the district court erred in its interpretation of state law."[294] Finding no error, the court affirmed.[295]

Significantly, the court noted that the Arkansas District Court expressed its "reservation about the correctness" of the *NEPACCO* holding, but still acquiesced to precedent because it found Arkansas and Missouri law similar.[296] Thus, even within the Eighth Circuit, the district court was critical of the *NEPACCO* holding.

The *Jones Truck* decision displays a willingness to look beyond the *NEPACCO* precedent and fully determine how the issue would be analyzed under existing Missouri law. However, the *Grisham* court's holding highlights *NEPACCO*'s inherent danger because it permits states to simply determine whether their state insurance law is identical to Missouri and then merely follow *NEPACCO* without challenging the analysis.

2. Interpretation and Application of Missouri Insurance Contract Law

As noted above, the *IPC* court accurately described Missouri insurance law, which defers to the intent and expectations of the insured.[297] As additional support for its decision, the court noted that the CGL policies purchased by IPC did not contain any specific exclusionary language.[298] Similarly, the Second Circuit also found the lack of exclusionary language important because it adds to the insured's expectation of coverage.[299]

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291. *Id.* at 1041-42.

292. *Id.* at 1042.

293. *See* Krombach v. Mayflower Ins. Co., 785 S.W. 2d 728, 731 (E.D. Mo. 1990) (viewing the terms of the policy in the manner most likely to be understood by the buyer of the policy).

294. *Grisham*, 927 F.2d at 1042.

295. *Id.*

296. *Id.*

297. *See Krombach*, 785 S.W.2d at 731.

298. Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 944 F.2d 940, 942-43 (D.C. Cir. 1991).

299. *See* Avondale Indus. Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1207 (2d Cir. 1989) (stating that an ordinary businessman would believe he was covered for damages under a CGL policy "particularly absent any specific exclusionary language in the policy").

The application of Missouri law proved to be the major source of disagreement between the Eighth Circuit and the District of Columbia Circuit. Throughout the opinion, the *NEPACCO* court defined the scope of Missouri law without reference to any external sources.[300] However, the Eighth Circuit faltered during the critical application phase.[301] In contrast, the District of Columbia Circuit consistently applied Missouri principles of law and viewed the *Armco* case as a product of a state that adheres to a technical meaning of insurance terms,[302] rather than as a universal interpretation as the *NEPACCO* court viewed the *Armco* holding.[303]

In addition, the *IPC* analysis was similar to other states whose insurance contract law is consistent with Missouri law.[304] Therefore, the District of Columbia Circuit was uniform in its characterization and application of Missouri law.

3. The Statutory Language of CERCLA

The *IPC* court took a dim view of the insurer's argument that CERCLA itself supports the notion that damages and cleanup costs are not compatible.[305] The District of Columbia Circuit relied on a Supreme Court holding[306] as well as several lower court decisions.[307]

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300. Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., Inc., 842 F.2d 977, 985 (8th Cir. 1988) (en banc) (citing Robin v. Blue Cross Hosp. Serv. Inc., 637 S.W. 2d 695, 698 (Mo. 1982) (en banc) (as to treatment of ambiguous language in an insurance policy)).

301. *Id.* at 985 (citing Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. 430, 434 (D. Md. 1986)).

302. *Independent Petrochemical Corp.* 944 F.2d at 946 ("Decisions construing the term differently were apparently governed by state rules of interpretation under which the technical or legal meanings of language controlled.").

303. *Continental*, 842 F.2d at 985 ("Black letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability insurance contracts.").

304. *See* Avondale Indus. Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1203-05 (2d Cir. 1989); New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1365-67 (D. Del. 1987); AIU Ins. Co. v. FMC Corp., 799 P.2d 1253, 1264-68 (Cal. 1990) (en banc).

305. *Independent Petrochemical Corp.*, 944 F.2d at 946-47. *Accord AIU Ins. Co.*, 799 P.2d at 1270-71.

306. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 12-13 (1989) (adopting a broad scope for damages in light of an absence of specific limiting statutory language). *But see* Bowen v. Massachusetts, 487 U.S. 879, 880 (1988) (defining "money damages" as having an ordinary meaning which is "compensatory relief for an injury suffered").

Union Gas dealt with CERCLA related issues whereas *Bowen* was completely

Furthermore, since the CGL policies were purchased prior to CERCLA's enactment it seems highly unlikely that at the time the policies were signed, the parties intended to be bound by the provisions of CERCLA.[308]

CERCLA does not provide a definition of damages.[309] This fact, coupled with the observation that CERCLA was designed to be a broad-based statute, serves to limit its importance in state insurance contract law.

The Eighth Circuit's argument that the CERCLA provisions are factors favoring the insurer, fails to consider the basic Missouri rules of insurance contract interpretation.[310] As previously noted, it is the intent of the parties and their reasonable expectation that will govern whether an ambiguous term is afforded a technical meaning.[311] To simply argue that the language in CERCLA indicates a distinction between damages and cleanup costs is to ignore the basic inquiry mandated by Missouri case law. Therefore, the *IPC* court found that the provisions of CERCLA are not dispositive to the relevant issue of insurance policy interpretation.[312]

VI. CONCLUSION

The *IPC* holding will not answer the question of who is liable for CERCLA cleanup cost reimbursement under a CGL insurance policy. There is no consensus as to whether damages are ambiguous or whether they are legal or equitable in nature. It is unlikely that these issues will be resolved because they deal with an area that is reserved to the states and their particular rules of insurance contract construction.

The *IPC* decision is valuable in that it may serve to re-establish the distinction between states that adhere to a technical interpretation of terms within insurance policies and those that do not. The *NEPACCO* decision blurred that distinction which led to decisions such as *Grisham*, where the district court, finding that Arkansas and Missouri insurance law were similar, ended its inquiry and deferred to the *NEPACCO* precedent. This resulted despite the district court's uneasi-

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outside of the CERCLA subject matter.

307. *See* Cadillac Fairview/California v. Dow Chem. Co., 840 F.2d 691, 693 (9th Cir. 1988); Ogden Corp. v. Travelers Indem. Co., 713 F. Supp. 1484, 1486 n.3 (E.D. Pa. 1989).

308. *See AIU Ins. Co.*, 799 P.2d at 1271.

309. *See* 42 U.S.C. §§ 9601-9675 (1988 and Supp. II 1990).

310. *See supra* notes 206-10 and accompanying text.

311. *See* Krombach v. Mayflower Ins. Co., 785 S.W. 2d 728, 731 (E.D. Mo. 1990).

312. Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 944 F.2d 940, 946-47 (D.C. Cir. 1991).

ness with the *NEPACCO* holding. Hopefully, *IPC* will give states that interpret insurance contracts with less emphasis on technical language the impetus to utilize *Abex*, or similar precedents, to challenge the logic of the *NEPACCO* decision.

Finally, the *IPC* holding may persuade the so-called technical meaning states to re-evaluate that posture in light of the valid concerns for the protection of the expectation and intent of the insured. The insured is the weaker party in a relationship that is best characterized as being one of adhesion. The insurer sets the premium, crafts the language and has the expertise. Thus, it seems reasonable that the insurer should carefully and clearly fashion the language to define the scope of the covered risk and not depend on favorable judicial construction to do it for him.

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