June 1989

Insurance Coverage of CERCLA Response Costs: The Limits of Damages in Comprehensive General Liability Policies

Stephen Mountainspring

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38325W

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Insurance Coverage of CERCLA Response Costs: The Limits of "Damages" in Comprehensive General Liability Policies

Stephen Mountainspring*

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)\(^1\) imposes strict and retroactive liability for cleanup costs on the parties responsible for the improper release of hazardous substances. As CERCLA has been implemented and enforced, it has become clear that these cleanup costs can be enormous. Companies that produce and handle hazardous wastes often attempt to collect all or part of these cleanup costs from their insurers under Comprehensive General Liability (CGL) policies. Many insurers have refused to pay CERCLA cleanup costs, and as a result, CERCLA enforcement actions have spawned extensive litigation over the scope of CGL policies.\(^2\)

This Comment addresses one aspect of this insurance coverage dispute: Is the cost of complying with government cleanup orders issued under CERCLA included within the scope of the term “damages” in the coverage clause of most CGL insurance policies? In Part I, I examine the background and importance of this aspect of the CERCLA insurance debate. In Part II, I review in some detail two groups of cases that have sharply divided over the interpretation of the term “damages” in CGL policies and that provide the doctrinal background against which this issue must be examined.

Finally, in Part III, I analyze how this issue should be resolved. A number of arguments suggest that the term “damages” as it appears in the coverage clause of CGL policies should be interpreted to include the

---


\(^2\) See infra notes 42-178 and accompanying text.
cost of complying with CERCLA cleanup orders. First, the interpretation of insurance contracts should be governed by state law, and the majority of cases define "damages" to include environmental cleanup costs. Second, general principles of insurance contract interpretation suggest that the term "damages" should be construed in favor of the insured so as to include CERCLA cleanup costs. Finally, the public interest in the swift cleanup of improperly handled hazardous wastes mandates an interpretation of the term "damages" that will conserve scarce agency resources and insure a prompt cleanup response.

I

THE SCOPE OF CERCLA CLEANUP CLAIMS

Hazardous substance problems are a relatively recent phenomenon. At the end of World War II, the United States produced about one billion pounds of hazardous wastes per year. By 1980, annual domestic waste production averaged 126 billion pounds, of which only about 10% was properly disposed.

For years hazardous waste disposal was considered an unimportant issue. By the 1970's, significant problems began arising from improperly disposed hazardous wastes. Congress began a concerted effort in 1974 to enact hazardous waste legislation; these early efforts were thwarted by the Nixon Administration. In 1976 Congress enacted the Resource Conservation and Recovery Act (RCRA) to regulate the transportation and disposal of prospective hazardous wastes. The problem of preexisting wastes, however, remained unaddressed until the Love Canal disaster brought it to public attention in 1976.

At Love Canal, a sixteen-acre former chemical landfill in Niagara Falls, New York, the improper disposal of hazardous substances resulted in elevated levels of birth defects, genetic abnormalities, and cancer occurrences. The massive contamination required the permanent evacuation of the town, facilitated by a government fund established to purchase homes at fair market value. The total estimated cost of cleanup exceeded $60 million; the original cost of proper disposal would

8. Id. at 90, 112-14.
9. Id. at 115-16.
have been about $4 million.\textsuperscript{10} Total legal claims from the Love Canal incident exceeded $2 billion.\textsuperscript{11}

Congressional hearings in response to Love Canal and a dismal litany of other hazardous waste spills and releases resulted in the enactment of the Comprehensive Environmental Response, Compensation and Liability Act of 1980.\textsuperscript{12} CERCLA radically altered obligations of parties involved in hazardous substance operations. It has been interpreted to impose retroactive, joint, and several strict liability for cleanup based on past involvement with the contaminated area.\textsuperscript{13} Under CERCLA, all potentially responsible parties (including past and present hazardous waste generators, transporters, and disposers)\textsuperscript{14} are jointly and severally liable for the costs of removal or remedial action incurred by the government or any other person.\textsuperscript{15} These costs may include damages for injury, destruction or loss of natural resources, and the costs of health studies.\textsuperscript{16} In addition, the Environmental Protection Agency (EPA) may secure an injunction ordering site cleanup,\textsuperscript{17} with substantial penalties for noncompliance.\textsuperscript{18} To ensure available resources for cleanup operations, Congress established the Hazardous Substance Superfund, funded by a surtax on chemical producers and handlers, as well as by money recovered through suits against responsible parties and general funds from the U.S. Treasury.\textsuperscript{19} Originally funded at $1.6 billion,\textsuperscript{20} Superfund was increased to $8.5 billion by the Superfund Amendments and Reauthorization Act of 1986 (SARA).\textsuperscript{21}

The magnitude of cleanup costs and other potential liabilities under CERCLA is staggering. By 1984, EPA had targeted approximately 850 sites on the National Priority List (NPL) as urgently needing cleanup and estimated that this number would increase to between 1,800 and 2,000 within several years.\textsuperscript{22} EPA estimated average per site cleanup

\textsuperscript{10} Id. at 111. The amount actually spent was $35 million. An additional $45 million annuity account was established to ensure that cleanup funds would continue to be available.

\textsuperscript{11} Id. at 38.


\textsuperscript{13} See, e.g., United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 843-45 (W.D. Mo. 1984) (NEEPCO) (CERCLA § 101(32) imposes strict liability in CERCLA actions, and noting in dictum the legislative history that states that joint and several liability should be determined according to common law principles); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983) (CERCLA imposes joint and several liability; if the defendants caused an indivisible harm, each is liable for the entire harm).


\textsuperscript{15} Id.; see also cases cited supra note 13.

\textsuperscript{16} 42 U.S.C. § 9607(a).

\textsuperscript{17} Id. § 9606(a).

\textsuperscript{18} Id. §§ 9606(b), 9607(c)(3).

\textsuperscript{19} Id. § 9611.

\textsuperscript{20} Id. § 9631.

\textsuperscript{21} 42 U.S.C. § 9611(a) (Supp. IV 1986).

\textsuperscript{22} OFFICE OF EMERGENCY AND REMEDIAL RESPONSE, U.S. ENVIRONMENTAL PRO-
costs at $8.1 million.\textsuperscript{23} Using this figure, total cleanup costs for sites already on the NPL will exceed $6.8 billion and, as additional sites are added to the list, will probably exceed $16 billion in the near future.\textsuperscript{24} The Office of Technology Assessment projects the total cost for cleaning up all potential hazardous waste disposal sites at $100 billion.\textsuperscript{25}

CERCLA liability has had a major impact on the insurance industry. Many potentially responsible parties are covered by CGL insurance policies and have sought indemnification of liabilities incurred under CERCLA.\textsuperscript{26} Litigation costs relating to the 1,800 worst sites are projected to reach $8 billion, 79% of which will be paid by the responsible parties.\textsuperscript{27} Insurance carriers are projected to spend about $500 million litigating coverage issues alone.\textsuperscript{28} In 1984, underwriting losses on CGL policies exceeded investment income by $3.8 billion, and in 1985 these losses exceeded investment income by $5.4 billion.\textsuperscript{29}

From this perspective, the importance of developments in insurance defense of CERCLA claims becomes apparent. Insurance companies do not want to pay the immense costs of a CERCLA cleanup, but businesses with CGL policies may expect such coverage and may require such coverage to defray enough of the cleanup costs to remain in business. As a practical matter, Superfund, although large, does not have enough money to pay for the cleanup of all CERCLA sites. Thus, coverage disputes between businesses and insurers may delay cleanups that the government may not commence without private assistance.

Most insurance claims for costs of response to cleanup actions arise under CGL policies. The CGL policy is a standardized insurance contract commonly used by business insurers since the 1880's.\textsuperscript{30} In 1940, the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau issued the first industry-wide standard general liability

---

\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
policy.\textsuperscript{31} This Comprehensive General Liability policy was revised in 1943, 1955, 1966, and 1973.\textsuperscript{32} The 1966 and 1973 versions are the most commonly litigated of the standard CGL policies in suits disputing coverage for CERCLA cleanup costs.\textsuperscript{33}

The issue of whether response costs are covered by CGL insurance centers around the absent or sketchy definition of the term “damages,” which is used in CGL policies to limit the scope of liability coverage. The language of the CGL coverage clause is identical in the 1966 and 1973 CGL policies\textsuperscript{34} and provides that the insurer will indemnify the insured for “all sums which the insured shall become legally obligated to pay as damages because of property damage.”\textsuperscript{35} The 1966 policy states that “damages” includes “damages for loss of use of property resulting from property damage.”\textsuperscript{36} Property damage is circularly defined as “injury to or destruction of tangible property.”\textsuperscript{37}

The 1973 revision of the standard policy provided little clarity. The general definition of “damages” was deleted altogether, and the newly incorporated definition of “property damage” was merely a reformulation of previous policy language. The revised policy defined property damage as “physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom.”\textsuperscript{38}

Since the 1950’s, courts have disagreed over the interpretation of the term “damages.” This disagreement has extended to the issue of whether CGL damages encompass environmental cleanup costs, which is the fo-

\textsuperscript{31} Id.; W. OBRIST, THE NEW COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICY: A COVERAGE ANALYSIS 5 (1966).
\textsuperscript{32} Bardenwerper, supra note 30, at 3.
\textsuperscript{35} Broadwell, 218 N.J. Super. at 526, 528 A.2d at 78 (emphasis added) (quoting a typical CGL coverage clause).
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 10-11.
cus of recent litigation. This controversy has become manifest in two groups of cases. The first group, led by *United States Aviex Co. v. Travelers Insurance Co.*,[^39] argues for a broad interpretation of damages that would include the cost of government-ordered environmental cleanups. The second group, led by *Maryland Casualty Co. v. Armco, Inc.*,[^40] defends a narrow interpretation of damages that bars the recovery of environmental cleanup costs from insurers as “damages” under CGL policies.

This split in judicial opinion has serious implications for the effective enforcement of CERCLA. The costs of hazardous waste cleanup strain the resources of the government and most businesses. Without insurance coverage, many sites may never be cleaned up and the legacy of improperly managed hazardous waste will remain. Because many environmental protection statutes mandate cleanup or reimbursement for cleanup of environmental damage, decisions affecting who must bear the cost of cleanup will affect how and when these statutes are enforced.[^41]

The next section explores the legal origins of the *Armco* and *U.S. Aviex* decisions. These decisions and subsequent cases address the issue of whether response costs are included in the term “damages.” As a group, these cases establish the framework within which courts must interpret the term “damages.”

II
THE INSURANCE COVERAGE DEBATE IN THE COURTS

Over the past thirty-five years, courts have divided on the question of whether standard CGL policies include CERCLA response costs within the term “damages.” Four common elements of judicial inquiry have come to define the framework for the interpretation of the term “damages”: (1) whether “damages” includes legal and equitable forms of judicial relief; (2) whether state law definitions of “damages” are preempted by federal law definitions suggested by CERCLA and the seventh amendment; (3) the appropriate interpretation of “damages” under general principles of insurance contract interpretation; and (4) public policy concerns over the inclusion of CERCLA response costs in “damages.”


Early cases interpreting the term "damages" in insurance contracts came before CERCLA's enactment focused attention on an important issue in the debate over CERCLA response costs: Does the term "damages" in standardized insurance contracts encompass legal and equitable forms of judicial relief? Early cases split on this issue.

One group of cases limited the term "damages" to judicial remedies at law. Relying on this limited construction, these courts held that the costs of making restitution or complying with an injunction or any other forms of equitable relief were not covered by an insurance contract that insured the policyholder against the award of damages. The 1955 case of Aetna Casualty & Surety Co. v. Hanna is a leading example. In Hanna, the policyholder had built a landfill on previously submerged property by surrounding the property with a retaining wall and filling the enclosed area with boulders, trash, and dirt. After storms and high tides undermined the retaining wall and deposited the fill material on adjoining property, the neighbors obtained an injunction ordering Hanna to remove the debris and rebuild the retaining wall. Hanna sued his insurer to obtain reimbursement for the cost of complying with the injunction under a policy that insured against "damages." The court held that Hanna's claim fell outside the policy's coverage because the costs of complying with mandatory injunctive orders did not constitute "damages." The court narrowly defined "damages" as a claim at law for "pecuniary compensation or indemnity which may be recovered in the courts by any person who has suffered loss, detriment or injury, ... through the unlawful act ... of another."47

42. 224 F.2d 499 (5th Cir. 1955).
43. The reasoning of Hanna evolved from an earlier case, Desrochers v. New York Cas. Co., 99 N.H. 129, 106 A.2d 196 (1954), that involved a marshland that Desrochers had filled, leading to flooding of neighbors' property. The neighbors were awarded an injunction forcing Desrochers to restore the natural flow of waters to its previous condition, and Desrochers sought coverage under a Comprehensive Personal Liability policy. The court held that "the cost of compliance with the mandatory injunction is not reasonably to be regarded as a sum payable 'as damages.' Damages ... are remedial rather than preventive, and in the usual sense are pecuniary in nature." 99 N.H. at 131, 106 A.2d at 198. The court reasoned that any expense Desrochers incurred in complying with the injunction would be a liability assumed under contract, which the policy expressly excluded. Moreover, this expense was neither damages, "nor ... in any real sense equivalent thereto." 99 N.H. at 133, 106 A.2d at 199. The main points in Desrochers that later cases develop are: (1) that the costs of complying with an injunction do not constitute and cannot be equated with damages; (2) that damages do not include preventive measures; and (3) that expenses assumed under contract, such as those incurred in complying with an injunction, are not covered by insurance.
44. 224 F.2d at 500.
45. Id. at 500-01.
46. Id. at 502.
47. Id. at 503. In the next development in the injunction branch, Ladd Constr. Co. v. Insurance Co. of N. Am., 73 Ill. App. 3d 43, 391 N.E.2d 568 (1979), Ladd sought coverage for the costs of complying with an injunction to remove a slag pile encroaching upon a railroad...
Cases following Hanna paralleled its distinction between legal damages and injunctive relief to deny insurance coverage for the costs of both restitution and preventive measures to avoid future harm to third parties. Haines v. St. Paul Fire & Marine Insurance Co. illustrates this trend in the context of restitution. In Haines, attorneys in a Baltimore law firm sought coverage from their insurance company for their costs in an SEC action against the attorneys and a registrant whom the attorneys had represented in a debenture offering. The U.S. District Court for the District of Maryland denied the compensation, holding that the policy only covered “damages,” not equitable remedies such as restitution. Restitution, the court reasoned, “is not equivalent to a tort damage award [which would be covered by a CGL policy] because the monetary award is measured not by the damage to plaintiff, but by the gain of the defendant.”

While avoiding specific reference to the law-equity distinction operating in Hanna and Haines, other cases used similar reasoning to distinguish legal “damages” from the costs associated with preventing or mitigating injuries to third parties. In Farr v. Traders & General Insurance Co., plaintiff Farr reduced damage to property owned by third parties by immediately initiating a cleanup after his oil well exploded and flooded adjacent properties with oil, water, and mud. Farr’s insurers compensated Farr for damage awards obtained by the adjacent property holders, but they refused to pay for Farr’s early cleanup efforts under the argument that such costs were not legal “damages” covered by Farr’s policy. The Supreme Court of Arkansas upheld the insurance company right-of-way. In rejecting the claim, the court relied on Desrochers and Hanna and held that “words and phrases such as 'in law,' 'in equity,' 'legally,' and 'damages' are not so confusing and ultra-technical as to defy understanding and interpretation by those who have . . . insurance policies such as the one issued in the instant case.” Id. at 50, 391 N.E.2d at 573-74. The court noted that the insured had a standard policy, and the court expected laypersons to appreciate, without express reference in the policy, the legal ramifications of the term “damages.” Id. at 50, 391 N.E.2d at 574.

48. 428 F. Supp. 435 (D. Md. 1977). The first case to address this issue, Seaboard Sur. Co. v. Ralph Williams’ Northwest Chrysler Plymouth, 81 Wash. 2d 740, 504 P.2d 1139 (1973), denied insurance coverage for restitution ordered in a lawsuit brought under a state consumer protection act for unfair competition. A related insurance case, Jaffe v. Cranford Ins. Co., denied coverage on the basis that damages were not involved where an insured claimed reimbursement of attorney fees in defending a criminal charge. 168 Cal. App. 3d 930, 932-933, 214 Cal. Rptr. 567, 569 (1985). The Jaffe court held that the insurer had no duty to defend because the possible outcomes of the charge (imprisonment or a fine) did not constitute damages; even if restitution of fraudulently obtained medical welfare benefits had been ordered, this would only involve return of something wrongfully received. Id. at 934-35, 214 Cal. Rptr. at 570.

50. Id. at 441.
51. Id.
52. 235 Ark. 185, 357 S.W.2d 544 (1962).
53. Id. at 185, 357 S.W.2d at 545.
54. Id. at 188-89, 357 S.W.2d at 546.
pany's narrow definition of "damages" because the value of the cleanup effort could not be precisely determined and because the insured had not obtained permission for the cleanup, as the policy required. The decision acknowledged, but gave no weight to, the fact that the insured's action almost certainly benefitted his insurer by reducing property damage that otherwise would have been covered by Farr's policy.

Although some courts denied insurance coverage for equitable forms of relief, other courts found that CGL "damages" did encompass both legal and equitable remedies against the insured. The earliest case favoring the inclusion of equitable remedies in "damages" is *Doyle v. Allstate Insurance Co.* Decided in 1956, *Doyle* involved a nuisance suit by a neighbor to enjoin operation of defendant Doyle's dog kennel. The nuisance suit failed, and Doyle claimed legal expenses under a Comprehensive Personal Liability Policy which provided that the insurer would defend any suit seeking "damages" due to the injury or destruction of a third person's property. The insurer refused to defend the suit on grounds that the nuisance action had sought equitable relief, not monetary damages. In awarding Doyle his expenses, the New York Court of Appeals found that "equity may award damages in lieu of the desired equitable remedy" and that "[t]he policy does not draw any distinction between damages awarded by a court of law and those awarded by a court of equity." The court found it irrelevant that no claim for monetary damages was made because a court of equity had broad discretion to shape relief and could have awarded damages even if none had been sought.

In direct contrast to *Farr*, some courts extended insurance coverage to measures taken by the insured to prevent harm to third parties. The preventive measures in these cases closely parallel CERCLA remedial actions, which are designed to prevent further harm to human health and the environment.

55. *Id.*
56. *Id.* In a related case, *J.L. Simmons Co. v. Lumbermens Mut. Ins. Co.*, 84 Ill. App. 2d 98, 228 N.E.2d 227 (1967), an excavator took measures to protect adjoining lands from collapse after heavy rains. These measures were not covered because the costs of mitigating damages were not themselves a measure of damages and because there was no legal obligation to pay damages. *Id.* at 106, 228 N.E.2d at 231. Another case, *Prime Drilling Co. v. Standard Accident Ins. Co.*, 304 F.2d 221 (10th Cir. 1962), denied insurance coverage of fire suppression costs on the grounds that the insured acted in response to a legal duty.

57. *Id.* at 439, 154 N.Y.S.2d 10 (1956).
58. *Id.* at 441, 154 N.Y.S.2d at 12.
59. *Id.* at 441, 154 N.Y.S.2d at 11-12.
60. *Id.* at 442, 154 N.Y.S.2d at 12.
61. *Id.* at 443, 154 N.Y.S.2d at 13-14.
62. *Id.*
A leading example is *Leebov v. United States Fidelity & Guaranty Co.* 63 Leebov, a building contractor, was insured by a contractor's liability policy insuring against the imposition of "damages."64 During Leebov's excavation of a hillside, an embankment broke and land began to slide toward nearby residences.65 Leebov quickly drove his trucks against the embankment and shored up the bank to avert disastrous consequences to the neighboring houses below.66 Upon receiving Leebov's claim for reimbursement, the insurer, contending that Leebov had incurred no legal liability for damage prevented, refused payment.67

The Supreme Court of Pennsylvania held that the insurer should indemnify Leebov for his preventive measures.68 The court reasoned that Leebov's laudable conduct should not be allowed to create a windfall for his insurers:

> It would be a strange kind of argument and an equivocal type of justice which would hold that the [insurer] would be compelled to pay out, let us say, the sum of $100,000 if the [insured] had not prevented what would have been inevitable, and yet not be called upon to pay the smaller sum [of $13,047] which the [insured] actually expended to avoid a foreseeable disaster.

This language reverberates throughout later cases construing insurance coverage for the prevention of future environmental harm.70 A

---

63. 401 Pa. 477, 165 A.2d 82 (1960). For a general discussion of early cases on this topic, see Annotation, Recoverability, Under Property Insurance or Insurance Against Liability for Property Damage, of Insured's Expenses to Prevent or Mitigate Damages, 33 A.L.R.3d 1262 (1970).

64. 401 Pa. at 479, 165 A.2d at 83.

65. *Id.*

66. *Id.* at 479-80, 165 A.2d at 83-84. The danger to the neighborhood was so great that the residents were evacuated for two months while Leebov completed the shoring. *Id.* at 481, 165 A.2d at 84.

67. *Id.* at 479-80, 165 A.2d at 83-84.

68. See *id.* at 481-84, 165 A.2d at 84-85.

69. *Id.* at 481, 165 A.2d at 84.

70. The reasoning in *Leebov* finds support in three cases that closely parse the policy language. *Globe Indem. Co. v. State*, 43 Cal. App. 3d 745, 118 Cal. Rptr. 75 (1974), involved an insured's right to coverage under a CGL policy for expenses incurred by the state in suppressing a fire and preventing further damage to both the insured's property and third-party property. *Globe Indemnity* addressed the question of whether an insured was covered under the CGL policy for expenses incurred in preventing or mitigating damage to property of a third party. See generally 43 Cal. App. 3d at 751-53, 118 Cal. Rptr. at 79-81. After concluding that the insured certainly would be liable for damage caused to third parties by the fire, the court's reasoning paralleled *Leebov* in stating that it would be "strangely incongruous" for insurance to cover "damages to tangible property destroyed through ... negligence in allowing a fire to escape but not ... sums incurred in mitigating such damages by suppressing the fire." *Id.* at 751, 118 Cal. Rptr. at 79.

*Globe Indemnity* offered the rule that "expenses incurred in the mitigation of damages to tangible property" should be recoverable under CGL policies. *Id.* at 752, 118 Cal. Rptr. at 79-80. Such a rule would encourage "a most salutary course of conduct" and was statutorily recognized in the California Insurance Code, which holds an insurer liable "[i]f a loss is caused by efforts to rescue the thing insured from a peril insured against." *Id.* at 752, 118 Cal. Rptr.
Pennsylvania state court, following **Leebov**, explained that CGL "damages" policies covered preventive measures when: (1) the damage to others’ property had already begun, and (2) the preventive measures were essential to protect the insurer from the accumulation of sizable claims.\(^7\)

Although the early cases construing the term "damages" in insurance contracts were divided, they all encountered the coverage issue outside of the environmental context. These courts did not confront the widespread problem of environmental pollution, nor did they consider the effects of statutes mandating the cleanup of polluted areas. In the 1970's, cases interpreting the term "damages" in the environmental context began to appear, reflecting developments in environmental law. Unlike their nonenvironmental predecessors, these cases agreed on the interpretation of "damages" in insurance contracts. More importantly, they held that liability policies covering "damages" encompassed the costs of mandatory environmental cleanups. These early environmental cases did not address the formalistic distinction between law and equity or the divided precedents, but did create a consensus that included statutorily mandated environmental cleanup costs within the ambit of CGL "damages."

In **Lansco, Inc. v. Department of Environmental Protection**, a superior court in New Jersey held that state-ordered cleanup costs were covered by standardized insurance language under New Jersey law.\(^7\) \(^2\) In **Lansco**, the insured sought coverage for the cost of complying with the New Jersey Water Quality Improvement Act, which mandated the cleanup of an oil spill.\(^7\) \(^3\) The court found that environmental cleanup costs were covered by standard policy language providing liability coverage for damages.\(^7\) \(^4\) The court held that, by ordering the cleanup,
the State... has fixed as the measure of damages the cost of eliminating the harmful substance from the waters of the State. Hence, the cost of the clean-up determines the amount Lansco became legally obligated to pay and the amount for which it is entitled to indemnification.\textsuperscript{75}

A subsequent case, \textit{Chemical Applications Co. v. Home Indemnity Co.}, paralleled Lansco in reasoning that liability for response costs was not a penalty, but rather the measure of damage caused by a polluting event.\textsuperscript{76} Moreover, \textit{Chemical Applications} echoed \textit{Leebov} in noting that the insured’s failure to comply with the cleanup order might increase subsequent costs to the insurer.\textsuperscript{77} The government then would undertake the cleanup, obtain a judgment for damages against the insured for cleanup costs—which could well exceed the amount it would have cost the insured—and create an unequivocal claim for “damages” against the insurer well in excess of the cost of the insured’s own cleanup efforts.\textsuperscript{78}

Finally, \textit{Kutsher’s Country Club Corp. v. Lincoln Insurance Co.} held that cleanup costs reflected the state’s power to establish damages to preserve its interest in public resources.\textsuperscript{79} Thus, such costs were properly within the ambit of “damages” as that term appears in standard insurance contracts.\textsuperscript{80}

\textbf{B. The U.S. Aviex Case}

By 1983, a doctrinal framework for interpreting the term “damages” had begun to emerge. The debate over whether “damages” encompassed equitable remedies had been staked out by \textit{Hanna} and its offspring. \textit{Leebov} and Lansco discussed public policy aspects of the need for early cleanup by polluters to prevent future harm. Finally, Lansco, Chemical Applications, Kutsher’s Country Club and other cases...
grated new statutory programs into the common law notions of damages that dominated early opinions.

In 1983, in *United States Aviex Co. v. Travelers Insurance Co.*, the Michigan Court of Appeals became the first court to hold that CGL "damages" encompass the costs of state-ordered environmental cleanups. In *U.S. Aviex*, a fire had destroyed the plaintiff's chemical manufacturing facility in 1978. Water used to fight the fire caused toxic chemicals from the facility to seep into the ground and contaminate the groundwater below. A year later, the Michigan Department of Natural Resources (DNR) threatened legal action if U.S. Aviex did not investigate the extent of the contamination and correct the problem. The investigation showed that the groundwater was severely contaminated and that cleanup costs were likely to exceed one million dollars. Faced with escalating threats of enforcement action from DNR and rising cleanup costs, U.S. Aviex initiated a plan to prevent further contamination. U.S. Aviex then sought a declaratory judgment ordering its insurer to reimburse it for the costs incurred in investigating andremedying the groundwater problem.

The insurer presented two major defenses: (1) that the insurance policy covered only money paid or ordered to be paid as compensation for injury or loss, not money expended in response to injunctive orders; and (2) that damage to the groundwater was not covered by the policy because the water was "property owned by the insured," and thus there was no injury to third parties.

The court rejected both arguments. Noting that the term "damages" had been too narrowly construed by the earlier cases that excluded equitable remedies and preventive measures, the Michigan court held that "damages" includes cleanup costs—whether sought directly by the government or incurred through complying with an injunction. "It is merely fortuitous," the court wrote, "that the state has chosen to have [the insured] remedy the contamination problem, rather than choosing to incur the costs of clean-up itself and then suing [the insured] to recover those costs" as legal damages.

---

82. *Id.* at 590, 336 N.W.2d at 843.
83. *Id.* at 583, 336 N.W.2d at 840.
84. *Id.*
85. *Id.*
86. *Id.* at 584, 336 N.W.2d at 840-41.
87. *Id.* at 584-85, 336 N.W.2d at 841-42.
88. *Id.*
89. *Id.* at 588-90, 336 N.W.2d at 842-43.
90. *Id.* at 590-91, 336 N.W.2d at 843-44.
91. *Id.* at 590, 336 N.W.2d at 843.
92. *Id.* The court resolved the groundwater issue by noting that under Michigan case law, percolating water is not owned by the owner of the land under which it flows, and thus

From 1983 to 1986, most cases dealing with the coverage of cleanup costs under standardized liability insurance contracts repeated and expanded upon the U.S. Aviex analysis. For example, in Buckeye Union Insurance Co. v. Liberty Solvents & Chemicals Co., the Ohio Court of Appeals favorably cited Lansco and other early cases and then reached a similar result by a new route. The Buckeye Union court applied a well-accepted principle of insurance contract interpretation: that the terms of standardized contracts written by the insurer should be narrowly construed against it and broadly construed in favor of the insured. Thus, the court interpreted "damages" to encompass the costs of cleanups initiated by injunction or state order.

The most significant case of the 1983-86 period was United States v. Conservation Chemical Co., a well-reasoned opinion that justified the inclusion of CERCLA and RCRA response costs within CGL damages. In 1960, Conservation Chemical Company (CCC) began operating an industrial chemical waste disposal facility in Kansas City, Missouri. During the 1970's and 1980's, over 150 waste generators disposed of over 28 million gallons of liquids, sludges, and solids at the CCC site on the floodplain of the Missouri River. Hazardous substances escaped from the site into the groundwater at a rate of over 22,000 pounds per year, creating a substantial health threat to people and animals in the path of the migrating toxics.

In the early 1980's, EPA brought actions against CCC and other waste generators in U.S. District Court in Missouri under RCRA and CERCLA for reimbursement of expenses and injunctive relief to compel cleanup of the site. In the CERCLA action, over 150 waste generators were impleaded by the four defendants selected as deep pockets by the government. CCC impleaded its insurers under a claim for legal expenses and cleanup costs under the "damages" clause of its CGL policy. CCC argued that the spreading contaminants constituted property damage to third parties and that response costs were a specific and appropriate measure of these damages. The insurers countered...
that the CERCLA suit was premised on endangerment, that the United States sought equitable restitution not legal damages, and that CCC's loss was an economic business loss, not loss due to compensation owed to injured third parties.\textsuperscript{104}

The district court agreed that cleanup claims under CERCLA and RCRA were not legal actions, but rather equitable actions in the nature of restitution.\textsuperscript{105} However, the court then reasoned that "actions seeking recovery of cleanup costs . . . are equivalent to actions seeking recovery of damages to natural resources."\textsuperscript{106} As in \textit{U.S. Aviex}, the failure of CCC to follow the remedial order would have led to a cleanup by the federal government followed by an action seeking recovery of cleanup costs as legal damages.\textsuperscript{107} Thus, the legal/equitable distinction between forms of relief was immaterial in deciding the scope of "damages" in the coverage clause of CGL policies.\textsuperscript{108}


The \textit{U.S. Aviex} and \textit{Conservation Chemical} decisions established that courts would not deny insurance coverage for environmental cleanup costs. The courts rejected the technical distinctions between law and equity. Instead, they emphasized the practical similarities between "damages" and response costs, as well as the need to construe "damages" broadly under established principles of insurance contract interpretation and civil procedure. But in 1986, in \textit{Maryland Casualty Co. v. Armco, Inc.},\textsuperscript{109} the U.S. District Court for the District of Maryland issued a decision that flew in the face of the \textit{U.S. Aviex} line and was resoundingly affirmed by the Fourth Circuit.

Ironically, \textit{Armco} arose from the same Missouri storage facility disaster that yielded \textit{Conservation Chemical}.\textsuperscript{110} After the court in \textit{Conservation Chemical} found for the policyholders, a few insurers, including Maryland Casualty, reached a settlement with their policyholders, including Armco.\textsuperscript{111} In response to the settlement action, the district judge who rendered the \textit{Conservation Chemical} decision vacated his order \textit{nunc pro tunc} with respect to the settling parties.\textsuperscript{112}

After using the settlement to escape from the \textit{Conservation Chemical} judgment, Maryland Casualty sought to void the settlement in the U.S.

\textsuperscript{104} \textit{Id.} at 188.
\textsuperscript{105} \textit{Id.} at 192-93.
\textsuperscript{106} \textit{Id.} at 193.
\textsuperscript{107} \textit{Id.} at 194.
\textsuperscript{108} \textit{Id.}
\textsuperscript{110} 822 F.2d at 1350; \textit{see supra} text accompanying notes 96-99.
\textsuperscript{111} 822 F.2d at 1350-51.
\textsuperscript{112} \textit{Id.} at 1351.
District Court in Maryland.\textsuperscript{113} Maryland Casualty sought a declaratory judgment that it had no duty to defend—and therefore no duty to indemnify—Armco.\textsuperscript{114} The court found for Maryland Casualty.\textsuperscript{115} On appeal, the Fourth Circuit affirmed and held that the Missouri district court action had no collateral estoppel or res judicata effect because that court had vacated its order \textit{nunc pro tunc} with respect to Maryland Casualty and Armco.\textsuperscript{116}

At both the trial and appellate levels, the Armco courts focused on Armco’s policy, which covered all sums that Armco became “legally obligated to pay as damages” because of injury to or destruction of property.\textsuperscript{117} The trial court denied coverage by resurrecting the distinction, abandoned by the \textit{U.S. Aviex} line, between legal damages and equitable relief.\textsuperscript{118} The trial court looked to the seventh amendment, which grants jury trials only to actions historically sounding in law.\textsuperscript{119} Courts have determined that because CERCLA response cost suits sound in equity they are not entitled to jury trials.\textsuperscript{120} The Maryland district court reasoned that since response costs are equitable for seventh amendment purposes, such costs “cannot be the equivalent of damages, or ‘essentially’ monetary, for purposes of interpreting [the damages clause of] an insurance contract.”\textsuperscript{121}

On affirming, the Fourth Circuit approved the trial court’s interpretation of Maryland’s “narrow, technical definition of damages” in insurance cases.\textsuperscript{122} The Fourth Circuit, however, adopted a different, narrow definition of “damages,” albeit with the same result. The Fourth Circuit rejected the district court’s seventh amendment analysis, which focused on the equitable or legal \textit{nature} of the underlying action.\textsuperscript{123} Instead, the court looked to the equitable or legal \textit{form} of the relief sought.\textsuperscript{124} Legal damages, the court reasoned, are substantially different from injunction,

\begin{itemize}
  \item \textsuperscript{113} \textit{Id.} at 1355.
  \item \textsuperscript{114} \textit{Id.} at 1350; 643 F. Supp. at 431.
  \item \textsuperscript{115} 643 F. Supp. at 435.
  \item \textsuperscript{116} 822 F.2d at 1355.
  \item \textsuperscript{117} 643 F. Supp. at 432; 822 F.2d at 1350.
  \item \textsuperscript{118} 643 F. Supp. at 433-35.
  \item \textsuperscript{119} \textit{Id.} at 432.
  \item \textsuperscript{120} \textit{Id.}; 822 F.2d at 1351; see, e.g., \textit{United States v. Dickerson}, 640 F. Supp. 448, 453 (D. Md. 1986); \textit{United States v. Motolo}, 605 F. Supp. 898, 913 (D.N.H. 1985); see also \textit{Slavitt, Jury Trial Rights Under CERCLA: The Effects of Tull v. United States}, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,127, 10,131 (1988) (discussing Tull v. \textit{United States}, 481 U.S. 412 (1987), which holds that defendants have a right to a jury trial to determine liability in EPA actions for civil penalties and damages under CERCLA. The article concludes that a jury trial is constitutionally required to impose civil penalties under CERCLA and probably required to recover for damage to natural resources).
  \item \textsuperscript{121} 643 F. Supp. at 435.
  \item \textsuperscript{122} 822 F.2d at 1352.
  \item \textsuperscript{123} \textit{Id.}
  \item \textsuperscript{124} \textit{Id.} at 1352-53.
\end{itemize}
restoration, or other equitable remedies. Thus, a reasonably prudent insurance purchaser could infer that an insurance contract limited to "damages" would not cover restitution or injunctive costs. As a result, Maryland Casualty was not liable under a CGL "damages" policy for the costs incurred in Armco's cleanup.

The Fourth Circuit offered a number of legal and policy arguments in support of its holding. The Fourth Circuit began its treatment of U.S. Aviex by dismissing it as erroneous. The U.S. Aviex court had noted that if U.S. Aviex refused to comply with a cleanup injunction, state officials would clean up at their own expense and bring a later suit for compensatory damages. Because U.S. Aviex would pay cleanup costs sooner or later, the form of the judicial remedy eventually imposed was a mere fortuity that should not produce a windfall for insurers.

The Fourth Circuit, relying on Peevyhouse v. Garland Coal & Mining Co., did not find the difference between legal damages and equitable restitution or injunction an irrelevant fortuity. This difference in remedy could have real economic consequences. In Peevyhouse, the projected cost of compliance with an injunction to restore the land to its original state was at least six times the market value of the restored land and nearly one hundred times the legal damages caused by not restoring the land. The Fourth Circuit also offered a number of policy arguments to support a narrow, conservative construction of "damages" in insurance contracts. The court noted the indefinite and discretionary nature of cleanup costs, which rest upon the discretion of the insured and

125. Id. Although the district court acknowledged that Maryland law governed a diversity case such as this one, 643 F. Supp. at 431, neither the district court nor the Fourth Circuit cited a single Maryland opinion on the definition or conceptual limits of the term "damages," relying instead on Desrochers, Hanna, and Haines. 822 F.2d at 1352-53, 643 F. Supp. at 431-34. Although Haines was a diversity case decided under Maryland law, it too made no reference to Maryland cases defining the term "damages." See Haines v. St. Paul Fire & Marine Ins. Co., 428 F. Supp. 435 (1977).

126. 822 F.2d at 1352-53.
127. Id. at 1354-55.
128. Id.
130. Id.
132. Id. at 111-12. The Fourth Circuit overlooked the later case of Rock Island Imp. Co. v. Helmerich & Payne, Inc., 698 F.2d 1075 (10th Cir. 1983), which concluded that the Oklahoma Supreme Court would have decided Peevyhouse the other way in 1983 because Oklahoma enacted the Open Cut Land Reclamation Act, OKLA. STAT. ANN. tit. 45, § 725 (West Supp. 1989), making it public policy to reclaim strip-mined land. A strong analogy between the Oklahoma act and CERCLA indicates that the Fourth Circuit's reliance on Peevyhouse is treacherously misplaced. See Miller v. C.K.L., Inc., No. 88 CA 6 (Ohio App. Oct. 6, 1988) (WESTLAW, States library, Ohio file) (noting the above cases, citing with approval the definition of damages in Armco, and then construing public policy under an Ohio reclamation act to mandate insurance coverage for reclamation: "the proper measure of damages must statutorily be the amount necessary to reclaim the entire affected area").
are disassociated from any harm to specific third parties.”

The court balked at imposing liability for possibly unnecessary costs and at forcing courts to adjudicate such disputes. Finally, the Fourth Circuit rejected the notion that early cleanup would ultimately benefit insurers by preventing future harms clearly covered by their policies. Since these hypothetical benefits were unknown and difficult to determine, it urged future courts not to move “beyond the well-illumined area of [pre-existing] tangible injury.”


Armco provided a forceful set of arguments for those seeking to construe damages narrowly and bar the inclusion of CERCLA cleanup costs. More recent cases have divided sharply over whether the reasoning of U.S. Aviex or Armco is more persuasive. The result has led to a fractious debate but also a dialogue between the two lines of reasoning.

Adherents to the Armco line have typically limited themselves to adopting the analysis of either the trial or appellate court in Armco.

133. Armco, 822 F.2d at 1353.
134. The court reasoned:

[ The insurer would be uncertain of the extent of its liability in the absence of a requirement for an injury, the insured would have the tendency to over-utilize the “free” resource, and the judicial system would be faced with the impossible task of attempting to define the limitations on the necessity for the costs incurred in preventing further harm. ]

Id. at 1353.
135. Id. at 1354.
136. Id.
137. Id.
138. Hayes v. Maryland Cas. Co., 688 F. Supp. 1513 (N.D. Fla. 1988), which followed the reasoning in Hanna and acknowledged but did not analyze Pepper’s Steel & Alloys, Inc. v. United States Fid. & Guar. Co., 668 F. Supp. 1541 (S.D. Fla. 1987), was decided the opposite way and was based on supposedly the same corpus of Florida law; Verlan, Ltd. v. John L. Armitage & Co., 695 F. Supp. 950 (N.D. Ill. 1988), which also relied on the precedent of Ladd Construction, makes the notable comment that “[a]lthough the decisions are far from unanimous, the majority of cases have refused to shift the responsibility to the insurer under the terms of a standard CGL policy.” 695 F. Supp. at 954.

The trend of cases is in the other direction than the Verlan court had asserted by about three to one, as shown in this Comment. In Cincinnati Ins. Co. v. Milliken & Co., 857 F.2d 979 (4th Cir. 1988), the same court that decided Armco perceived “no material distinctions between the South Carolina and Maryland laws in the construction and interpretation of insurance policies,” and cited a single South Carolina case. 857 F.2d at 980-981. But see infra note 265 (discussing the difference between Maryland law and that of all other states as to insurance contract interpretation). See Travelers Ins. Co. v. Ross Elec. of Wash., Inc., 685 F. Supp. 742 (W.D. Wash. 1988) (following the statutory remedy distinctions in CERCLA); Continental Ins. Co. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977 (8th Cir. 1988) (5-3 en banc decision) (denying insurance coverage for response costs), rev’d 811 F.2d 1180 (8th Cir. 1987) (2-1 panel decision), rev’d No. 84-5034-CV-S-4 (W.D. Mo. 1985).

In what may be the development of a new CERCLA insurance issue, several cases have denied coverage because the insured incurred costs before the obligation had matured into a legally enforceable one. In these cases, the insured acted in response to receiving a “potentially responsible party” notification, Technicon Elec. Corp. v. American Home Assur. Co., 141
One notable exception is *Mraz v. Canadian Universal Ins. Co.* In that case, the Fourth Circuit Court of Appeals supplemented *Armco* by analyzing the term "damages" as defined within CERCLA itself. *Mraz* involved leakage of chemical waste from 1300 drums buried in a supposedly leakproof, clay-lined pit. Twenty-three years later an investigation revealed soil and water contamination. The government cleaned the site and then brought suit against *Mraz* and others to recover the response costs. *Mraz*, in turn, sued his former insurer for indemnification.

In denying coverage under the "damages" clause of a CGL policy, the *Mraz* court noted that CERCLA itself distinguishes government suits seeking compensation for "damages" to natural resources from those seeking cleanup costs. The Fourth Circuit panel applied this distinction to the "damages" clause of the CGL contract. Because the government sought the "costs incurred ... for ... cleanup, removal, ... and other response actions," and not "damages for injury to, destruction of, or loss of natural resources," *Mraz*'s insurance did not cover the government's claim.

A.D.2d 124, 533 N.Y.S.2d 91 (1988), or acted prior to EPA issuing a remedial order, Detrex Chem. Indus., Inc. v. Employers Ins. of Wausau, 681 F. Supp. 438 (N.D. Ohio 1987). See also *J.L. Simmons Co. v. Lumbermens Mut. Ins. Co.*, 84 Ill. App. 2d 98, 228 N.E.2d 227 (1967) (no insurance coverage if costs of mitigating damages not legally obligated). The issue that obligations have not yet matured to become legally enforceable will probably be a minor one because courts that are inclined to extend coverage also tend to interpret damages broadly, and "the law's policy to favor settlements and to avoid litigation" provides an incentive to interpret the triggering event to be an administrative action, rather than force the parties to await a formal claim for damages. 681 F. Supp. at 460. The most likely result is that insured parties will be more careful to comply with purely procedural requirements before undertaking remedial actions in order not to jeopardize coverage by acting too soon.

---

139. 804 F.2d 1325 (4th Cir. 1986).
140. *Id.* at 1326.
141. *Id.*
142. *Id.*
143. *Id.* at 1328 (discussing CERCLA, 42 U.S.C. § 9607(a)(4)(A)-(C) (1982)).
144. *Id.* at 1327-29.
145. *Id.* at 1329 (quoting government's complaint).
146. *Id.* (quoting CERCLA, 42 U.S.C. § 9607(a)(4)(C) (1982)).
147. *Id.* at 1329. The court also denied insurance coverage on two other bases. First, the policy language only covered "occurrences" that resulted in property damage during the policy period. *Id.* at 1327. Most CGL policies cover property damage that occurs after the policy period as long as the occurrence takes place during the period. *Id.* Since the exact date that the leakage occurred could not be determined, the court used the rule that the occurrence was deemed to have taken place when the damage was first discovered. *Id.* at 1328. This reasoning appears in no other response cost case and, perhaps, reflects peculiar policy language.

In addition, the court found that *Mraz* had signed away coverage in a release clause of a settlement agreement from an earlier suit for fumes. *Id.* at 1329-30. *Mraz* was a 2-1 decision on the issue of CERCLA damages; the concurrence argued that the waiver was dispositive and that it was neither necessary nor appropriate to consider any other issue. *Id.* at 1330.
Despite the Armco decision, a number of courts have rallied to protect the authority of U.S. Aviex. Most of these courts have confined themselves to an affirmation of the U.S. Aviex rule and an unabashed rejection of the arguably narrow minded and hypertechnical Armco analysis. Two cases, however, have made important additions to U.S. Aviex doctrine: Broadwell Realty Services v. Fidelity & Casualty Co. of New York and Intel Corp. v. Hartford Accident & Indemnity Co.

Broadwell involved measures taken to stop a gasoline leak from an underground storage tank owned by Broadwell onto adjacent lands. New Jersey state officials threatened a punitive assessment of triple the costs of cleanup if Broadwell failed to comply with a state cleanup order. Broadwell complied with the cleanup order at its own expense, avoided the penalty, and filed suit for compensation from its insurer under the “damages” clause of its CGL policy. The trial court granted Broadwell's summary judgement motion, but the Appellate Division of the New Jersey Superior Court reversed.

The New Jersey court made two new arguments for including cleanup costs as “damages” under CGL insurance policies. First, the

---

148. See GAF Corp. v. Continental Cas. Co., No. 87-3272 (E.D. La. Jan. 12, 1989) (WESTLAW, Allfeds library, DCT file) (“Louisiana cases have long treated clean-up costs as part of the general measure of damages”); Avondale Indus., Inc. v. Travelers Indem. Co., 697 F. Supp. 1314, 1319 (S.D.N.Y. 1988) (“[t]he average businessman does not differentiate between 'damages' and 'restitution'; in either case, money comes from his pocket and goes to third parties”); Miller v. C.K.L., Inc., No. 88 CA 6 (Ohio Ct. App. Oct. 6, 1988) (WESTLAW, States library, Ohio file) (regarding reclamation of strip-mined land, “the proper measure of damages must statutorily be the amount necessary to reclaim the entire affected area”); Sharon Steel Corp. v. Aetna Cas. & Sur. Co., No. 87-2306 (D. Utah June 20, 1988) (response costs to remedy environmental injury “considered damages” as the term is used in insurance contracts); Wagner v. Milwaukee Mut. Ins. Co., 145 Wis. 2d 609, 613 n.3, 427 N.W.2d 854, 856 n.3 (Ct. App. 1988) (“where there has been property damage, clean-up costs necessitated by that damage are covered under the insurance policy”).


152. Broadwell, 218 N.J. Super. at 519, 528 A.2d at 77.

153. Id. at 520, 528 A.2d at 78.

154. Id. at 520-22, 528 A.2d at 78-79.

155. Id. at 536, 528 A.2d at 86.
court emphasized the effect of punitive damages on Broadwell's claim.\textsuperscript{156} The court reasoned that cleanup measures preventing a punitive assessment should be compensable because they protected the insurer from much greater damages.\textsuperscript{157} This reasoning may apply to CERCLA claims, where treble damages for noncompliance are also available.\textsuperscript{158}

Second, \textit{Broadwell} became the first case to rely heavily on principles of insurance contract interpretation to interpret the meaning of "damages" in a CGL policy. The \textit{Broadwell} court relied on two principles: (1) that ambiguities in standardized insurance contracts are to be construed in favor of the insured,\textsuperscript{159} and (2) that courts should give effect to the reasonable expectations of the insured.\textsuperscript{160} The court found that "damages" was an ambiguous term and that Broadwell reasonably expected its CGL policy to cover the risks associated with a leaky underground tank.\textsuperscript{161} Consequently, cleanup costs were compensable as "damages."\textsuperscript{162}

Since \textit{Broadwell}, many other cases have applied principles of insurance contract interpretation; they represent a growing trend in the area of CERCLA insurance litigation. These cases have applied three additional principles of contract interpretation: (1) insurance policy language must be given its "ordinary and usual" meaning,\textsuperscript{163} (2) "insurance policy contracts should not be so strictly construed as to thwart the general object of the insurance,"\textsuperscript{164} and (3) coverage clauses are to be interpreted broadly while exclusion clauses should be interpreted narrowly.\textsuperscript{165} A final overarching consideration is that the intention of the parties, as ascertained from the language of the policy and the parties' reasonable expectations, should be given full effect.\textsuperscript{166}

\textit{Intel Corp. v. Hartford Accident & Indemnity Co.}\textsuperscript{167} also made important new arguments that CGL policies cover cleanup costs. The Intel Corporation manufactured semiconductors in Silicon Valley, California. As part of its operation, Intel used chemical solvents, classified as haz-

\begin{thebibliography}{99}
\item \textsuperscript{156} \textit{Id.} at 516, 528 A.2d at 76.
\item \textsuperscript{157} \textit{Id.} at 526, 528 A.2d at 81.
\item \textsuperscript{158} \textit{Id.} at 526, 528 A.2d at 81.
\item \textsuperscript{159} \textit{See} 42 U.S.C. § 9607(c)(3) (1982 & Supp. IV 1986).
\item \textsuperscript{160} \textit{Broadwell}, 218 N.J. Super. at 524, 528 A.2d at 80.
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.} at 525-29, 528 A.2d at 81-82; \textit{see also} Township of Gloucester v. Maryland Cas. Co., 668 F. Supp. 394, 399 (D.N.J. 1987) (preventive measures required to protect groundwater and other environmental systems that flow across property boundaries).
\item \textsuperscript{163} \textit{Id.} at 529, 528 A.2d at 82.
\item \textsuperscript{165} \textit{Compass Ins. Co. v. Cravens, Dargan & Co.}, 748 P.2d 724, 730 (Wyo. 1988).
\item \textsuperscript{167} \textit{Compass}, 748 P.2d at 730.
\item \textsuperscript{168} 692 F. Supp. 1171 (N.D. Cal. 1988).
\end{thebibliography}
ardous substances under CERCLA,168 that were stored in unsecured underground tanks.169 After Intel moved its operations to another site, soil and groundwater contamination was discovered.170 On its own initiative, Intel began cleanup efforts and ultimately entered into a consent decree with EPA.171 After Intel’s claim for insurance coverage under its CGL policy was denied, Intel filed suit against its insurer.172

In finding that Intel’s cleanup costs were covered under its CGL policy, the District Court for the Northern District of California supplemented the U.S. Aviex analysis. First, applying the Erie choice of law doctrine,173 the Intel court sought a definition of damages in California law. By California statute, “[e]very person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.”174 Since Intel had “damaged the property of all Californians” through its pollution of the percolating groundwater,175 its costs fell within the California statutory definition of damages and were thus covered by Intel’s standard CGL policy.176 Intel’s emphasis on state law is important;177 it implies that Armco’s and Mraz’s reliance on CERCLA’s distinction between response costs and natural resources damages and the seventh amendment distinction between law and equity is misplaced.

Additionally, the district court expressed its commitment to encouraging environmental cleanups, even at the expense of certain insurance company interests. It noted that “there simply is not enough money in Superfund and enough ‘horse-power’ in the EPA [and state agencies] to clean up first and seek . . . reimbursement later;” “industry cooperation is essential to begin to combat the nation’s hazardous waste problem.” Furthermore, the prospects for cooperation “would be undermined if insurers’ contributions are made contingent on a government cleanup first, followed by a judgment against the insured, and then a claim against the insurer.”178

170. Id. at 1172-73.
171. Id. at 1173.
172. Id. at 1174.
174. Intel, 692 F. Supp. at 1189 (quoting CAL. CIV. CODE § 3281 (West 1971)); id. at n.25 (noting that detriment was statutorily defined in CAL. CIV. CODE § 3282 (West 1971) as “loss or harm suffered in person or property”).
175. Id. at 1183.
176. Id. at 1189-90. Intel further held that the measures the company took to mitigate damages were covered under the Leebov doctrine endorsed in the California case Globe Indemnity, discussed supra note 70.
178. Id. at 1193.
The complicated doctrinal tapestry that produced and perpetuates the \textit{U.S. Aviex/Armco} schism is woven with many strands. Issues fundamental to the resolution of the issue include:

1. Does the term "damages" in CGL insurance contracts include legal and equitable forms of judicial relief?
2. Do federal definitions of damages suggested by CERCLA and the Seventh Amendment preempt state law definitions?
3. What is the proper interpretation of the CGL "damages" clause under principles of insurance contract interpretation? and
4. Are CERCLA response costs "damages" as a matter of public policy?

In the following Part, I analyze these four questions and conclude that under the relevant legal doctrine and public policy concerns CERCLA response costs should be recoverable as "damages" under CGL insurance contracts.

III

THE LIMITS OF THE DAMAGES CONCEPT IN CGL POLICIES FOR INSURANCE PURPOSES

The \textit{Armco} rule, which denies recovery of CERCLA response costs under CGL policies, is not unprecedented. Nevertheless, the analysis underlying the rule is faulty and application of the rule violates important principles of choice of law, insurance contract interpretation, and public policy concerns. In the following analysis, I argue against the \textit{Armco} rule and for a modified version of the \textit{U.S. Aviex} rule.

I argue that state law, not CERCLA language, is the proper source for legal definitions of the term "damages" and that when local law is used the term "damages" will be held to embrace CERCLA response costs. I also propose that the definition of damages in the law of remedies is sufficiently broad to encompass restitutionary measures or reimbursement actions, such as those commonly arising under CERCLA. Furthermore, principles of insurance contract interpretation require an ordinary language interpretation of the term "damages" and the construction of any ambiguities in favor of the insured. Once again, I conclude that CERCLA response costs are encompassed by the "damages" term of the CGL coverage clause. Finally, I suggest that the public interest in timely, effective cleanups of improperly handled hazardous materials mandates a definition of "damages" that includes CERCLA response costs.
A. State Law Should Determine Whether the Term "Damages" Includes Response Costs

Armco relies on the CERCLA section 107 distinction between liability for damages to natural resources and liability for response actions to justify the exclusion of response costs from damages for insurance purposes.179 Because CERCLA makes this distinction, the court concluded that response costs could not properly be considered damages under the statute.180 This conclusion is misguided because it wrongly assumes that the language in CERCLA is an appropriate source of law for interpreting the CGL policy. As discussed in the U.S. Aviex line of cases, state—not federal—law governs insurance contracts.181

In the McCarran-Ferguson Act,182 Congress established the supremacy of state law in interpreting insurance contracts.183 "The business of insurance,” Congress wrote, “shall be subject to the laws of the several States.”184 Moreover, the Erie doctrine holds that state law must be applied to resolve substantive issues of law in diversity cases.185 Many cases dealing with the interpretation of damages in CGL policies arise in federal court as diversity actions between the insured and its insurer.186 In such cases, the language of the insurance contract should be interpreted under state law and not the whim of the court.187

U.S. Aviex and its progeny premise their rejection of the CERCLA distinction between damages and response actions on the inappropriateness of federal law to interpreting the insurance contract.188 Armco concedes this principle,189 but nonetheless fails to apply Maryland law.190 Indeed, the only reference in Armco to Maryland law is to Haines v. St. Paul Fire & Marine Insurance Co.,191 a diversity case that relied on a federal statute for its definition of damages.192

---

180. See id.
184. Id.
186. See supra notes 42-178 and accompanying text.
188. See, e.g., Intel, 692 F. Supp. at 1186.
189. Armco, 822 F.2d at 1352.
191. See supra notes 48-51 and accompanying text.
Not only is CERCLA an inappropriate source of law, Armco’s interpretation of CERCLA is inconsistent with the plain language of the statute. The CERCLA definition of “damages” includes the reasonable costs of assessing the injury to the natural resources\(^\text{193}\) and the costs of restoring or rehabilitating the natural resource.\(^\text{194}\) The Armco reasoning, however, emphasizes that “damages” in a CGL policy refers to compensatory damages for loss, detriment, or injury suffered.\(^\text{195}\) This strict definition of “damages” employed by Armco excludes CERCLA’s explicit provisions for restoration costs and probably would not include the costs of assessing injury to natural resources.

More importantly, any application of CERCLA to the language of an insurance contract is fundamentally misleading because CERCLA is not an insurance statute. CERCLA does define certain cognizable harms for which the responsible party may become liable. But CERCLA never purports to define the relationship between an insurer and the insured for the purposes of allocating the costs of this liability. Thus, CERCLA should not be used to define the term “damages” for the purpose of interpreting the scope of coverage of an insurance policy. Indeed, once the scope of liability is defined by CERCLA, the scope of the insured’s coverage for this liability should be determined under state law.

Finally, there is good reason to believe that when state law is applied, courts will find “damages” to be broadly defined and to include the costs of environmental cleanups. Two states already have established a broad definition of “damages” by statute.\(^\text{196}\) Additionally, many states that have not imposed a broad definition of “damages” by statute have accomplished the same result by common law.\(^\text{197}\) Finally, given the principles of insurance interpretation and public policy concerns I discuss later, there is good reason to believe that those states that have not devel-

\(^{194}\) Id. § 9611(c)(2).
\(^{195}\) Armco, 822 F.2d at 1352; Continental Ins. Co. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 986 (8th Cir. 1988) (both referring to the definition of damages in Aetna Cas. & Sur. Co. v. Hanna, 224 F.2d 499, 503 (5th Cir. 1955)).
B. Tort Principles and the Law of Remedies Suggest That Damages Should Encompass CERCLA Response Costs

Cases denying insurance coverage for response costs have attempted to draw fine categorical distinctions between "damages" and other forms of relief. Armco, for example, found that actions for equitable relief such as restitution or an injunction are distinct from an action for damages. As discussed in Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co., this distinction can be significant: "the type of relief sought is critical to the insured and the insurer, because under the CGL policies the insurer is liable only for legal damages, not for equitable monetary relief, such as cleanup costs." The courts found that because response costs are analogous to restitutionary, preventive, and injunctive measures, they are not generally covered by the term "damages."

This effort at conceptual distinction breaks down on a number of levels in the analysis of a CGL insurance contract. First, where response costs are analogous to restitution, this kind of restitution is traditionally encompassed by the damages concept in tort law and, by some authorities, under contract law as well. Second, even when response costs result from complying with a remedial order, they are nonetheless encompassed within the term "damages" as used in a CGL policy.

1. Response Costs as Restitution

Often, the government or a private responsible party will pay for the costs of cleanup under CERCLA and then seek compensation from other responsible parties. Claims between private responsible parties are essentially claims for contribution among joint and several tortfeasors. Government claims for compensation for response costs constitute an action for performance of a public duty. Both types of action are traditionally regarded as actions for restitution.

CERCLA establishes strict liability for responsible parties who mishandle hazardous wastes, and claims for strict liability traditionally

---

198. See infra notes 257-310 and accompanying text.
199. Armco, 822 F.2d at 1352-53.
200. Id.
201. See Armco, 822 F.2d at 1352-53; see also Continental Ins., 842 F.2d at 987.
202. See Armco, 822 F.2d at 1352-53; see also Continental Ins., 842 F.2d at 987.
204. Id. §§ 86, 115.
205. RESTATEMENT OF RESTITUTION, supra note 203, § 115 comment a.
sound in tort. Consequently, in defining "damages" one should look to the tort principles commonly applied to interpret insurance contracts dealing with tort liability. Alternatively, one could analogize the environmental injuries from the mishandling of hazardous chemicals to personal injuries resulting from negligent conduct.

When tort principles are applied, the term "damages" embraces restitutionary remedies, such as the remedy commonly awarded to responsible parties who implement CERCLA cleanups at their own expense and then later seek compensation from other parties. The Restatement (Second) of Torts states that "[c]ompensatory damages are the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him." Because the terms "indemnity" and "restitution" accurately describe suits seeking reimbursement for response costs, relief sought under these suits falls within the tort definition of damages. Indeed, CGL coverage is generally construed to include tort liability for physical damage resulting from hazardous waste contamination.

Moreover, the distinction between law and equity drawn by the Armco court does not affect the interpretation of "damages" under tort principles. Under tort principles "damages," including restitution, may be awarded in equity. Even in contract law, "damages" can be broadly construed to encompass restitution. "The term 'damages' is very frequently used to denote any sum of money for which a court gives in judgment to an injured party," regardless of the technical rubric under which this payment is classified.

The clearest indication that restitution is traditionally included within the term "damages" for insurance purposes lies in claims of indemnification and subrogation among joint tortfeasors. Consider the common situation where parties A and B commit a tortious act upon C. C establishes that A and B are jointly and severally liable and recovers tort damages from B (perhaps because B has deeper pockets, more liquid assets, or a more amenable insurance carrier). B then brings an action

209. 4 Restatement (Second) of Torts § 903 (1979) (emphasis added); see also Restatement of Restitution, supra note 203, § 86 ("[a] person who has discharged a tort claim to which he and another were subject is entitled to indemnity or contribution from the other").
211. See infra notes 250-56 and accompanying text.
against \( A \) for contribution (partial indemnification under a theory of subrogation) and recovers;\(^{213}\) this action for reimbursement is one of restitution.\(^{214}\) At this point the example exactly parallels CERCLA cases where one responsible party \( B' \) seeks contribution from another responsible party \( A' \) for their damage to the environmental interests of \( C' \).

For traditional torts based on negligence or strict liability, \( A \) would be indemnified by a CGL policy. As the original action by \( C \) is for damages, there is no defense that \( A' \)'s insurer should not indemnify \( A \) merely because \( B' \)'s action against \( A \) prays for restitution. One commentator has stated, "An extensive search has unearthed no decision in which a liability insurer has successfully denied coverage of the insured's obligation to indemnify a cotortfeasor."\(^{215}\) Applying this conclusion to CERCLA cases, the insurers' defense that there is no coverage because the claim lies in restitution irrationally contradicts the indemnification, contribution, and subrogation procedures involved in a conventional tort claim against joint tortfeasors.

This parallel between indemnification among joint tortfeasors and actions for restitution of CERCLA response costs among responsible parties is not analyzed extensively in the cases. The U.S. Aviex group of cases recognizes this parallel implicitly.\(^{216}\) However, the cases do not discuss the similarity between reimbursement suits for CERCLA response costs and suits for contribution among joint tortfeasors.

Distinctions between traditional notions of restitution and more recent conceptual analyses of restitution are also relevant to the determination that damages can include restitution. Traditionally, restitution was given to prevent a defendant's unjust enrichment.\(^{217}\) As opposed to damages that measure plaintiff's losses, restitution includes a series of differ-

\(^{213}\) The principle of subrogation against a fellow joint tortfeasor is a departure from the common law, which prohibited such suits; some jurisdictions still prohibit subrogation. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts § 50 (5th ed. 1984) [hereinafter Prosser and Keeton on Torts]. About half the states have adopted the Uniform Contribution Among Tortfeasors Act, which allows such subrogation; many other states allow contribution because of judicial decisions in cases not involving moral turpitude. See 8B Appleman, Insurance Law §§ 4941, 4943 (rev. ed. 1976 & Supp. 1988); 16 Couch on Insurance, supra note 210, § 62:172. The common law rule apparently has no judicial following so far as insurers are concerned.

\(^{214}\) Restatement of Restitution, supra note 203, § 86; see also id. § 4(e) (connecting subrogation and restitution); id. § 81, comment i (connecting the concepts of subrogation and contribution among joint tortfeasors).

\(^{215}\) Annotation, Liability Insurance Policy as Covering Insured's Obligation to Indemnify, or Make Contributions to, Cotortfeasor, 4 A.L.R.3d 620, 621 (1965).


\(^{217}\) For provisions particularly applicable to CERCLA response cost cases, see Restatement of Restitution, supra 203, § 95 (making safe a dangerous condition), § 115 (supplying a service immediately necessary for public safety).
ent measures that generally focus on the defendant's gains.\textsuperscript{218} Underlying earlier cases denying insurance coverage for restitution in a nonenvironmental context is the notion that restitution forces an insured to disgorge benefits that it would be unjust to keep. These courts held that insured parties should not be able to collect insurance for the return of wrongful gains.\textsuperscript{219}

However, as mentioned in the \textit{U.S. Aviéx} line of cases, restitution in a modern setting embraces a wide variety of forms of relief.\textsuperscript{220} A suit for reimbursement of CERCLA response costs differs from traditional restitution cases. Unlike traditional cases, the measure of relief is not the insured's unjust enrichment, but the payments made by the government or another responsible party, who now seeks compensation.\textsuperscript{221} In CERCLA cases the insured is not liable for response costs until entry of judgment against him. At least in a legal sense, the insured has not been unjustly enriched by the failure to adequately dispose of the hazardous material. When the insured is found liable for response costs, a suit for compensation against other responsible parties becomes a tortfeasor contribution action that is normally covered by insurance.

Another distinction between CERCLA response cases and traditional actions for restitution lies in the fact that in CERCLA cases the insured party typically does not own the land damaged by his misconduct. In the traditional case, the party against whom compensation is sought captures the benefit of owning land that has been cleaned up at someone else's expense.\textsuperscript{222} Thus, this party should pay for receiving the benefit of salvaged land out of his own pocket, and not be allowed to simply pass the cost on to insurers.\textsuperscript{223} In CERCLA cases, no benefit accrues to the insured from the cleanup activity, except the benefit of avoiding his fair share of the cleanup costs already paid by another responsible party.\textsuperscript{224}

The \textit{Handbook on the Law of Remedies} addresses these peculiar restitution cases where the plaintiff-first tortfeasor's costs, rather than the defendant-second tortfeasor's unjust enrichment, are the measure of the remedy: "When the restitutionary interest is measured in this fashion it ceases to be restitution at all. It is no longer a disgorgement of money

\begin{itemize}
\item \textsuperscript{218} D. Dobbs, \textit{Handbook on the Law of Remedies} § 1.1 (1973).
\item \textsuperscript{222} See generally id. § 9607(a)(3)-(4).
\item \textsuperscript{223} See generally id. § 9607.
\item \textsuperscript{224} "Benefit" includes the situation wherein one party discharges the duty of another.
\end{itemize}
that unjustly enriches the defendant, for he is not enriched by services that do not add to his assets.

Significantly, all the cases Armco relies on to support its assertion that response costs are restitution, which is traditionally not covered by insurance, involved defendants who wrongfully received money or an equivalent benefit. Armco ignores the cases that do correspond to CERCLA restitution cases—those between joint tortfeasors seeking contribution from one another under a subrogation theory. Such cases fall squarely within restitution, yet the parties are routinely indemnified by their insurers. Although these tort cases generally use the terms “contribution” or “subrogation” rather than “restitution,” this semantic difference is immaterial. It merely camouflages the parallel. A second difference is also irrelevant: while tort actions clearly label the remedy as “damages,” CERCLA’s statutory scheme describes liability for “costs.”

Both Armco and U.S. Aviex have put too broad a gloss on the issue of whether response costs, as restitution, are covered by insurance. The Armco line analyzes the issue only to the point that response costs are identified as restitutionary measures: the line does not distinguish the different types of restitutionary measures. Moreover, it fails to recognize that some of these measures, such as contribution among joint tortfeasors, have substantial grounds for being included in the term “damages” for insurance purposes. The U.S. Aviex line makes some reference to the different types of restitution, but does not recognize the issue as dispositive. Cases following U.S. Aviex generally assert that response costs are the measure of damages or that state laws defining damages control. However, they too have failed to examine the issue more closely. As a result, the argument that CERCLA response costs may be considered restitutionary relief and included in the measure of damages has never been given full legal effect.

2. Response Costs as Reimbursement for Injunctive Relief

A knottier issue arises when insurance coverage for response costs is sought directly from the insurer after the insured has complied with a cleanup order. In restitution, the insurance company is asked to cover the indemnity of the insured for costs incurred by another responsible party or the government. In reimbursement cases, the insured is seeking compensation for cleanup costs the insured has incurred directly.


226. See supra notes 128-37 and accompanying text.

227. See 8B Appleman, supra note 213, §§ 4941, 4943; 16 Couch on Insurance, supra note 213, § 62:172; Prosser and Keeton on Torts, supra note 213, §§ 50-51, for case citations.
Remedial orders and consent decrees are generally considered to be equitable forms of relief, which under the “accepted technical meaning”\textsuperscript{228} of damages are excluded from insurance coverage. Under \textit{Armco} and \textit{Farr}, equitable relief was broadly construed to include preventive measures taken on the insured’s own initiative, even when such measures were absolutely necessary to avert mountainous claims.\textsuperscript{229} “Damages,” these courts reasoned, “includes ‘only payments to third persons when those persons have a legal claim for damages.’”\textsuperscript{230}

In contrast, the \textit{U.S. Aviex} line has included injunctive response costs in damages based on three theories. CERCLA response costs are CGL damages because they are: (1) ultimately enforceable in a legal proceeding; (2) a measure of the damage to natural resources; and (3) a preventive measure that would be covered by insurance in that jurisdiction. Each of these theories forms a basis for including claims for reimbursement in CGL “damages” that merits closer examination.

That CERCLA cleanup orders, and judicial injunctions to enforce the cleanup orders, are ultimately enforceable at law should push courts to treat the cost of complying with such remedial orders as damages.\textsuperscript{231} If the insured fails to comply with a remedial order, the government will conduct the cleanup and seek reimbursement from the insured, and this monetary reimbursement is “damages” as that term is used in CGL policies.\textsuperscript{232} As a result, altruistic responsible parties will be punished for voluntary cleanups while their more self-interested counterparts will force a delayed government cleanup and receive the cost of compensating the government from their insurers. Additionally, the government need not ask responsible parties to clean up on their own and may adopt the enforcement strategy of cleaning up and seeking reimbursement later. Thus, whether or not a responsible party receives insurance compensation may depend entirely on the fortuity of the government electing one enforcement strategy over another.\textsuperscript{233} To avoid unjust and arbitrary rul-
ings on the scope of CGL coverage, the cost of voluntarily complying with a CERCLA order should be treated as damages, just as a government claim for reimbursement is now treated as damages.

It might be argued that my analysis of the ultimate enforceability of remedial orders at law proves too much. If the possibility of legal enforcement is sufficient to render a remedy "legal," then an injunction of any kind is a legal remedy that falls within the ambit of "damages" under CGL policies. This approach could dramatically expand insurer liability and break down nearly all distinctions between damages and other remedies.

This criticism has some force, but it is not dispositive. There are a number of reasons for including insured reimbursement within CGL damages, and these reasons taken together remain persuasive despite the flaws of each. More importantly, there are crucial distinctions between compliance with CERCLA cleanup orders and compliance with other injunctions. Hazardous materials cleanup is a very specialized activity that responsible parties typically pay a specialized contractor to carry out for them. As a result, the difference between voluntary compliance and compensating the government for publicly financed cleanup may simply be the difference between whose name is put on a check. Moreover, CERCLA injunctions result directly from the exactions of a federal statute, obtained and enforceable by a government agency. This distinguishes CERCLA cases from most other cases, where an award of damages requires a monetary payment and the issuance of an injunction requires a change in conduct.

A second reason for including compliance costs within damages is that the cost of cleanup equals the measure of damages to publicly held property.234 Fixing damages by the cost of repair is a common practice in tort cases,235 and it is a practice that should not be abandoned simply because the costs of repair in CERCLA cases are determined by the bounds of a government cleanup order rather than a doctor's prescription or an auto mechanic's estimate. Although certain forms of publicly held property may not be traded in established markets, this fact should not bar insurance coverage when an accurate cleanup cost can be determined in advance.236 And government cleanup orders do provide specific requirements for compliance, as well as an accurate basis for determining what the total cost of compliance will be. The release of

---

235. D. Dobbs, supra note 218, § 5.10; see, e.g., Annotation, Measure of Damages for Conversion or Loss or Damage to Personal Property Having No Market Value, 12 A.L.R.2d 902, 906 (1950).
236. "Where the property is merely injured or damaged, and is repairable, the cost of such repairs will be allowed as damages." Annotation, supra note 235, at 929. A fair analogy can be drawn between personal property with no market value and property such as publicly owned groundwater ownership rights for which there can be no market. See supra note 92.
hazardous substances into the environment harms, and the state has the power to protect, the public interest in these environmental resources by exacting damages for such harms.\textsuperscript{237}

A final justification for including injunctive response costs in damages is that early compliance with remedial orders insures that damage to the environment will be kept to the lowest possible level. In general, insurance coverage will be extended to cover the costs of preventive measures where property damage has actually occurred and the preventive measures were necessary to prevent further damage.\textsuperscript{238} CERCLA cases meet both requirements of this general rule: the hazardous substance release damages property, and cleanup of areas contaminated by hazardous substances is necessary to prevent further harm to natural resources.\textsuperscript{239} CERCLA claims are within the spirit of the rule, as well. When hazardous materials have been mishandled, catastrophic liability can often be avoided by early effective action.\textsuperscript{240} And later, when the government cleanup must be undertaken, the enormous costs of last minute cleanup are more likely to fall upon insurers because government claims for monetary reimbursement are likely to be found to be damages, even under the narrow \textit{Armco} rule.\textsuperscript{241} By including the cost of voluntary cleanup within CGL "damages," the courts will encourage early cleanup and protect insurers from substantial liability at a later date.

In summary, courts should find that the cost of voluntarily complying with CERCLA cleanup orders and injunctions should be compensable as damages under any one of a number of theories. First, CERCLA cleanup orders and injunctions are ultimately enforceable at law, and the scope of insurance coverage should not depend on the fortuity of the form of government enforcement. Second, the terms of CERCLA cleanup orders and injunctions specifically define the scope of damages and provide an adequate basis for calculating the monetary value of any voluntary cleanup effort. Finally, the courts should encourage the mitigation of future harm—and future insurer liability—by allowing responsible parties that do act quickly and voluntarily to recover the costs of cleaning up as damages under CGL policies.


\textsuperscript{239} As discussed in the case history section above, it seems inconceivable that an insurer would actually prefer the insured to allow damage to accrue in order to ensure coverage of cleanup costs. Moreover, the passage of Superfund demonstrates the public imperative that hazardous waste sites be cleaned up as soon as possible to prevent further harm.

\textsuperscript{240} At Love Canal, for example, an estimated $4 million spent on proper disposal would have avoided an estimated $60 million in ultimate cleanup costs. \textit{See supra} notes 7-11 and accompanying text.

3. Response Costs in Law and Equity

There is a final aspect of cases dealing with tort law and remedies that we must address before we turn to the effect of the principles of insurance contract interpretation in the next section: the effect of the distinction between law and equity on CGL damages. The trial court in Armco and the Eighth Circuit in NEPACCO have both advanced the argument that CERCLA suits seeking a cleanup injunction or collection of cleanup costs are equitable in nature and, therefore, are not encompassed by the term "damages" in CGL policies. These two cases rely primarily on an analysis of the seventh amendment of the U.S. Constitution to support their application of the law/equity distinction to CERCLA cases.

The seventh amendment ensures the right of jury trial for actions cognizable at law in 1791, but not those cognizable in equity or admiralty. The leading case defining the seventh amendment distinction between law and equity is Tull v. United States. In Tull the federal government sought an injunction and civil monetary penalties from a developer who dumped fill on wetlands in violation of the Clean Water Act. Tull, the developer, was denied a jury at the trial level; the Fourth Circuit Court of Appeals affirmed, and the Supreme Court reversed. The Supreme Court held that federal actions to enforce the Clean Water Act by injunction and monetary penalties are analogous to 18th century actions for debt, which were within the jurisdiction of the English law courts. In reaching this conclusion, the Court focused on the nature of the relief sought. While finding that the suits for injunction and civil penalties sounded in law, the Court went on to find that the government's claim for restitution of cleanup costs it had expended sounded in equity and did not require a jury trial.

With Tull in mind, the effect of the seventh amendment on the application of the CGL "damages" clause to CERCLA is at worst unclear and, at best, supports a broad interpretation of "damages" to include cleanup costs. Simply analogizing CERCLA cleanup suits to Tull, it can be argued that the response costs and injunction typically sought by the government in CERCLA cases are analogous to the civil penalties and injunction found by the Court to be essentially legal in Tull because of

242. Id. at 432.
243. 842 F.2d 977 (8th Cir. 1988) (5-3 en banc decision) (denying insurance coverage for response costs).
244. U.S. CONST. amend. VII.
246. See id. at 414.
247. Id. at 416-17.
248. Id. at 420.
249. Id. at 417-18.
250. Id. at 424 (quoting Porter v. Warner Holding Co., 328 U.S. 395, 402 (1946)).
the penalty provision in CERCLA.\textsuperscript{251} Thus, even if we adopt Armco’s narrow definition of CGL “damages,” CERCLA response costs granted as remedies in law should be included.

Additionally, there is a good reason not to adopt Armco’s narrow definition of damages. The distinction between law and equity developed by the Armco line assumes that damages cannot be awarded in equity and that restitution cannot be awarded in law. Both assumptions are incorrect. Corbin notes that there is no justification for distinguishing between the remedies of damages and restitution by describing one as “legal” and the other as “equitable.”\textsuperscript{252} Both remedies could be obtained in either the courts of common law or those of equity.\textsuperscript{253} Further, the leading treatise on equity notes that equity can award damages,\textsuperscript{254} and an extensive discussion on the availability of damages as a term of relief in equity actions appeared in the leading case of State v. Sunapee Dam Co.\textsuperscript{255}

It is noteworthy that the Fourth Circuit, in affirming the district court decision in Maryland Casualty v. Armco, chose not to rely on the underlying cause of action for analyzing the law/equity distinction. The court instead emphasized the form of relief sought.\textsuperscript{256} The refusal of the circuit court to adopt the district court’s reliance on the seventh amendment, combined with the fact that distinctions between law and equity have long since been abandoned as a method for determining the type of relief, indicates the weakness of this element of the Armco analysis.

Finally, and most importantly, interpreting the scope of CGL damages with reference to the seventh amendment abandons many of the factors traditionally considered important in interpreting insurance contracts. Seventh amendment analysis prevents the court from considering the intentions of the parties, the effect of state law, the ordinary meaning of the term “damages,” or the important public policy concerns at issue in the CERCLA cases. Seventh amendment analysis of the scope of CGL damages is decision-by-technicality at its worst.

The term “damages” as it is used in insurance policies has a long history of interpretation in the law of torts and remedies. This history argues for a broad interpretation of damages that would incorporate CERCLA response costs.

\textsuperscript{252} 5 A. Corbin on Contracts § 996 (1964).
\textsuperscript{253} Id.
\textsuperscript{254} 1 J. Pomeroy, A Treatise on Equity Jurisprudence §§ 110, 112 (S. Symonds 5th ed. 1941).
\textsuperscript{255} See 72 N.H. 114, 115-25, 55 A. 899, 901-06 (1903).
C. Principles of Insurance Contract Interpretation

The principles of insurance contract interpretation receive occasional reference in both the Armco and U.S. Aviex lines of cases. However, given that CERCLA response cost cases are fundamentally insurance cases, the use of these principles could and should be expanded. Most of the cases do not go beyond the acknowledgment that ambiguities in the insurance contract should be resolved in favor of the insured. Broadwell,257 Compass Insurance Co. v. Cravens, Dargan & Co.,258 and Intel259 are the few notable exceptions.

In what follows I suggest how such principles might be more fully applied to the interpretation of the scope of damages in CGL policies. More particularly, I consider the effect of five basic tenets of insurance contract interpretation: (1) ambiguity in the policy language should be resolved in favor of the insured; (2) policy language should be given its ordinary, usual meaning; (3) coverage clauses should be interpreted broadly and exclusion clauses narrowly; (4) the contract should give effect to the reasonable expectations of the parties; and (5) the intention of the parties should be considered. Cumulatively, these principles strongly support the inclusion of response costs in CGL “damages.”

Ambiguities that appear in insurance contracts are almost universally interpreted in favor of the insured.260 Courts on both sides of the response cost debate agree on this principle.261 However, the cases divide over whether the term “damages” is ambiguous.262 This disagreement arises because cases such as Armco claim that the term “damages” should be given its legal, technical meaning (and this, according to Armco, is not ambiguous),263 while cases following the U.S. Aviex rationale have given the term its ordinary meaning, which may vary according to the viewpoint of the layperson.264

Given the general standard for determining the presence of ambiguities, cases in the U.S. Aviex line seem to have the better argument.265

260. 13 APPLEMAN, supra note 213, § 7401; 2 COUCH, supra note 213, § 15:74.
261. See 13 APPLEMAN, supra note 213, § 7401.
262. Id.
265. Maryland is the only state that does not follow the general rule construing ambiguities against the insurer. See Travelers Co. v. Boyer, 301 F. Supp. 1396, 1406 (D. Md. 1969);
Traditionally, the determination that an insurance contract is ambiguous depends on how the reasonably prudent person would understand the language of the contract. The understanding of an individual in the insurance field or an attorney is not the appropriate standard of interpretation.

A second principle of insurance contract interpretation holds that policy language is to be given its ordinary, usual meaning—not a legal or technical meaning. Armco is anomalous in choosing the “legal, technical meaning” of damages. Even more dubious is the reasoning in NEPACCO that acknowledged that the term “damages” is reasonably open to different constructions outside the insurance context, but then favored the narrow technical meaning over the broad ordinary definition. The ordinary meaning of damages embraces any judicially ordered payment to compensate for the harm caused by past misconduct. This definition is in accord with dictionary definitions adopting common usage. This ordinary meaning would encompass payments used to clean up hazardous materials released due to the prior mishandling of these chemicals by the responsible party.

Even if a technical definition of the term “damages” is adopted, there is no agreement as to the scope of this technical definition and no basis for assuming that, in the ordinary parlance of the insurance industry, technically defined “damages” excludes CERCLA response costs. For example, different courts may or may not include restitution and preventive measures in their definition of damages. Moreover, the standard CGL policy fails to offer a decisive definition in the contract, which is where a technical definition of “damages” might easily be established. The U.S. Aviex line of cases noted that because the insurers neglected the opportunity to write an explicit definition, any ambiguity in


Because insurance policies are not considered adhesion contracts in Maryland, the ambiguity in the term “damages” need not be resolved in favor of the insured because the principle of contra proferentem is inoperative. See 3 RESTATEMENT (SECOND) OF CONTRACTS § 206 (1982). This peculiarity in Maryland law reconciles Armco with the opposing decisions from other jurisdictions that do favor the insured in construing ambiguities; inexplicably, Armco does not cite the controlling Maryland cases.

266. 13 APPLEMAN, supra note 213, § 7384; 2 COUCH, supra note 213, § 15:84.
268. See Armco, 822 F.2d at 1352.
269. See Northeastern Pharm. & Chem. Co., 842 F.2d at 985-86.
270. A dictionary defines “damages” as “the estimated reparation in money for detriment or injury caused by a violation of a legal right.” WEBSTER'S THIRD NEW INT'L DICTIONARY 571 (1971).
271. See supra text accompanying notes 34-38.
the term arises from their negligence and should be construed against
them.272

The two principles of insurance contract interpretation discussed
above flow from the notion that a standardized insurance policy is an
adhesion contract, written by the insurer's skilled draftsperson.273 Because the insurer has control over the policy language, the insurer is in a
position to purposely write ambiguous terms into the contract and to
take advantage of this ambiguity by denying coverage when a specific
claim arises. Without the protection of the standard of interpretation,
the unwary insured might be trapped by technical definitions that have
no meaning, or a counterintuitive meaning, in the eyes of the ordinary
person. Indeed, the result of cases like Armco is that companies who
thought they had obtained a comprehensive liability policy found instead
that they had purchased a policy that compensated for only a narrowly
defined type of damages.

A third principle of insurance contract interpretation supporting the
rationale of U.S. Aviex is that coverage clauses should be interpreted
broadly, whereas exclusion clauses should be interpreted narrowly.274
More specifically, coverage clauses should be broadly interpreted so as to
effectuate, not frustrate, the purpose of insurance.275 And the purpose of
CGL insurance is to provide comprehensive general coverage against lia-
bility arising from the operation of a business. To deny coverage for
CERCLA response costs frustrates the purpose of a unified comprehen-
sive liability system and produces a windfall for insurers who are released
from liability.

A fourth principle, that the insurance contract should give effect to
the reasonable expectations of the parties, tends to expand coverage be-
yond the literal meaning of the policy.276 "[A] purchaser of comprehen-
sive insurance normally expects ordinary transactions to be covered and
if an insurer would create an exception, it must do so clearly."277 From
the language of the CGL policy, it is reasonable for the insured to expect
a comprehensive general liability policy to provide coverage for all prop-
erty damage that the insured is legally obligated to pay and for which the
insurance company has not created a clear exception.278 The duty of

272. See Armco, 822 F.2d at 1350; Continental Ins. Co., 842 F.2d at 985 (Heaney, J.,
dissenting).
273. 13 Appleman, supra note 213, § 7401; 2 Couch, supra note 213, § 15:84.
274. 13 Appleman, supra note 213, §§ 7405, 7486; 2 Couch, supra note 213, §§ 15:48,
1988); Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co., 17 Ohio App. 3d 127, 132,
275. 13 Appleman, supra note 213, § 7386; 2 Couch, supra note 213, § 15:42; see Com-
276. 13 Appleman, supra note 213, § 7385.
277. Id. § 7405.
good faith and reasonableness in carrying out the terms of the contract also implies that the insurer must give effect to the reasonable expectations of the insured.\(^{279}\)

The fifth principle of insurance contract interpretation holds that courts should look to the intention of the parties when the contract was formed.\(^{280}\) Although this principle has been called "the polar star of insurance contract construction,"\(^{281}\) it is difficult to apply to CERCLA response cost cases because the damage, mishandling of hazardous materials, and liability, retroactive liability for cleanup costs, were probably not specifically anticipated.

Furthermore, there is no indication in the history of CGL policies as to what the drafters of the contract intended. Neither the 1966 nor the 1973 versions of the CGL policy offer any indication of an intent to exclude coverage of response costs. Both versions failed to include either a substantial definition of the term "damages," or an exclusion for environmental cleanups or other governmentally mandated activities.\(^{282}\)

The fact that the CERCLA response cost liability was not specifically foreseeable, however, does not mean that parties to CGL policies had no applicable intentions. One function of CGL policies is to allocate the risk of unforeseeable liabilities to insurers so that businesses can plan business strategies with some security. This function is suggested by the title: Comprehensive General Liability Policy. This function is also suggested by the absence of an express and narrow definition for damages in a contract written by insurance industry representatives who easily could have created such a definition if they intended to limit the policy to specific known forms of damages. Finally, CGL policies lack any exclusionary language dealing with environmental hazards or retroactive liability. Both retroactive liability and liability for creating environmental hazards were well established as legal doctrines when the CGL policies were revised in 1973.\(^{283}\) Because CGL policies were intended to allocate the risk


280. 13 APPLEMAN, supra note 213, § 7385.

281. Id.; see also 2 COUCH, supra note 213, §§ 15:9, 15:58.

282. See supra note 38 and accompanying text. The pollution exclusion clause in the 1973 policy excludes pollution that is not sudden and accidental, but that issue is not the subject of this Comment.

283. On retroactive liability of CERCLA, see United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 840-41 (W.D. Mo. 1984), and Ohio ex rel. Brown v. Georgeoff, 562 F. Supp. 1300, 1302-12 (N.D. Ohio 1983); on the constitutionality of federal statutes establishing retroactive liability, see Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) (for black lung disease); Lichter v. United States, 334 U.S. 742 (1948) (for war contract renegotiations); and on the long tradition of U.S. Supreme Court opinions upholding states' rights to readjust civil rights and burdens in retroactive matters, see, for example, Welch v. Henry, 305 U.S. 134, 146 (1938). In general, the Court's position is that:
of unforeseen liability, they should be interpreted to include liability for unforeseen CERCLA response costs.

In addition to the five principles discussed above, two principles of insurance contract interpretation appearing in the case law merit some discussion despite the fact that they will probably play only a minor role in the continuing debate over the interpretation of CGL damages. First, each word in an insurance policy is deemed to have meaning. While this principle justifies an extensive analysis of the term "damages," it does not indicate how to interpret the term. Second, although the words in an insurance policy are to be given their ordinary meaning, they must be construed in accordance with established rules of law—even if the insured is not familiar with these rules. At first blush this may appear to endorse adherence to the Armco analysis. However, as evidenced by the numerous cases in the U.S. Aviex line, an accepted legal construction of the term "damages" does not exist. Consequently, even if the insured contracted with the knowledge that the legal definition of damages would control, the insured could not, with any certainty, determine what this term actually meant.

When principles of insurance contract interpretation are applied in interpreting the scope of "damages" in CGL policies, the result is a broad definition of damages that incorporates CERCLA response costs. "Damages" has a sufficiently broad meaning in ordinary language to encompass response costs. Moreover, any ambiguity in the term and the coverage clause should be construed in favor of the insured. Although the intent of the parties might be difficult to determine specifically with reference to CERCLA liability, the intent can be discerned with reference to unforeseen liability for property damage. Once again, CERCLA liability is incorporated by the "damages" clause of CGL policies.

D. Public Policy Considerations

Finally, three public policy considerations favor following the U.S. Aviex rule to include CERCLA response costs in CGL damages. First, response costs are the only reasonable measure of damage to the community's interests resulting from the release of hazardous substances. Sec-

[T]here exists a general power in the state governments to enact retrospective or retroactive laws .... The only limit upon this power in the States by the Federal Constitution .... is the provision that these retrospective laws shall not be such as are technically ex post facto, or such as impair the obligation of contracts. League v. Texas, 184 U.S. 156, 161 (1901) (quoting Baltimore & Susquehanna R.R. v. Nesbit, 51 U.S. (10 How.) 395, 401). Thus when the 1966 standard CGL policy was promulgated, drafters could look to a 168-year tradition of judicially upheld state acts establishing parties' rights retroactively; this offered substantial opportunity to consider an exclusion clause covering retroactive liability. Hence, the retroactive nature of CERCLA liability should not be considered in inferring the parties' intent.

284. 13 APPLEMAN, supra note 213, § 7384; 2 COUCH, supra note 213, § 15:44.
ond, voluntary private cleanups should be encouraged, especially in light of the government’s limited cleanup resources. Third, insurance company interests in specific and limited coverage are served when the government limits cleanup liability to the cost of carrying out acts clearly specified in the cleanup order.

1. Response Costs as the Economic Measure of Damages for Environmental Pollution

Adherence to a legal, technical definition of damages and the conventional economic analysis used to determine these damages would result in an incomplete assessment of the true harm resulting from the release of hazardous substances. Under a conventional economic analysis, damages are limited to the cost of replacing the injured property as these costs are set by markets in the type of property injured. This value may not adequately represent the full range of harm to a community and its natural resources.

Damage to natural resources has always been difficult to quantify. Natural resources may or may not carry any market value, and the fact that resources may be publicly owned complicates the task of assigning economic loss due to harm. Damage to groundwater, which often results from the release of hazardous substances, is particularly difficult to assess. In a conventional analysis, damage to the resource is limited to the market value of the property interest. Groundwater, however, flows across property boundaries, and the effect of groundwater contamination on any particular piece of property is nearly impossible to identify. In areas where some economic value is assigned to groundwater, this value is low because of groundwater abundance, nonutilization, or the ready availability of alternative water sources.

Even where market values can be assigned to damaged property, the market value remains an inappropriate measure of the economic loss that the community may incur from the release of hazardous materials. Damage from a toxic release may exceed the sum of the market value of all the affected properties. From the community’s point of view, the potential economic liability that accompanies a toxic release goes beyond property damage; it includes psychic stress, an increased risk of cancers

286. 4 Restatement (Second) of Torts, supra note 209, § 906 comment a.
288. Id.
291. See infra notes 292-301 and accompanying text.
and other diseases, decreased real estate prices for those properties that are not directly affected by the released materials, and in the case of small towns, complete economic destruction.292

The CERCLA scheme rejects this conventional market analysis as an unrealistic measure of the damage resulting from the release of hazardous substances. Instead, CERCLA articulates a public policy that improperly released hazardous materials should be cleaned up rather than abandoned. The liability imposed under CERCLA is equivalent to the economic cost necessary to restore the property to acceptably safe condition; the value of the property is determined by the amount of money it takes to restore, not replace, the property.293 CERCLA liability is essentially a societally based liability, not a market one.

CERCLA substitutes the concept of “response costs” for “market replacement value.”294 As a result, where the cost of cleanup exceeds the replacement value of the property, a toxic release will lower an individual parcel’s economic value to a negative amount.295 In the ideal world of the economist, the rational society would abandon such property rather than clean it up. CERCLA recognizes that the value of cleaning up an individual parcel includes more than the market replacement costs, and when these additional values are factored into the analysis it is still profitable to clean up parcels where cleanup costs exceed market replacement values.

Groundwater contamination provides an especially compelling example of the need for a broader theory of economic damages, such as that provided by CERCLA response costs. In fact, the method in which groundwater damage is now assessed in most state jurisdictions is analogous to the CERCLA response cost scheme. Most jurisdictions consider groundwater to be a public resource.296 Damage to groundwater constitutes tangible property damage and will trigger coverage under a CGL policy.297


294. Id.

295. See Times Beach case, supra note 292 and Love Canal case, supra notes 8-11 and accompanying text.


Although groundwater is not owned by any one party, the state interest in groundwater is sufficient to sustain an action for damages caused by pollution.\textsuperscript{298} The insurer's argument that the owned property exclusion of the CGL policy should preclude coverage is averted: once the pollutant enters the groundwater immediately below the site it has damaged the property of a third party—the public.\textsuperscript{299} Finally, because no public market for the groundwater may exist, and therefore no market value for the water can be set, the measure of damages is set at the cost of repair instead of the replacement costs.\textsuperscript{300} The damage to the resource must be measured by the cost of restoring the resource to its original condition.\textsuperscript{301}

The measure of damage to groundwater currently used by many state jurisdictions, like CERCLA, provides a more accurate assessment of the true devastation caused by hazardous substances than traditional market based methods of assessing damages. CERCLA response costs represent the true costs of pollution to natural resources and the community and should be included within the damages covered by the CGL policy.

2. Limited Agency Resources

The government agencies charged with enforcing CERCLA and related state statutes depend heavily upon the cooperation of the potentially responsible parties to accomplish their mission. Limited agency resources prevent government from cleaning up sites first and seeking reimbursement later as a standard procedure.\textsuperscript{302} The cooperation of responsible parties would not be readily forthcoming if CGL policies are held not to cover expenses incurred in complying voluntarily with reme-

\textsuperscript{298} Port of Portland v. Water Quality Ins. Syndicate, 796 F.2d 1188 (9th Cir. 1986).
\textsuperscript{300} See supra note 236.
\textsuperscript{301} This principle is discussed in American Motorists Ins. Co. v. Trane Co., 544 F. Supp. 669, 684 (W.D. Wis. 1982), aff’d, 718 F.2d 842 (1983); Wisconsin Tel. Co. v. Reynolds, 2 Wis. 2d 649, 87 N.W.2d 285, 289 (1958); and Measure of Damages, supra note 235, at 929.
\textsuperscript{302} EPA estimated that cleanup costs for 1,800 to 2,000 sites urgently in need of cleanup will total from $15.8 to $17.6 billion. EXTENT OF THE HAZARDOUS RELEASE PROBLEM, supra note 22, at 4-3 (1984). Other estimates place the total bill at $100 billion or more. See Environmental Liability Insurance (D) Task Force, Report of Subcommittee on Background and History, in 1 1986 PROCEEDINGS OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 732, 733.

By comparison, the Superfund Amendments and Reauthorization Act (SARA) increased the total amount available in the Hazardous Substance Superfund to $8.5 billion. 42 U.S.C. § 9611(a) (1982 & Supp. IV 1986). Thus, in the scenario where responsible parties refuse to cooperate so as to preserve their insurance rights, a shortfall of at least $7.3 billion to more than $100 billion must come from an additional authorization.
dial orders. To minimize costs to themselves and to maximize recovery from their insurers, companies would resist compliance, allow the government to clean up the site and seek monetary reimbursement, and then turn to their insurers for compensation of the government’s claim for traditional damages.\textsuperscript{303} This course of action would clearly be detrimental to the public interest in the efficient cleanup of hazardous wastes.\textsuperscript{304} Yet this is the course recommended by the \textit{Armco} court to responsible parties seeking compensation from their CGL insurance carriers. If courts continue to apply the reasoning of the \textit{Armco} decision to the issue of insurance coverage of response costs, insured parties will find it against their best interests to comply with remedial orders or voluntarily enter into consent decrees.\textsuperscript{305} As a result, transaction costs would increase, scarce agency resources would needlessly be spent, and the cleanup of hazardous waste sites would be delayed.\textsuperscript{306} The net effect of the \textit{Armco} rationale is an increased burden on public resources and the public interest.

3. \textit{Insurance Concerns}

\textit{Armco} warned of three dangers in construing insurance contracts to cover the preventive and mitigating measures required by CERCLA: (1) in the absence of proven injury, liability is uncertain and insurance companies should not be forced to speculate as to the value of uncertain injury (\textit{Armco} held that no property damage had been proved in the case at bar, despite the massive contamination); (2) responsible parties will overexploit the free resource of insurance and spend too much on cleanups; and (3) because it is difficult for the judiciary to define the limits of the cost necessary to clean up a site and prevent further harm, those costs cannot be imposed on insurers.\textsuperscript{307}

These three objections may be valid as an argument against the general practice of granting insurance coverage for preventive measures and mitigating costs, but they lack merit in CERCLA response cost cases. First, environmental contamination has usually been held to be an injury to tangible property.\textsuperscript{308} In addition, the role of EPA in determining the damage caused by hazardous substances and constructing a remedial order to remedy this damage eases the burden of defining the boundaries of a damage claim. The insured’s right to the “free” resource of insurance can easily be restricted to the limits of the EPA remedial order, consent

\begin{itemize}
\item[] \textsuperscript{303} \textit{Intel}, 692 F. Supp. at 1193.
\item[] \textsuperscript{304} \textit{Id.}
\item[] \textsuperscript{305} \textit{Id.}
\item[] \textsuperscript{306} \textit{Id.}
\item[] \textsuperscript{308} \textit{See}, \textit{e.g.}, United States v. Conservation Chem. Co., 653 F. Supp. 152, 189-93 (W.D. Mo. 1986).
\end{itemize}
decree, or adjudication by courts according the customary judicial defer-
ence to EPA determinations.309

The language of the 1966 and 1973 CGL policies now covering most
businesses liable under CERCLA should be construed to include cover-
age for response costs. This conclusion will undoubtedly affect the insur-
ance market. Insurance for environmental contamination has become
very expensive,310 with very restricted coverage, because of the massive
liabilities under CERCLA. Already, insurance for liability for environ-
mental contamination has become increasingly expensive, and exclusions
in CGL policies have appeared. Nonetheless, any changes in future ac-
tion will not alleviate the existing problem. The magnitude of the haz-
ardous waste problem is staggering and sites contaminated by these
wastes must be cleaned up. Public policy dictates that insurance policies,
written to provide comprehensive general liability, cover the costs of
cleaning up these wastes.

IV
CONCLUSION

Improper disposal and accidental releases of hazardous substances
have created a major threat to public health. Congress responded to this
threat by enacting CERCLA, which established the strict liability of past
and present hazardous substance generators, transporters, and dump site
owners and operators for cleaning up releases. CERCLA liability is ret-
roactive, joint, and several. Liable parties incur response costs in three
ways: (1) in suits for reimbursement of cleanup actions undertaken by
state or federal governments; (2) in suits for reimbursement of cleanup
actions undertaken by other liable parties in response to a remedial order
or consent decree; and (3) in conducting the cleanup themselves in com-
pliance with a remedial order or consent decree.

The operations of many liable parties were conducted while a Com-
prehensive General Liability insurance policy was in effect. In response
to claims for reimbursement of response costs, insurers have raised the
defense that response costs are not covered by the term “damages” be-
cause they are restitutionary or injunctive in nature. This distinction fol-
lows the language of CERCLA, which establishes separate liabilities for
“damages for injury to natural resources” and for “costs of removal or
remedial actions,” and leads to a narrow, technical definition of the term
“damages.”

310. Brett, Insuring Against the Innovative Liabilities and Remedies Created by Superfund,
6 UCLA J. ENVTL. LAW & POL’Y 1, 59-60 (1986).
The preponderance of legal reasoning favors extending coverage of response costs. The argument is stronger for indemnifying restitution claims than reimbursing injunction claims, but policy reasons compel treating the two alike and extending coverage to both.

The proper source of law for analyzing the term "damages" in the coverage clause is state law because of the McCarran-Ferguson Act and the *Erie* doctrine. The distinction between damages and response costs in CERCLA is not itself relevant for insurance purposes. State law provides several sources of definitions for the term "damages": some states, such as California and Oregon, define damages by statutes that include remedial measures such as response costs. Under common law, the tort definition of compensatory damages includes restitution.

Because of the principles of insurance contract interpretation, it is not necessary to reach a definitive answer as to whether damages include response costs. These principles extend coverage once it is shown that any of the following apply: (1) the term "damages" is ambiguous, (2) the ordinary, usual meaning of the term "damages" includes costs incurred as a result of a legal liability, or (3) it is within the insured's reasonable expectation that coverage of a "Comprehensive General Liability" policy would include liability for release of hazardous substances into the environment, particularly at a time when such release was not against the law. Response costs are covered by insurance because they meet all three of these requirements in that: (1) substantial legal authority includes restitution and preventive measures within the definition of legal damages, (2) the dictionary definition of damages includes costs incurred as a result of legal liability, (3) the title "Comprehensive General Liability" is a legitimate indication of the parties' intention in forming the contract, and (4) coverage clauses, where the term "damages" appears, are generally interpreted broadly to effectuate the purpose of the insurance contract.

The compelling reason for treating the expenses of complying with a remedial order in the same way as a claim for restitution is that limited agency resources require the cooperation of liable parties in conducting cleanups where those parties have the necessary resources to do so. Although Congress established Superfund to bankroll cleanups of sites where the responsible parties were either unable or unwilling to conduct the cleanup, estimates range to over $100 billion to clean up all hazardous waste disposal sites. In addition, agencies have limited personnel and fiscal resources to pursue recalcitrant parties. If the insured must await a restitution claim from the government or another responsible party to be guaranteed insurance coverage, there will be a strong incentive not to cooperate in the cleanup so as to ensure insurance coverage. There is no

311. See *supra* notes 182-87.
312. *4 Restatement (Second) of Torts* § 903 (1979).
logical reason why the insured should permit a dangerous condition to continue to exist and possibly result in injury to others, merely to ensure coverage. As a matter of public policy, the injunctive relief afforded by a remedial order or consent decree must be accorded the same treatment as a claim for restitution.

The potentially disruptive effect that extending insurance coverage to preventive measures will have on the insurance industry is mitigated in the case of response costs. Unlike gratuitous preventive measures, CERCLA remedial actions are undertaken in response to identifiable property damage, the remedial steps are determined by an objective third party, and the solution has finite limits. Insurers would be well advised to limit retroactive liability, a legal doctrine that has been functioning in American law since the 18th century, and explicitly define damages in their policies should they not intend indemnification of restitutionary or injunctive measures. While it may be tempting to use a narrow definition because it helps the insurance industry retain vitality, such use is unfair to the insured parties, whose expectations of coverage are protected in most jurisdictions by the broad definition.

In balancing the social usefulness of a strong insurance industry against the interests of insured parties in receiving the (unanticipated) benefits of their policies, the judicial view sees each insurance contract as an isolated transaction, and from this perspective, law and equity favor the insured. From a societal viewpoint, insurance companies are independent enterprises performing a valuable function. While we might think of insurance companies as free market entities, in reality because of extensive government regulation, coverage is assured even if the insurance company becomes bankrupt. As a societal issue, insurance coverage of CERCLA response cost claims should not be seen as an impediment to the industry’s vitality. Rather, coverage will lead to more expensive insurance, to the bankruptcy of inefficient or unfortunate companies, and perhaps to some extent to the government subsidization of involuntary insurance guaranty associations. These phenomena are part of a free market, of evolution toward greater economic efficiency. Concerns that insurance industry vitality will be diminished are inconsistent with a free market viewpoint, even if it leads us to new vistas of self-insurance, risk retention mechanisms, or government insurance agencies. To this extent, the argument that the narrow definition of damages is necessary to maintain the position of the insurance industry is founded on specious premises, for it assumes a superior right of economic existence of insurance companies over other enterprises. Thus, in balancing the insured’s interests against the insurer’s on this issue, societal interests are best served by focusing on the insurance contract’s legal implication per se, without additionally considering the impact on the social functions of the present insurance system.