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COMMENT

**“Superiorfund” — An Answer to State
Court Holdings that Government-
Mandated Cleanup Costs Constitute
“Damages” under Comprehensive
General Liability Policies**

Lynn M. Kuchta

This comment analyzes the state high court decisions which seem to be reaching a consensus that the term “damages” in a Comprehensive General Liability policy encompasses the cost of cleaning up a hazardous waste site. In six state high court cases, the courts held in favor of the insureds, holding that cleanup costs constitute “damages.” In only three state high court cases, decided by two courts, the holdings were in favor of insurers with rulings that cleanup costs do not constitute “damages.” Two possible solutions to resolve the insurance carriers’ dilemma regarding the “damages” question are proposed in this comment. The preferred alternative is to amend the Comprehensive Environmental Response, Compensation, and Liability Act and make cleanup costs an uninsurable interest. With reimbursement of cleanup costs by insurers an impossibility, an alternative to insurance would be necessary. The author

proposes a solution to the problem in the creation of a pollution fund to clean up hazardous waste sites. As a less desirable alternative, the author recommends that insurance carriers seek alternatives to litigation such as settling out of court.

I. Introduction

This comment will discuss whether government-mandated cleanup costs associated with hazardous waste sites constitute "damages" under the Comprehensive General Liability (CGL) insurance policy. As an introduction, a hypothetical will be presented to illustrate the significance of this issue. Next, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹ will be briefly outlined as it applies to the issue. A description of the CGL insurance policy will follow.

In the second section of this comment, a background of the "damages" issue will be presented. The background section discusses two opposing positions taken by the federal courts. The first is the position that cleanup costs do not constitute "damages" and is made up of three different theories. These three theories include: a legal/technical reading of the word "damages," the position that cleanup costs are equitable or injunctive relief and finally, that cleanup costs are prophylactic measures. The second and opposing position will discuss the holdings of the federal courts which find that cleanup costs constitute "damages." This position relies on two separate theories. The first theory uses a plain, ordinary meaning of the term "damage" to hold that cleanup costs constitute damages, while the second theory focuses on the substance of governmental cleanup mandates to arrive at the same conclusion.

The third section of this comment focuses on the recent state high court decisions which have addressed the "damages" issue. As in the federal courts, the state decisions are divided on this issue. The first part of the third section will

1. 42 U.S.C. §§ 9601-9675 (1983 & Supp. 1991).

discuss those cases which hold that cleanup costs do not constitute "damages." This position relies on three different theories to reach its conclusion. These theories include the reasonable person standard, the lack of understanding theory and the theory that cleanup costs are preventive measures. The second part of the section will discuss the three theories which the courts use to arrive at the opposite conclusion; that cleanup costs constitute "damages." This position uses the plain meaning theory, the reasonable person standard and also provides a limitation on the term "damages."

The fourth section of this comment will provide an analysis of the problem and the fifth will offer two possible solutions to the problem. The final section will present a conclusion to summarize the comment.

A. Hypothetical

The following hypothetical serves to demonstrate why the insurance industry needs to find new alternatives to address the recent state court holdings that government-mandated cleanup costs constitute "damages" under CGL policies.

The ABC Company (ABC) is a paint products manufacturer in Cleanville, Montana. Between 1965 and 1976, it disposed of its manufacturing by-products at the Tidywaste disposal site. In December 1986, the United States Environmental Protection Agency (EPA) ordered ABC to remove all drums and waste from the facility.

In 1966, The Surepay Insurance Company (Surepay) and ABC entered into a standard form CGL policy for the period from January 1, 1966, through January 1, 1969. The policy stated that the company would pay "on behalf of the insured, all sums which the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence."

The EPA placed the Tidywaste disposal site on the National Priorities List² in 1987 and notified ABC of its poten-

2. 40 C.F.R. § 300.5 (1990). National Priorities List "means the list, compiled by EPA pursuant to CERCLA section 105, of uncontrolled hazardous substance releases in the United States that are priorities for long-term remedial evaluation and re-

tial liability under CERCLA. Under an administrative consent agreement, ABC attempted to remedy the damage at the site and expended two million dollars in the cleanup effort. ABC then requested that Surepay reimburse it for the two million dollars under its CGL policy. Surepay denied coverage to ABC stating that the term "damages" in the CGL policy did not cover the costs of cleaning up a hazardous waste site. ABC brought a declaratory judgment action against Surepay seeking coverage for the costs of the remedial action. It is now 1991, and the litigation continues.

This hypothetical presents the controversial issue of who will pay for government-mandated cleanup costs associated with hazardous waste sites governed by CERCLA - the insured or the insurer? This comment will describe the analytical process used in the recent decisions of the state courts of last resort and suggest solutions to resolve this problem.

B. CERCLA's Language

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted in 1980 and amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA).³ The statute was enacted in an effort to eliminate unsafe hazardous waste sites. CERCLA, commonly known as Superfund, gives the United States Environmental Protection Agency (EPA) several alternatives for responding to the release of hazardous substances.⁴ It authorizes "the President [or the President's agents] to remove or arrange for the removal of . . . hazardous substance[s], pollutant[s], or contaminant[s], or take any other response measure . . . which the President deems necessary to protect the public health or welfare or the environment."⁵ This statutory language allows

sponse." *Id.*

3. 42 U.S.C. §§ 9601-9675. The program was reauthorized in 1986 under the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

4. David J. Hayes & Conrad B. MacKerron, *Superfund II: A New Mandate*, BNA SPECIAL REPORT 4 (1987).

5. CERCLA § 104(a)(1)(B), 42 U.S.C. § 9604(a)(1)(B).

the EPA to undertake the cleanup itself and then, following cleanup, to bring an action to recover the cleanup costs from potentially responsible parties (PRPs) who contributed to the release of hazardous substances at the site. A second alternative is to require the PRPs to finance and implement the cleanup program themselves under an administrative consent order.⁶

The section of CERCLA most relevant to this discussion is section 107(a) which identifies the PRP's liability. The applicable section provides in part:

any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, . . . or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -

(A) all costs of removal or remedial action incurred by the United States Government or a State . . . ;

(B) any other necessary costs of response incurred by any other person . . . ; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.⁷

Thus, the two types of damages are for cleanup or response costs (A) - (B) and natural resource damages (C). While this statute identifies who is liable for, and who may perform the cleanup, it does not answer the question of whether a PRP will be indemnified for the costs of cleanup under its CGL policy. Presumably, a PRP will attempt to recover its costs from an insurance company with whom it holds or held a lia-

6. CERCLA § 106(a), 42 U.S.C. § 9606(a). See also, John F. Wagner Jr., Annotation, *Validity and Construction of § 106(a) and (b)(1) of Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C.S. § 9606(a) and (b)(1))*, *Authorizing Equitable Abatement Actions and Administrative Orders and Prescribing Fines for Noncompliance with such Orders*, 87 A.L.R. FED. 217, 226 (1988).

7. CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4).

bility insurance policy. To date, insurance companies have typically denied the PRP's claim for cleanup or response costs, and either the PRP or the insurance company has brought a declaratory action to determine whether or not coverage is available under the policy. The courts then have the burden of interpreting the language of the insurance policy.

C. The Comprehensive General Liability Policy

The insurance policy usually at issue in CERCLA recovery actions is called the Comprehensive General Liability (CGL) policy. The first standard form for CGL insurance was developed and made available in 1940.⁸ In 1966, the standard CGL policy defined the term "damages" for the first time. "Damages" included "damages for death and for care and loss of services resulting from bodily injury and damages for loss of use of property resulting from property damage."⁹ In 1973, the "damages" definition was deleted from the CGL policy.¹⁰

CGL insurance was so named because it consisted of a comprehensive insuring agreement covering all hazards within the scope of the insuring agreement that were not specifically excluded.¹¹ Since the CGL policy is a contract, its coverage can best be understood by examining its exclusions, definitions and other policy provisions.¹² However, a few generalizations can be made. The coverage of a CGL policy includes a "broad insuring agreement providing for the insurer's duty to defend suits against the insured and to pay damages for which the insured is found liable."¹³ Typically, the CGL policy will contain the following passage:

The company will pay on behalf of the insured all

8. Mark K. Suri, *Taking the Insurers to The Dumps: Interpreting "Damages"—Is There Coverage for Hazardous Waste Cleanup Costs Under Comprehensive General Liability Insurance?*, 13 J. CORP. L. 1101, 1108 (1988) [hereinafter Suri].

9. *Id.* at 1110.

10. ROBERT E. KEETON, *BASIC TEXT ON INSURANCE LAW* 84 (1971).

11. The National Underwriter Company, *FC&S - The Fire Casualty & Surety Bulletins*, B-2, (1983)[hereinafter The National Underwriter Company].

12. *Id.*

13. *Id.* at Ba-1.

sums which the insured shall become legally obligated to pay as damages because of:

Coverage A—bodily injury or

Coverage B—property damage

to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage.¹⁴

The interpretation of the policy language quoted above is where the dispute begins. This discussion will focus particularly on the interpretation of the term “damages” in the insuring agreement. Both the federal and the recent state courts of last resort are divided on how to interpret this term.

II. Background

This section discusses the two opposing positions taken by the federal courts in reference to the “damages” issue. The first position holds that cleanup costs do not constitute damages, while the second position holds the opposite view.

A. Cleanup Costs Do Not Constitute Damages

The cases which hold that cleanup costs do not constitute “damages” recoverable under CGL policies generally rely on one of three positions.¹⁵ The first position interprets the word “damages” in a legal or technical way.¹⁶ The second position

14. DONALD S. MALECKI & ARTHUR L. FLITNER, *THE NATIONAL UNDERWRITER COMPANY, COMMERCIAL GENERAL LIABILITY - THE NEW CLAIMS - MADE AND OCCURENCE FORMS*, 113-14 (2d ed. 1986).

15. See, e.g., *Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979, 981 (4th Cir. 1988)(insurer had no duty to defend an action brought by the United States to recover its costs in removing wastes from an insured's property); *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1329 (4th Cir. 1986)(response costs themselves are not “damages”); *Grisham v. Maryland Casualty Co.*, No. 88-3063, slip op. at 3 (W.D. Ark. Jan. 18, 1989)(cleanup costs do not constitute sums the insured is legally obligated to pay as damages); *Maryland Casualty Co. v. Ormond*, No. 87-3038, slip op. at 13 (W.D. Ark. Jan. 6, 1989)(“cleanup costs are not encompassed within the meaning of the word ‘damages’ in the standard form CGL polic[y]”); *Fort McHenry Lumber Co. v. Pennsylvania Lumbermen's Mut. Ins. Co.*, No. HAR-88-825, slip op. at 6 (W.D. Wash. Sept. 23, 1988)(recovery for costs incurred for cleanup are precluded).

16. *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d

asserts that cleanup costs are equitable or injunctive in nature and do not constitute "damages,"¹⁷ while the third position holds that cleanup costs are prophylactic measures as opposed to damages.¹⁸

1. Legal/Technical Meaning

The first position is based upon a narrow, legal/technical reading of the word "damages." This position begins by referring to the language of the contract. An insurance policy is a contract, the terms of which must be interpreted using state law.¹⁹ Many states require the language of an insurance contract to be given its plain meaning, and if the language is ambiguous, the ambiguity will be construed in favor of the insured.²⁰ In other circumstances the term "damages" is found to be ambiguous; however, the Eighth Circuit in *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)* found that the term "damages" is not am-

977, 985 (8th Cir.) (en banc), *cert. denied*, 488 U.S. 821 (1988)(finding that the term "damages" is not ambiguous in the insurance context and that the plain meaning of "damages" does not include cleanup costs); *Cedar Chem. Corp. v. American Universal Ins. Co.*, No. 87-2838-4B, slip op. at 6 (W.D. Tenn. Sept. 13, 1989)("in the insurance context, the term 'damages' has acquired the plain and ordinary meaning of legal damages" and therefore cleanup costs are not covered).

17. *Maryland Casualty v. Armco, Inc.*, 643 F. Supp. 430 (D. Md. 1986), *aff'd*, 822 F.2d 1348, 1354 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988)(claim seeking compliance with regulatory directives does not constitute a claim for "damages" under the insurance policy); *Travelers Ins. Co. v. Ross Elec. of Wash., Inc.*, 685 F. Supp. 742, 745 (W.D. Wash. 1988) (environmental cleanup costs were not within coverage of property damage policy because recovery of such costs is an equitable remedy); *Verlan, Ltd. v. John L. Armitage & Co.*, 695 F. Supp. 950, 954 (N.D. Ill. 1988)(cost recovery claims under CERCLA do not seek "damages" relief, but are restitutionary in nature); *Headley v. St. Paul Fire & Marine Ins. Co.*, 712 F. Supp. 745, 749 (D.S.D. 1989)(injunctive relief claim for state environmental statute was not covered because the claim was not for a sum of money which fell under the terms of the policy's coverage).

18. *United States Fidelity & Guar. Co. v. Morrison Grain Co.*, 734 F. Supp. 437, 450 (D. Kan. 1990)(response costs are the expense of preventing or mitigating an injury and are distinct from "damages"); *Travelers Indem. Co. v. Allied-Signal, Inc.*, 718 F. Supp. 1252, 1255-6 (D. Md. 1989)(neither environmental cleanup nor costs to prevent future pollution to the environment constitute "property damages").

19. *National Grange Mut. Ins. Co. v. Pinkney*, 399 A.2d 877 (1979).

20. *Town of Epping v. St. Paul Fire & Marine Ins. Co.*, 444 A.2d 496, 498 (1982).

biguous when viewed in the insurance context.²¹ Although conceding that environmental damages caused by improper disposal of hazardous wastes could constitute property damage, the court felt that the dispositive issue was whether cleanup costs fell within the meaning of damages.²² Thus, the court held that the term "damages" was not ambiguous and its plain meaning, in the insurance context, refers to legal damages and does not include cleanup costs.²³ While not rejecting the rule of construction that terms of an insurance contract are to be given their ordinary meaning, the Fourth Circuit in *Maryland Casualty Co. v. Armco, Inc.*, supported this position.²⁴ In this action, the insurer sought a declaratory judgment that it was not obligated to indemnify its insured in a CERCLA action for sums incurred in the cleanup of hazardous waste contamination. The court, stating that judicial decisions have "limited the breadth of the definition of 'damages,'" ²⁵ subscribed to a legal, technical definition of the term "damages." While injunctive and restitutionary relief often involve an expenditure of funds, "damages" as used in a CGL policy only includes "payments to third persons when those persons have a legal claim for damages."²⁶ Therefore, the term "damages" is to be understood in its "accepted technical meaning in law."²⁷

The courts have also decided that construing the term "damages" in a limited way "is consistent with the provision

21. *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977, 985 (8th Cir.) (en banc), cert. denied, 108 S. Ct. 703 (1988). It is interesting to note that the court in *Independent Petrochemical Corp. (IPC) v. Aetna Casualty & Surety Co.*, while acknowledging that the home circuit's view of state law is entitled to deference, declined to follow the NEPACCO court which was also applying Missouri law. Nos. 89-5367, 89-5368 (D.C. Cir. Sept. 13, 1991) at 11. Instead, the IPC court found that the "[t]echnical meaning is the exception rather than the rule in Missouri, and the insurers therefore also had to show that the parties intended to be bound by it." *Id.* at 19-20.

22. *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d at 983.

23. *Id.* at 985.

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

25. *Id.*

26. *Aetna Casualty and Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955).

27. *Id.*

defining the insurer's obligation as a whole."²⁸ The courts hold that an insurer does not agree under the CGL policy to pay "all sums" which the insured becomes legally obligated to pay; the insurer agrees to pay all "sums which the insured shall become legally obligated to pay as damages."²⁹ Further, the courts, as in *Maryland Casualty Co. v. Armco, Inc.*, believe that if the term were given a broad meaning, then the term "damages" would become "mere surplusage because any obligation to pay would be covered."³⁰ This would cause the phrase "as damages" to be ineffective.³¹ The court in *Maryland Casualty Co. v. Armco, Inc.* determined that damages had a specific meaning which limited the insured's obligation under the policy and found that the government's claim for relief was not a claim for damages and therefore was not covered under the terms of the insurance policy.³²

2. Equitable Relief-Injunctive Relief

The second position taken by the courts is that under the CGL policy the insurer must only pay for legal damages and not for such equitable monetary relief as cleanup costs.³³ "Black letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability insurance

28. *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d at 986; *see also*, *Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979; *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d at 1352; *Aetna Casualty and Sur. Co. v. Hanna*, 224 F.2d at 503.

29. *Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. 430, 432 (D. Md. 1986), *aff'd* 822 F.2d 1348 (4th Cir. 1987).

30. *Id.* *See also* *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d at 986; *Maryland Cup Corp. v. Employers Mut. Liab. Ins. Co. of Wisc.*, 568 A.2d 1129, 1132 (Md. Ct. Spec. App., 1990).

31. *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d at 1352.

32. *Id.*

33. *Travelers Ins. Co. v. Ross Elec. of Wash., Inc.*, 685 F. Supp. 742, 744 (W.D. Wash. 1988); *Aetna Casualty and Sur. Co. v. Hanna*, 224 F.2d 449, 503-504 (5th Cir. 1955); *Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. at 432; *United States v. Northeastern Pharmaceutical Chem. Co.*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d at 987; *Verlan, Ltd. v. John L. Armitage & Co.*, 695 F. Supp. 950, 954 (N.D. Ill. 1988); *United States Fidelity & Guar. Co. v. Morrison Grain Co.*, 734 F. Supp. 437, 450 (D. Kan. 1990).

contracts.”³⁴

“In defining ‘damages’ and distinguishing ‘damages’ from equitable remedies,”³⁵ the court in *Maryland Casualty Co. v. Armco, Inc.* focused “not on the nature of the underlying action, but rather on the form of relief sought.”³⁶ The court found that the recovery of cleanup costs would not remedy the injury sustained; rather, a claim for cleanup cost recovery is designed to reimburse the government for restoring the contaminated property to its status quo. Accordingly, a claim for reimbursement of cleanup costs is not a claim for damages; it is a claim for equitable relief which is not recoverable under the policy.³⁷

The CERCLA statute itself provides an inherent distinction between forms of relief for environmental pollution. The relief sought may be either cleanup costs or compensatory damages for injury to, or destruction of, the environment.³⁸ In *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co.*, the court differentiated sections 107(a)(4)(A) and (B) from (C).³⁹ Under section (A), a PRP is liable for “all costs of removal or remedial action incurred by the United States Government or a State.”⁴⁰ Section (B) holds a PRP liable for “any other necessary costs of response incurred by any other person.”⁴¹ Both sections (A) and (B) are considered to be cleanup costs which differ from section (C) which constitutes “damages for injury to, destruction of, or loss of natural resources.”⁴² A district court in Washington agreed that when the government seeks recovery of cleanup costs under §107(a)(4)(A) or (B), the lawsuits are equitable actions for monetary relief in the form of restitution or reimbursement of

34. *Maryland Casualty v. Armco, Inc.*, 643 F. Supp. at 432.

35. *Maryland Casualty v. Armco, Inc.*, 822 F.2d at 1352.

36. *Id.*

37. *Id.*

38. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4).

39. *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d at 985.

40. CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A).

41. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

42. 842 F.2d at 987.

costs, and a jury trial is not usually provided.⁴³

One court analogized liability for response costs to the cost of complying with health and safety regulations.⁴⁴ The court stated that "while such costs are mandated by government agencies, . . . CGL policies do not cover such costs. Such costs are merely part of the cost of doing business, . . . [s]uch costs are not covered by CGL policies, any more than the cost of installing fire extinguishers as required by the Occupational Safety and Health Administration."⁴⁵ If the federal government sought recovery for "damages for injury to, destruction of, or loss of natural resources"⁴⁶ under § 107(a)(4)(C), there is a greater likelihood of recovering costs under the CGL policy.⁴⁷ The CGL policy covers "damages" but not cleanup costs which are expenditures for complying with the directives of regulatory agencies.⁴⁸ The costs of removing an obstruction as required by a mandatory injunction are not sums that the insureds were obligated to pay as damages within the meaning of the CGL policy.⁴⁹

3. Prophylactic Measures

The third approach taken by those courts holding that cleanup costs do not constitute damages asserts that cleanup costs are merely prophylactic measures. Insurers typically "reimburse only damages arising from actual, tangible injury," and do not insure prophylactic measures because their risks are more difficult to estimate and "are not connected with a harm to specific third parties."⁵⁰ This position reasons that remedial action taken by the government is a prophylactic

43. *Travelers Ins. Co. v. Ross Elec. of Wash., Inc.*, 685 F. Supp. 742, 744 (W.D. Wash. 1988).

44. *Aetna Casualty & Sur. Co. v. Gulf Resources & Chem. Corp.*, 709 F. Supp. 958 (D. Idaho 1989).

45. *Id.* at 962.

46. CERCLA § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C).

47. *Aetna Casualty & Sur. Co. v. Gulf Resources & Chem. Corp.*, 709 F. Supp. at 962.

48. *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d at 1354.

49. *Id.*

50. *Id.* at 1353.

measure because the government is attempting to avert future harm to humans and the environment where no specific third party is affected. Allowing coverage of prophylactic measures would provide the insured with the ability to overuse its insurance resources to the detriment of its insurer. The *Armco* court "decline[d] to extend the obligations of insurance carriers beyond the well-illuminated area of tangible injury and into the murky and boundless realm of injury prevention."⁵¹

B. Cleanup Costs Constitute Damages

There are also courts which have taken the opposing position and have found coverage based on two different theories.⁵² The first theory finds that the term "damages" should be interpreted using its plain, ordinary meaning.⁵³ The second

51. *Id.* at 1354.

52. *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1168 (W.D. Mich. 1988)(the cleanup costs are essentially compensatory damages for injury to common property and for that reason the insurer has a duty to defend); *Unigard Mutual Ins. Co. v. McCarty's Inc.*, No. 83-1441, slip op. at 5 (D. Idaho Aug. 4, 1989)(the insurers could have limited the definition of "damages" by simply including a sentence in the policy that damages do not include equitable relief); *Federal Ins. Co. v. Susquehanna Broadcasting Co.*, 727 F. Supp. 169, 174 (M.D. Pa. 1989), *amended in part*, 738 F. Supp. 896 (M.D. Pa. 1990)(response costs are not equitable in nature and therefore are recoverable as "damages"); *Aerojet-General Corp. v. San Mateo County Superior Ct.*, 209 Cal. App. 3d 973, *opinion omitted* 257 Cal. Rptr. 621, 627 (1st Dist.), *petition for reh'g denied*, 211 Cal. App. 3d 216, 258 Cal. Rptr. 684 (1989)(the cost of government directed cleanup costs constitute damages).

53. *Avondale Indus. Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1207 (2d Cir. 1989) *cert. denied*, 110 S. Ct. 2588 (1990)(an average person reading the policy would believe himself covered for demands and potential "damage" claims asserted in an administrative proceeding); *Fireman's Fund Ins. Cos. v. Meenan Oil Co.*, No. 84-CV-3285 slip op. at 25 (E.D.N.Y. May 3, 1990)(the average person does not differentiate between damages and restitution); *American Motorists Ins. Co. v. Levelor Lorentzen, Inc.*, No. 88-1994, slip op. at 8, 57 U.S.L.W. 2270 (D.N.J. Oct. 14, 1988), *appeal dismissed*, 879 F.2d 1165 (3d Cir. 1989), *vacated on other grounds*, No. 88-1994 (D.N.J. June 27, 1990)(the average person would conclude that cleanup costs constitute an obligation to pay damages); *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1365 (D. Del 1987)(an ordinary definition of the word "damages" makes no distinction between actions at law and actions in equity and therefore the underlying action would be covered); *Donaldson v. Aetna Casualty & Sur. Co.*, No. 88-6690 slip op. at 4 (Mass. Super. Ct. Middlesex County Ct. Apr. 4, 1990)(court applied broad definition to the term "damages" to include costs for environmental cleanup).

theory focuses on the substance of governmental cleanup mandates to find that cleanup costs constitute damages.⁵⁴

1. Plain, Ordinary Meaning

One theory is that the word "damages" has a plain, ordinary and popular meaning. This theory relies on the layman's dictionary definition, one of which defines "damages" as: "the estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for a wrong or injury caused by violation of a legal right."⁵⁵ The dictionary does not make a distinction between an action in equity and one in law.⁵⁶ When construed by the courts using the dictionary definition, the term "damages" includes costs that a PRP would be "legally obligated to pay" for injunctive relief, statutory response costs, or other required remedial actions enforceable in a legal proceeding.⁵⁷ In *National Indemnity Co. v. United States Pollution Control*, the court, applying Oklahoma law, found that the term "damages" covered response and environmental cleanup costs.⁵⁸ Judge West

54. *Marotta Scientific Controls, Inc. v. RLI Ins. Co.*, No. 87-4438, slip op. at 32 (D. N.J. June 5, 1990)(expenses incurred pursuant to environmental agency directives are compensable damages under the policies); *National Indem. Co. v. United States Pollution Control*, 717 F. Supp. 765, 767 (W.D. Okla. 1989)(the term "damages" covers response and environmental cleanup costs); *Chesapeake Util. Corp. v. American Home Assurance Co.*, 703 F. Supp. 551, 561 (D. Del. 1989)(court held that the term "damages" does not, as a matter of law, exclude costs of cleaning up a site); *Triangle Publications, Inc. v. Liberty Mut. Ins. Co.*, 703 F. Supp. 367, 372 (E.D. Pa. 1989)("damages" has been held to include equitable relief and therefore expenses incurred in cleanup operations could fall within the meaning of the policy); *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1190 (N.D. Cal. 1988)(governmentally mandated cleanup and investigation costs are "damages" and are fully compensable under a comprehensive general liability policy); *United States Aviax Co. v. Travelers Ins. Co.*, 336 N.W. 2d 838, 843 (Mich. App. 1983)(the mere fact that the EPA chose to clean up the site itself is merely fortuitous and should not excuse the insurer from liability on the policy); *Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co.*, 528 A.2d 76, 81 (N.J. Super. Ct. App. Div. 1987)(costs incurred in carrying out legally mandated abatement actions are recoverable as "damages").

55. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 571 (1976).

56. *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1365 (D. Del. 1987)

57. *Id.*

58. *National Indem. Co. v. United States Pollution Control*, 717 F. Supp. at 767.

found that "[t]he policy defined damages in an inclusive manner only, leaving the term open to interpretation;"⁵⁹ therefore, because the policy "did not affirmatively limit the definition of damages to the legal definition only,"⁶⁰ the court found that the plain ordinary meaning applied.⁶¹ Another court which came to the same conclusion held that the court could not "ride to the rescue" of the insurers because they imprudently failed to limit the term "damages."⁶²

In an action involving a state administrative proceeding rather than a CERCLA action, *Avondale Industries Inc. v. Travelers Indemnity Co.* stated that "an ordinary businessman reading th[e] policy would have believed himself covered for the demands and potential damage claims being asserted in the . . . administrative proceeding."⁶³ The court ruled that "[t]he average person would not engage in a complex comparison of legal and equitable remedies in order to define 'as damages,' but would conclude based on the plain meaning of the words that the cleanup costs. . . would constitute an obligation to pay damages."⁶⁴

2. Substance of Governmental Cleanup Mandates

Courts which find that cleanup costs constitute damages sometimes rely on a second theory which focuses on the substance of governmental cleanup mandates rather than on their form.⁶⁵ These courts hold that the mere fact that the EPA chose to clean up the site itself and then sue for reimbursement, rather than suing originally for damages, should not excuse the insurer from liability on the policy.⁶⁶ One court

59. *Id.* at 766.

60. *Id.*

61. *Id.*

62. *Unigard Mut. Ins. Co. v. McCarty's Inc.*, No. 83-1441 at 5.

63. *Avondale Indus. Inc. v. Travelers Indem. Co.*, 887 F.2d at 1207.

64. *American Motorists Ins. Co. v. Levelor Lorentzen, Inc.*, No. 88-1994 at 8, 57 U.S.L.W. 2270 (D.N.J. Oct. 14, 1988), *appeal dismissed*, 879 F.2d 1165 (3d Cir. 1989), *vacated on other grounds*, No. 88-1994 (D.N.J. June 27, 1990).

65. *See United States Aviex Co. v. Travelers Ins. Co.*, 336 N.W. 2d 838 (Mich. App. 1983). *See also United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich. 1988).

66. *United States Aviex Co. v. Travelers Ins. Co.*, 336 N.W.2d at 842-843. *See*

noted, "it is merely fortuitous from the standpoint of either plaintiff or defendant that the state has chosen to have plaintiff remedy the contamination problem, rather than choosing to incur the costs of cleanup itself and then suing plaintiff to recover those costs."⁶⁷ In this context, another court stated, "[i]t would defy logic to suggest that direct payment [by the insured] was not 'damages,' but that reimbursement was."⁶⁸ The same court further found that the existence of coverage should not be based on whether the government does or directs the work and seeks reimbursement.⁶⁹ "If the government undertook the cleanup and sued the responsible parties for the cost, certainly such an award would be considered damages."⁷⁰

Supporting this theory is the idea that the technical meaning of "damages" includes the relief sought by the insured because there is legal coercion involved. The rationale is that because the government is coercing the PRP to clean up the site, it is equivalent to bringing a legal action for damages.⁷¹ The court in *Intel Corp. v. Hartford Accident & Indemnity Co.*,⁷² found that the fact that the potentially responsible party's obligation is not in the form of a civil judgment or a criminal fine does not alter the fundamental nature of his obligation.⁷³ The court stated that the PRP's "participation in the 'consent' decree is a polite way in which the EPA forebears the use of its legal authority to compel cleanup."⁷⁴

also *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139; *New Hampshire Ins. Co. v. H. Brown Co.*, No. 87-56134 (Mich. Cir. Ct. Kent Co. Sept. 29, 1989).

67. *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. at 1170 (W.D. Mich. 1988), citing *United States Aviex Co. v. Travelers Ins. Co.*, 336 N.W. 2d at 843.

68. *American Motorists Ins. Co. v. Levelor Lorentzen, Inc.*, No. 88-1994 at 8-9.

69. *Id.*

70. *Id.* at 9.

71. *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171 (N.E. Cal. 1988).

72. *Id.*

73. *Id.*

74. *Id.* at 1190.

III. Recent State High Court Decisions

Eight state high courts have recently addressed the "damages" issue in nine different decisions. Of these, three decisions found in favor of the insurance carriers holding that cleanup costs are not damages⁷⁵ and six favored the insureds and found that cleanup costs are damages.⁷⁶ Additionally, the "damages" issue is pending before the highest courts of several other states.⁷⁷

A. Cleanup Costs do not Constitute Damages

Those state high courts which held that cleanup costs do not constitute damages relied on several different theories and previously decided opinions. The first theory uses a reasonable person standard while the second theory asserts that a lack of understanding of the policy terms does not create an ambiguity. The last theory is that cleanup costs are either preventive measures or pollution control and are not damages.

1. Reasonable Person Standard

One of the theories on which the state high courts relied was that the reasonable person would believe that cleanup costs do not constitute damages. A reasonable or ordinarily intelligent person reading the CGL policy carefully would agree that cleanup costs are not covered under the policy.⁷⁸ Further, it is argued that there are many words in an insurance policy which may not be understood by a first time reader. However, the Maine Supreme Judicial Court held that "only by completely eliminating the phrase 'as damages' can

75. See *infra* notes 78, 84, 87.

76. See *infra* notes 88, 91, 92, 95, 97, 99.

77. Jones Truck Lines v. Trans. Ins. Co., Nos. 89-1729, 89-1759, (3d Cir. submitted Feb. 27, 1990); Polkow v. Citizens Ins. Co., 435 Mich. 863 (1990).

78. Patrons Oxford Mut. Ins. Co. v. Marois, 573 A.2d 16,18 (Me. 1990) (where Maine Department of Environmental Protection ordered cleanup of pollution which resulted from leaking underground storage tanks located on the insured's property the court held that the ordinarily intelligent insured engaged in a more than casual reading of the policy would not consider money spent to meet the DEP's demands to be sums which the insured is legally obligated to pay as damages).

coverage be found,"⁷⁹ and that simply because the words are not understood by the first time reader "would not justify excising words from the contract."⁸⁰

2. Lack of Understanding of the CGL Policy Terms is not an Ambiguity

A second theory which the courts relied on was that there may be a lack of understanding by insureds as to the term "as damages." This, however, does not mean that the term is ambiguous. An ambiguity is only created by the courts when they interpret the terms and "convert . . . an insured's hope or assumption that every out-of-pocket payment is covered into a part of the contract language."⁸¹

3. Preventive Measures - Pollution Control

The third theory relied upon by the courts is that cleanup costs are either preventive measures or pollution control, but they do not constitute "damages."⁸² The high court in Maine held that cleanup costs are expenses that may be required to halt continuing pollution and are not property damage.⁸³ The same court, applying New Hampshire law, found that the costs of installing a gasoline recovery system to recover leaked gasoline and prevent further gasoline contamination were not covered under the CGL policy.⁸⁴ The court relied on *Desrochers v. New York Casualty Co.*,⁸⁵ where the court found that the costs of removing an obstruction as required by a mandatory injunction are not sums that the insureds were obligated to pay as damages within the meaning of the general liability policy.⁸⁶

The New Hampshire Supreme Court also addressed the

79. *Id.* at 19 n.7.

80. *Id.* at 27.

81. *Id.* at 19.

82. *Id.* at 18; see also *Lido Co. of New England, Inc. v. Fireman's Fund Ins. Co.*, 574 A.2d 299, 301 (Me. 1990).

83. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16, 19 (Me. 1990).

84. *Lido Co. of New England, Inc. v. Fireman's Fund Ins. Co.*, 574 A.2d at 301.

85. 106 A.2d 196 (N.H. 1954).

86. *Id.* at 199.

"damages" issue by vacating an appeal summarily affirming a lower court's favorable decision on the "damages" issue. The court vacated acceptance of the appeal as improvidently issued.⁸⁷

B. Cleanup Costs Constitute Damages

Those state high courts which held that cleanup costs constitute damages relied on several different theories. The first theory follows a plain meaning approach and the second theory uses a reasonable person standard. The final theory puts a limitation on the term damages.

1. Plain Meaning Rejects Legal/Technical Meaning

The first theory relied upon by courts holding that cleanup costs constitute damages was that the plain meaning of "damages" should be followed rather than a legal/technical meaning.⁸⁸ The Washington Supreme Court ruled that in interpreting the term "damages" one should "look to standard English language dictionaries" for definition.⁸⁹ Accordingly, the term "damages" was not being used in its legal and technical sense in the policies, but rather in its ordinary meaning. "The plain, ordinary meaning of damages as defined by the dictionary defeats insurers' argument. Standard dictionaries uniformly define the term 'damages' inclusively, without making any distinction between sums awarded on a 'legal' or 'equitable' claim."⁹⁰

The North Carolina Supreme Court agreed with this reasoning and held that "the term 'damages' is not being used in its legal and technical sense in these [CGL] policies."⁹¹ A more recently decided case, *AIU Insurance Co. v. Superior*

87. *Troy Mills, Inc. v. Aetna Casualty & Sur. Co.*, No. 89-311 slip op. at 36 (N.H. Feb. 13, 1990).

88. *Boeing Co. v. Aetna Casualty & Sur. Co.*, 784 P.2d 507, 511 (1990), *reconsideration denied*, No. 55700-4 (Wash. Jan. 4, 1990).

89. *Id.* at 877, 784 P.2d at 511.

90. *Id.*

91. *C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co.*, 388 S.E.2d 557, 557 (N.C. 1990).

Court of Santa Clara County,⁹² also construed the term damages using a plain and ordinary meaning.⁹³ The California court held that where the insured sought coverage for government-ordered cleanup costs the remedies sought by the agencies satisfied the plain and ordinary meaning of the phrase 'damages.'⁹⁴ The most current case on the issue, *A.Y. McDonald Industries, Inc. v. Insurance Company of North America*,⁹⁵ also followed the plain meaning theory and expressed that the term damages should not be given a meaning which only a specialist or expert in insurance matters would afford the term, rather, undefined terms in the policy should be given their ordinary meaning.⁹⁶

2. Reasonable Person Standard

Those courts holding that cleanup costs constitute "damages" also decided that the standard to be used in interpreting the terms of the policy is that of the reasonable person. However, these courts found that the reasonable person would think that the term "damages" included the costs of cleaning up a waste site.⁹⁷ The Massachusetts Supreme Judicial Court in supporting this view held that "a reasonable policyholder reading the language would fairly expect that the policy covered amounts he must spend to correct pollution damage for which the law holds him responsible."⁹⁸ The Minnesota Supreme Court found that "[i]t is consistent with the reasonable expectations of the insureds under these policies that the cleanup costs be covered."⁹⁹ Finally, the North Carolina Supreme Court agreed that the word "damages" includes

92. *AIU Ins. Co. v. Superior Court of Santa Clara County*, 799 P.2d 1253 (Cal. 1990).

93. *Id.*

94. *Id.* at 1279.

95. *A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am.*, No. 89-1722 (Iowa Sept. 18, 1991).

96. *Id.* at 31.

97. *Hazen Paper Co. v. United States Fidelity & Guar. Co.*, 555 N.E.2d 576 (Mass. 1990).

98. *Id.* at 583.

99. *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 181 (Minn. 1990).

cleanup costs because a reasonable business person purchasing a comprehensive general liability insurance policy would expect cleanup of toxic wastes pursuant to government order to be covered unless the policy explicitly limited the term's meaning.¹⁰⁰

3. Limitation on the Term "Damages"

Several of the courts which held that cleanup costs constitute "damages" narrowed their holdings and decided that the term "damages" does not cover safety measures or other preventive costs taken in advance of any damage to property.¹⁰¹ In the *Boeing* case, the court noted that the term "damages," as the policy states, must be "because of property damage."¹⁰² Thus, safety measures and preventive costs which are not property damages would not be covered by the policy. The Massachusetts Supreme Judicial Court agreed and held that where there has been no property damage "costs incurred in complying with an injunction or order directed to damage prevention or costs incurred in complying with the law"¹⁰³ are not covered. The Minnesota Supreme Court held that "purely preventive measures are not covered in the absence of property damage."¹⁰⁴ And lastly, the court in *AIU Insurance Co. v. Superior Court of Santa Clara County* held that the costs of compliance with injunctions ordering the insured to undertake prophylactic measures are not covered by CGL policies covering payment of damages.¹⁰⁵

IV. Analysis of the Problem

As the above discussion shows, the state courts of last re-

100. *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co.*, 388 S.E.2d 557, 570 (N.C. 1990).

101. *Boeing Co. v. Aetna Casualty & Sur. Co.*, 784 P.2d 507, 529 reconsideration denied, No. 55700-4 (Wash. Jan. 4, 1990); *Hazen Paper Co. v. United States Fidelity & Guar. Co.*, 555 N.E.2d at 582; *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d at 184.

102. *Boeing*, 784 P.2d at 512.

103. *Hazen Paper Co. v. United States Fidelity & Guar. Co.*, 555 N.E.2d at 582.

104. *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d at 184.

105. 799 P.2d 1253, 1276 (Cal. 1990).

sort are well on their way to a consensus on the issue of whether the term "damages" encompasses the cost of cleaning up hazardous waste sites. In six cases, the courts ruled in favor of the insureds, holding that cleanup costs constitute "damages."¹⁰⁶ In only three cases, decided by two courts,¹⁰⁷ the holdings were in favor of the insurers, with rulings that cleanup costs do not constitute "damages."

Enormous sums are being expended by both the insureds and insurers to litigate over the meaning of the term "damages."¹⁰⁸ For an insurance carrier, it would be difficult to believe that the damages issue will be resolved in its favor in future state court decisions. Certainly, the stream of recent decisions does not provide a basis for such a prediction. This leads to the question of why insurers should litigate this issue; or more precisely, why should they spend exorbitant sums of money in arguing the question? It seems wasteful to spend such enormous sums on litigation and end up with a result which hardly solves the problem. Lest one forget, the overarching problem facing the insurance industry, as well as society, is cleaning up hazardous waste sites. It seems clear that such sums of money could be better spent cleaning up the environment rather than paying litigation costs associated with policyholder litigation.¹⁰⁹

V. Suggested Alternatives

Two possible alternatives are appropriate for the insurance industry. One of these solutions is the creation of a

106. See *supra* notes 88, 91, 92, 95, 97, 99.

107. See *supra* notes 78, 84, 87.

108. There are also several other terms in the Comprehensive General Liability policy which are being disputed in the courts; for example, what is an "occurrence," what is "property damage," and is there a "suit" against the policyholder.

109. According to M.R. Greenberg, Chairman of American International Group, Inc., to date, fewer than five percent of the sites listed on the National Priorities list have been cleaned up. Cleanup work has been commenced at hundreds of sites; however, there has been little improvement to our environment compared to the vast amount of money spent by the PRPs and their insurers in litigation. "We must find a new way to fund America's environmental cleanup, which one federal agency has estimated could be a '30-to-60-year, \$500 billion problem.'" M.R. Greenberg, 'No-Fault' Plan to Clear Hazardous-Waste Sites, WALL ST. J., April 23, 1991, at A23.

cleanup fund. A second solution is the avoidance of litigation through settlement.

A. Amend CERCLA - Create a Superior Cleanup Fund

The goal of Superfund when enacted was to prevent pollution and to force the polluters to bear the costs of hazardous waste disposal. The Senate Report states explicitly that Congress designed CERCLA to "assur[e] that those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the cost of doing business."¹¹⁰ The polluters should be deterred from continuing the practices of polluting. Deterrence is ineffective where the polluters are allowed to pass the costs of cleaning up a hazardous waste site on to their insurers. The insurance companies become the "deep pocket" of industry when they are charged with the costs of cleaning up Superfund sites, an outcome which the insurance companies have been fighting tooth and nail. As this comment shows, the insurers have been involved in much litigation in an attempt to avoid paying the costs of cleanup.¹¹¹

In order to avoid the polluters' costs being passed on to the insurance companies, and to avoid the problem of poor waste disposal habits on the part of the polluters, the insurance industry should encourage members of Congress to amend CERCLA in 1994 when reauthorization is expected. This amendment should provide that government-mandated cleanup costs arising under CERCLA are not insurable interests; therefore, these costs can not be passed on to the pol-

110. S. REP. NO. 848, 96th Cong., 2d Sess. 13 (1980).

111. Testimony presented to the Chairman of the Subcommittee on Policy Research and Insurance Committee on Banking, Finance and Urban Affairs indicates that in a 1989 study of thirteen insurers, the insurers were involved in 1,962 lawsuits with insureds over pollution coverage issues and that they had spent millions of dollars in legal costs pursuing these lawsuits and defending insureds. The insurers indicated that they spent an average of 15.8 million dollars on these suits. United States General Accounting Office, Report to the Chairman, Subcommittee on Policy Research and Insurance, Committee on Banking, Finance and Urban Affairs, House of Representatives, Hazardous Waste, Pollution Claims Experience of Property/Casualty Insurers, 4-5 (February 1991).

luters' insurers. The polluters, or PRPs, would still be held responsible for payment of cleanup costs, but these costs could not be passed on to the insurer.

If cleanup costs were uninsurable, an alternative source of funds would be necessary to pay for these costs. One alternative would be the establishment of a pollution fund to clean up hazardous waste sites.¹¹² The present CERCLA process would continue to determine who was responsible for the disposal of the hazardous waste. The PRPs would then turn to the cleanup fund to pay that percentage of cleanup costs for which they had responsibility, while private party claims for property damage and bodily injury would continue to be brought against the CGL policies.

Contribution to the cleanup fund would be mandatory for those parties identified as PRPs at currently existing Superfund sites, with contribution based on compiled volumetric rankings for all the sites listed on the National Priorities List (NPL).¹¹³ A numerical factor would be multiplied by the volumetric ranking to determine a particular PRP's contribution. As new sites were added to the NPL, the PRPs involved at particular sites would be required to contribute in proportion to their percentage of waste sent to the site in relation to all other PRPs and their contributions at all other sites.

PRPs who were later removed from the PRP list would be reimbursed the amount which they had contributed. If a site were removed from the NPL, the corresponding PRPs and percentages would be removed from the cleanup fund. In the same manner, new sites would generate more PRP contributions.

112. Although Superfund was created with a 1.6 billion dollar tax on the petrochemical industry which was increased to 8.5 billion dollars in 1986, it has proven to be inadequate as very few sites have actually been cleaned up. Jon F. DeWitt & Charles M. Denton *Personal Liability Under CERCLA for Corporate Officers and Directors*, 5 *Toxics L. Rep.* (BNA) 375 (August 15, 1990).

113. In addition to contribution being based on the volumetric ranking of the PRP, another approach would be to base the contribution on both the PRP ranking and the toxicity of the PRP's waste. This approach may be more difficult to administer.

For those companies which have declared bankruptcy, the present funds in the Superfund would be used to clean up the site; however, if the cleanup costs were to surpass the resources of the Superfund, then either the PRPs at the particular site would be responsible for the bankrupt companies' contribution or a guaranty fund could be established whereby the PRPs contribute a fixed percentage to cover the failed companies.

Insurance companies would not be afforded a windfall because they would also be required to contribute to the fund. At least two methods of including the insurance companies in the cleanup fund are proposed. One way is to require insurance companies to contribute to the fund based on a percentage of premiums earned on the pre-1986 CGL policies¹¹⁴ of those insureds involved as PRPs at hazardous waste sites at the time of the enactment of this proposed legislation. The second method is to tax the insurance companies prospectively; a tax would be levied on all Comprehensive General Liability policies written after the enactment of this proposed alternative. This approach would spread the cost of hazardous waste cleanup throughout the general public as opposed to merely impacting the insurance companies and PRPs. Either plan would allow the insurance companies to return to the business of writing insurance and to provide some form of pollution coverage without the fear of Superfund's harsh liability scheme.¹¹⁵ These plans would also assure cleanup solutions in

114. The pre-1986 date would be appropriate because before the 1970s, insurers provided coverage for a broad range of coverage under the Comprehensive General Liability policies. *See supra* pp. 5-6. Beginning in the late 1960s through the 1970s insurers began revising their policies and added a pollution exclusion clause to specify that the CGL policies only covered sudden and accidental pollution events. In the 1980s, these pollution exclusions were even further limited to exclude pollution incidents. Between late 1985 and early 1986, insurers stopped providing policies covering pollution-related damages. DONALD S. MALECKI & ARTHUR L. FLITNER, *THE NATIONAL UNDERWRITER COMPANY, COMMERCIAL GENERAL LIABILITY - THE NEW CLAIMS-MADE AND OCCURRENCE FORMS*, 44-48 (2d ed. 1986).

115. As indicated in the previous footnote, the insurers stopped writing CGL policies which might cover pollution. Although in the 1970s the insurers created exclusions in their policies in an attempt to limit the coverage of pollution, the courts have not interpreted these exclusions as the insurers intended in their contracts. *See supra* notes 52-54. This is why the insurers are very hesitant to write policies which may be

an expedited manner.

B. Insurers' Alternative - Settle Out of Court

If the alternative proposed above were not to be adopted, a second solution for insurance carriers would be to seek alternatives to the litigation process. It would certainly seem wiser to remove these disputes from litigation, where possible, in order to save time and money. As the decisions to date have not favored the insurers, such a course of action would save both the insurers' and the insureds' resources for better uses.

It is in the interests of insurers to settle out of court where the jurisdictional law is unfavorable to the insurers. Insurers should only litigate where the action is defensible, in those few states which have decided that cleanup costs are not covered under the CGL, or where other coverage defenses exist.

VI. Conclusion

As this analysis has attempted to show, the state high courts seem to be well on their way to reaching a consensus on the issue of whether the term "damages" in a CGL policy encompasses the cost of cleaning up a hazardous waste site. In six state high court cases, the courts have held in favor of the insureds, holding that cleanup costs constitute "damages." In only three state high court cases, decided by two courts, the holdings were in favor of insurers with rulings that cleanup costs do not constitute "damages." Several cases presenting the damages issue are pending before the highest state courts, and authorities believe that they will follow the present trend and rule in favor of the policyholders.

Two possible alternatives to resolve the insurance carriers' dilemma regarding the "damages" question are proposed in this comment. The preferred alternative would be to amend CERCLA and make cleanup costs an uninsurable interest. With reimbursement of cleanup costs by insurers prohibited, an alternative source of funds would be necessary. One solu-

construed to cover pollution events.

tion to the problem which would assure cleanups in an expedited manner would be the creation of a pollution fund to clean up hazardous waste sites.

A less desirable alternative would be for insurance carriers to seek an alternative to litigation such as settling out of court. This would save both time and money, and both the insurers and the insureds could put their resources to better use.