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BETRAYING FORMALITY FOR FALSE EQUITY: THE DANGER OF TRANSPOSING EQUITABLE CONSIDERATIONS INTO CONTRACT LAW TO REMEDY REGULATORY PITFALLS

ELLIOTT MORRIS*

INTRODUCTION

The core function of a contract is to ensure contracting parties that they will get what they bargain for. To facilitate this function contracts must inherently serve to bind parties to the terms of their agreement. Remove this axiomatic quality, and contracts essentially become a jumble of words worth less than the paper they are printed on. A cursory survey of contract law displays a common theme of courts vehemently protecting this principle—utterly refusing to determine the scope of an agreement, regardless of whether unforeseen circumstances transformed an equitable transaction into an unconscionable but binding agreement.¹ Traditional contractual remedies echo the notion that a court’s inquiry rests exclusively upon formal concerns (such as whether the parties’ bargain established a legally recognizable right).² While traditional contract analysis may have carried harsh results, courts remained stalwart to the principle of non-invasive analysis.³

The historical reluctance of courts to redefine or modify an agreement followed the ideal that the burden of contracting should be borne by those seeking to contract.⁴ The general justification for the court’s

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¹ See, e.g., *Lucy v. Zehmer*, 84 S.E.2d 516, 522–23 (Va. 1954) (holding that because Zehmer was competent to contract, the sale of property was valid insofar as it met the formal requirements for contracting); *N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co.*, 799 F.2d 265, 266 (7th Cir. 1986) (refusing to modify the terms of the agreement despite the contract’s clear result of bankrupting one of the parties).

² See generally RESTATEMENT (SECOND) OF CONTRACTS § 345 (AM. LAW INST. 1981) (providing a non-exhaustive list of available contract remedies).

³ *Sun Printing & Publ’g Ass’n v. Moore*, 183 U.S. 642, 674 (1902).

⁴ See *id.*

reluctance to intervene and fix broken contracts was rooted in a respect for the autonomy of the contracting parties—an understanding that the parties themselves are more competent to evaluate and assign risk insofar as the parties have the most at stake in the transaction.⁵ Abstractly then, the loss of equity arising from poor contracting may be seen as both an incentive for parties to carefully construct their agreements and a necessary cost for facilitating an efficient and uniform transactional playing field.

Contemporary legal scholars often refer to this approach of judicial restraint when analyzing contracts as “Legal Formalism” or the “Formalist” approach because the approach generally places significance in an agreement’s form.⁶ Within the realm of pure contract interpretation, Legal Formalism has remained the prevalent approach.⁷ However, particular frictions in modern transactions have led some courts to stray from the traditional Formalist approach, and in response to perceived inequity, transpose equitable considerations into the analysis of particular contracts.⁸ The approach has been coined “Legal Functionalism” or the “Functionalist” approach.⁹ Under a Functionalist approach, concerns regarding a uniform and consistently applied legal framework for transactions are superseded by a desire to interpret contracts in a way that yields socially desirable consequences.¹⁰ Legal Functionalism has the most traction within the context of insurance contracts—especially when the insured party is a consumer.¹¹ Within the context of insurance contracts, the Functionalist approach practically functions to aggressively interpret insurance agreements in favor of the insured.¹² Generally, courts

⁵ *Holden v. Hardy*, 169 U.S. 366, 369–77, 389 (1898); *see generally* *N. Ind. Pub. Serv. Co.*, 799 F.2d 265 (7th Cir. 1986).

⁶ Peter Nash Swisher, *Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach*, 57 *Ohio St. L.J.* 543, 545–46 (1996).

⁷ *Layer v. Barrow County*, 778 S.E.2d 156 (Ga. 2015) (denying relief on the basis of an oral “contract” because plaintiff Mike Layer failed to meet any of the formal requirements of the accusations he alleged).

⁸ *C & J Fert., Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 169 (Iowa 1975) (concluding that the dickered exclusion of “burglary” which excluded “inside jobs” was “unconscionable” to the “doctrine of reasonable expectations”).

⁹ Swisher, *supra* note 6, at 544–45, 551.

¹⁰ *Id.* at 546.

¹¹ James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 *ARIZ. ST. L.J.* 995, 995 (1992) (discussing the various techniques and doctrines implemented by courts in evaluating the duties and scope of coverage of insurance contracts).

¹² *Id.* at 998 (“Pro insured bias would appear to be a systemic bias; yet, the bias is episodic in implementation.”).

justify the aggressive pro-insured bias upon the insurer's superior sophistication and bargaining power.¹³

The fundamental issue with the Functionalist approach is inconsistency. Considering the equitable consequences of transactions inherently requires a costly weighing of the specific factual scenario surrounding the transaction, such an application of transaction-specific considerations only inspires uncertainty, and uncertainty inspires greater transaction costs.¹⁴ Changes in facts and moral sentiments obscure the consequences of actions and undermine the most fundamental pursuit of contract law—to give the parties what they bargained for. The difficulty in weighing equitable concerns is perhaps the reason why courts applying the Functionalist approach often presume inequity when one party is perceived to stand in a superior position.¹⁵

While the Formalist approach may yield some harsh consequences, at the very least the approach facilitates commercial uniformity and efficiency, and also disperses the costs and burdens of contracting equitably upon those benefiting from the contract.¹⁶ When parties are commercially sophisticated, a reasonable Formalist approach appears unquestionably superior insofar as an efficient and consistent market is arguably a necessary condition for facilitating the fairest groundwork for commercial transactions.¹⁷

Even if one grants the underlying assumption that the moral concern for fair contracting outweighs concerns of market efficiency, the Functionalist approach at best provides the incentive for lazy contracting and at worst it provides an incentive for immoral transacting.¹⁸ Instead of encouraging greater sophistication, the approach would exchange contractual autonomy for inconsistent protections. The principle of contractual autonomy should be axiomatic to the body of contract law. While

¹³ See *id.* at 110, 1013 (discussing various justifications for special insurance contract interpretation rules, ultimately concluding that the true justification stems from an informational asymmetry between the insurer and the insured). *But see* Swisher, *supra* note 6, at 545, 551, 588. See generally C & J Fert., Inc., 227 N.W.2d. at 169–71.

¹⁴ Swisher, *supra* note 6, at 996–97, 1047, 1058.

¹⁵ Fischer, *supra* note 11, at 1012 (“Nonetheless, courts often avoid analysis of these questions and simply declare that the contract is one of adhesion.”).

¹⁶ See generally Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950–52, 1012–1016 (1988).

¹⁷ See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

¹⁸ *Id.* at 1688.

not an exclusively American principle, the “right” to contract serves as a historical cornerstone of American business transactions.¹⁹

Even if the policy justifications of discrepancies in sophistication and bargaining power are assumed to be valid, the application of legal formalism to insurance contracts appears somewhat inappropriate in light of the legislative and commercial realities of the insurance industry. The insurance industry is among one of the most heavily regulated industries in America.²⁰ One of the reasons that states regulate the insurance industry so heavily is precisely because of the concern that insurers will take advantage of their less-sophisticated consumer base.²¹ In exchange for extensive state regulation, insurers are allowed to benefit from relaxed antitrust scrutiny, which enables insurers to pool and compile data regarding court treatment of particular provisions.²² In turn, this information is used to provide “standardized terms” that courts would theoretically recognize and interpret in a consistent and predictable fashion.²³ Despite standardization, courts still interpret insurance contracts with an aggressive pro-insured bias.²⁴ Courts aptly recognize that the standardization of terms still does not remedy the sophistication discrepancy which exists between insurers and insured.²⁵ While some courts have entertained the idea of imposing a duty to inform upon insurers, courts generally refrain from doing so.²⁶ As a result courts still approach insurance contracts (especially average consumer contracts) with a decisively pro-insured bias, which often gives effect to the insured’s expectations of coverage regardless of whether such an expectation was reasonable.²⁷

Nevertheless, developments in the law display a dangerous potential for courts to transpose the equitable considerations derived from

¹⁹ *Lochner v. New York*, 198 U.S. 45, 66 (1905) (articulating a fundamental “right to contract” derived from economic due process). *But see W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937) (denying the economic due process mechanism upon which the *Lochner* decision relied). While the status of an American “right to contract” as a fundamental right is questionable, the ability to freely contract arguably has remained at very least an implicit right in traditional U.S. transactions; however, particular aspects of modern transactions have led some to question the competency of party’s ability to contract.

²⁰ Fischer, *supra* note 11, at 1002.

²¹ *Id.* at 1047–48.

²² *Id.* at 1054–56.

²³ *Id.* at 996.

²⁴ *Id.*

²⁵ *Id.* at 1047.

²⁶ Fischer, *supra* note 11, at 999.

²⁷ *Id.* at 997.

the Functionalist approach to complex business transactions where the justifications for the Functionalist's relaxed-equitable standards are utterly irrelevant, and serve no legitimate policy concern.²⁸ The starkest example of such an inappropriate invasion of equity lies in the small "majority" of states' allocation of Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") liability to insurers under pre-CERCLA Comprehensive²⁹ General Liability ("CGL") insurance policies.³⁰ All three of the majority approaches attach liability to insurance issuers in a manner that is absurd and runs entirely contrary to any established body of contract law. While the scope of this issue is undoubtedly limited,³¹ the doctrinal conclusions drawn from numerous courts indicate that future legislation mimicking the retroactive structure of CERCLA could similarly inspire extreme judicial departures from contract law. Modern regulation often imposes hardship upon industries. When hardships arise as a consequence of legislation, such hardships may present a dangerous temptation for courts to apply legal Functionalism to pre-regulatory agreements on the basis that the regulation itself renders the circumstances inequitable.

Courts should avoid the temptation of turning contract law into something beyond its intended purpose of facilitating commercial transactions. In attempting to reach the fairest conclusion courts will only betray efficiency for perceived equity.³²

This Note will analyze the majority approaches to pre-CERCLA CGL contracts from both Formalist and Functionalist approaches, with the intent of displaying how counterintuitive the majority's reasoning is

²⁸ This Note is not primarily concerned with evaluating the Functionalist justification regarding consumer protection. As such, this paper will not address this argument. However, the author remains highly skeptical of the assumption that judicial activism is the most beneficial way of effectuating consumer protection as opposed to regulatory supervision.

²⁹ *Comprehensive General Liability Insurance (CGL)*, INSURANCEOPEDIA.COM, <https://www.insuranceopedia.com/definition/1292/comprehensive-general-liability-insurance-cgl> [<https://perma.cc/GQK9-FTQ3>] (last visited Jan. 23, 2017) (explaining that modern versions of CGL insurance are commonly referred to as "commercial general liability" as opposed to "comprehensive general liability").

³⁰ *McGinnes Indus. Maint. Corp. v. Phoenix Ins. Co.*, 477 S.W.3d 786, 793, 803 (2015).

³¹ Swisher, *supra* note 6, at 600 (noting that modern CGL policies explicitly reject indemnification of CERCLA liability and courts generally appear to respect such agreements).

³² Ridgeway M. Hall Jr. & Kirsten Nathanson, *Lessons Learned From the Intersection of CERCLA and Contract Law*, 32 *Env'tl L. Rev.* 11481 (2002); see also DAVID B. FARER, *CONTRACTUAL ALLOCATION OF ENVIRONMENTAL RISK IN TRANSACTIONS: CASE LAW DEVELOPMENT UNDER CERCLA* (2013), http://www.greenbaumlaw.com/media/publication/29_Contractual%20Allocation%202013.pdf [<https://perma.cc/5PPY-QYEA>].

in relation to any established body of contract interpretation.³³ This Note will be divided into four sections. Section I will provide a brief overview of CERCLA. Section II will discuss the various approaches courts employ when analyzing liability under pre-CERCLA CGL policies. Section III will analyze these approaches under both Formalist and Functionalist perspectives and will argue that the shifting of liability to insurers under pre-CERCLA CGL policies is unjustified. Finally, the Conclusion will summarize the argument and provide concluding thoughts.

Prior to jumping the gun and delving into the issue, an understanding of the radical effects of CERCLA is necessary in order to understand the impetus behind the majority's allegedly Functionalist reasoning.

I. BRIEF OVERVIEW OF CERCLA

Beginning in the 1970s, amidst heightened environmental concerns regarding the disposal of hazardous chemical waste, Congress began arming the recently created Environmental Protection Agency ("EPA") with a radical ability to allocate liability for environmental damage to polluters through administrative proceedings.³⁴ The new liability-allocating function of administrative proceedings vastly increased the efficiency with which the EPA could enforce environmental regulations by providing an independent avenue for seeking environmental damages outside of the typical jurisprudence, which hinged relief upon the cumbersome tort action of nuisance law.³⁵ As such, the EPA could enforce environmental

³³ Like many insurance policies, Commercial General Liability insurance policies are generally modeled on the standard ISO coverage form. *See* ISO, COMMERCIAL GENERAL LIABILITY COVERAGE FORM (2003), <http://www.ngwa.org/documents/insurance/ngwasamplegeneralliabilityform.pdf> [<https://perma.cc/K4DE-25PN>]. While contracting parties are free to dicker the format, they rarely do so. *See* Marianne Bonner, *Insurance Services Office (ISO)*, THE BALANCE (Nov. 4, 2016), <https://www.thebalance.com/insurance-services-office-iso-462706> [<https://perma.cc/E25Q-YB8H>]. The provisions discussed in this Note are rarely substantially altered. ISO regularly updates the provisions of the coverage form. *See Insurance Policy Programs*, VERISK, <https://www.verisk.com/capabilities/insurance-policy-programs.html> [<https://perma.cc/9XRK-G372>] (last visited Jan. 23, 2017).

³⁴ *See generally* Federal Water Pollution Control Act Amendments of 1972, 92 P.L. 500, 86 Stat. 816 (amendments to the water legislation are the first in a series of future amendments and legislation that would empower the EPA to more robustly enforce environmental laws); *see also* Frank P. Grad, *Treatise on Environmental Law* Ch. 4A, § 02 (Matthew Bender 2016) (1973) (providing background information on the impetus behind CERCLA).

³⁵ GRAD, *supra* note 34.

regulations without getting bogged down in traditional court inquiries involving rigid element requirements that required substantially more legwork to satisfy.

In 1980, Congress passed the original version of CERCLA.³⁶ CERCLA's overarching goal was to institute a "polluter pay" system that held polluters liable for their release of "hazardous substances."³⁷ CERCLA accomplished this by instituting a very broad and inclusive liability structure. In its original form, CERCLA enabled the EPA to attach liability to four types of parties: (1) the owner of the property, (2) any person who owned a contaminated property at the time of disposal, (3) anyone who owned the toxic substances that ultimately served as the source of the contamination (regardless of whether they caused the pollution), and (4) anyone who accepted the chemicals for transport.³⁸ If liability attached to any of these parties, the party would be liable *for all* costs associated with the clean-up as well as any permanent damages for the loss of natural resources.³⁹

Within six years of CERCLA's passage, Congress passed the Superfund Amendments and Reauthorization Act ("SARA" or "superfund") to correct issues that prevented full enforcement under CERCLA.⁴⁰ The superfund amendments reauthorized CERCLA and also yielded several substantive changes, the most principle of which were broadening liability and making polluter non-compliance a more costly endeavor.⁴¹ The broadened scope of liability under SARA was justified on the basis that discerning liability would be incredibly difficult where decades of environmental pollution had effectively obscured or concealed the identity of responsible parties.⁴² SARA further enables the EPA to disperse strict liability joint and severally (with clean-up costs theoretically being distributed pro rata for each party's share of the pollution).⁴³ Undoubtedly,

³⁶ Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") 42 U.S.C. §§ 9601–9605 (2012).

³⁷ GRAD, *supra* note 34; *see* CERCLA § 101(14) (defining "hazardous substances", mostly in reference to other acts. Notably, petroleum is excluded from CERCLA's definition of "hazardous substances.").

³⁸ CERCLA § 107(a)(1)–(4).

³⁹ *Id.* at § 107(a)(A)–(C) (outlining damages).

⁴⁰ Superfund Amendments and Reauthorization Act ("SARA") of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986); GRAD, *supra* note 34, at Ch. 4A § 02(1)(a).

⁴¹ SARA, 100 Stat. 1613 sec. 205.

⁴² GRAD, *supra* note 34, at Ch. 4A § 02(1)(f).

⁴³ *Id.* at § 02(1)(k)–(q).

CERCLA lives up to its title of “comprehensive,” the CERCLA/SARA structure for dispersing liability has generally been hailed as a massive success—vastly increasing the efficiency of environmental restoration by giving the EPA the proper authority to enforce environmental regulation; however, this efficiency undoubtedly comes at a cost.⁴⁴

CERCLA/SARA undeniably represents a paradigm shift in American environmental regulation—reflecting a stronger commitment to protecting the environment.⁴⁵ However, as is often the byproduct of any substantial paradigm shift, CERCLA’s abrupt transition to a radical and robust liability structure yielded unforeseen and dramatic consequences upon pre-CERCLA transactions.⁴⁶ As CERCLA liability may attach rapidly to a large pool of potentially responsible parties (“PRP[s]”), past ownership/affiliation with a superfund property could inadvertently subject a party to hundreds of thousands of dollars in clean-up costs.⁴⁷ Liability may attach regardless of a party’s role (or lack of role) in relation to the pollution.⁴⁸ Suddenly, owning a waste disposal company in the 1950s could result in hefty clean-up costs.⁴⁹ The results of “CERCLA’s joint and several liability scheme may be terribly unfair in certain instances. Nonetheless, equitable considerations play no role in the apportionment analysis”⁵⁰

The irrelevance of equitable considerations is particularly revealing of CERCLA’s primary concern—principally finding a party to absorb the costs of clean-up.⁵¹ This aim is furthered by the broad discretion with which the EPA may institute an action. The timing of superfund actions is left utterly to the determination of the EPA—meaning that one is

⁴⁴ *Id.* at Ch. 4A § 01[5].

⁴⁵ *Id.*

⁴⁶ See generally Jeffrey M. Moss, *Impact of CERCLA on Real Estate Transactions*, 6 B.Y.U. J. PUB. LAW 365 (1992).

⁴⁷ See, e.g., *Arizona v. City of Tucson*, 761 F.3d 1005 (9th Cir. 2014) (Callahan, J. dissenting); *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 514 (2013); *U.S. v. NCR Corp.*, 688 F.3d 833 (7th Cir. 2012).

⁴⁸ *Id.*

⁴⁹ *B.F. Goodrich Co. v. Murtha*, 754 F. Supp. 960, 962 (D. Conn. 1991), *aff’d*, 958 F.2d 1192 (2d Cir. 1992).

⁵⁰ *PCS Nitrogen Inc.*, 714 F.3d at 181 (quoting *Bell Petroleum Servs.*, 3 F.3d at 897 and *Burlington Northern*, 556 U.S. at 615).

⁵¹ See generally *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Federal Facilities*, EPA, <https://www.epa.gov/enforcement/comprehensive-environmental-response-compensation-and-liability-act-cercla-and-federal> [<https://perma.cc/8UYN-VMF7>] (last visited Jan. 23, 2017).

never certain when the EPA will actually take action, or whether they will be held liable at all. For example, in *B.F. Goodrich Co. v. Murtha*, over 200 users of a dump facility were held to be jointly and severally liable for clean-up costs under CERCLA.⁵² Some of the parties found liable were responsible for dumping that had occurred several years prior.⁵³ While CERCLA serves to efficiently facilitate environmental restoration, CERCLA's application imparts increased transaction costs, uncertainty, and unforeseen costs upon the American real estate and commercial markets.⁵⁴ While contemporary companies are given the benefit of foresight, insofar as they are alerted to the consequences of polluting or owning a superfund site post-CERCLA, the distribution of liability to pre-CERCLA transactions represents a clear desire to obtain liability independent of equitable considerations.⁵⁵ Obviously, these affects must be contextualized against the environmental successes of CERCLA; however, those with a sympathetic heart may find that the application of CERCLA liability to pre-CERCLA transactions inspires a certain sympathy for those transactions, which retroactively gave rise to expensive clean-up liability.

II. JURISDICTIONAL APPROACHES

At the time of this Note, seventeen states have considered whether a CGL insurer's duty to defend is triggered by an EPA "Notice of Liability" letter ("PRP Letter"),⁵⁶ and fourteen of these states have effectively ruled that the insurer is liable.⁵⁷ In considering the allocation of CERCLA

⁵² See *B.F. Goodrich*, 958 F.2d at 1192; see also *U.S. v. Monsanto Co.*, 858 F.2d 160, 164 (4th Cir. 1988) (holding the site-owner and the polluter jointly and severally liable for clean-up costs).

⁵³ *B.F. Goodrich*, 958 F.2d at 1202.

⁵⁴ Arguably, costs associated with waste disposal should be borne by those who engage in the handling/production of hazardous materials. This Note will not investigate the policy considerations behind CERCLA; rather, it will assume that the reforms were merited by the need for hazardous material regulation.

⁵⁵ *PCS Nitrogen Inc.*, 714 F.3d at 181 (quoting *Bell Petroleum Servs.*, 3 F.3d at 897).

⁵⁶ A "Notice of Liability" letter is a letter sent to a party who is potentially liable for environmental damage under CERCLA. *Superfund "Notice of Liability" Letters*, EPA, <http://www.epa.gov/enforcement/superfund-notice-liability-letters> [<https://perma.cc/8GGE-VYSC>] (last visited Jan. 23, 2017).

⁵⁷ The most recent case, *McGinnes Indus. Maint. Corp. v. Phoenix Ins. Co.*, 477 S.W.3d 786 (2015), brought the number of "hybrid" and "Functional equivalent" jurisdictions to fourteen. These jurisdictions include: (1) Alabama; (2) Colorado; (3) Connecticut; (4) Iowa;

liability under pre-CERCLA CGL contracts, courts primarily inquire into whether the insurer's duty to defend has been triggered.⁵⁸ The inquiry generally involves considering whether the EPA proceeding process (often the specific PRP Letter itself) constitutes a "suit," or at the very least the "initiation of a suit."⁵⁹ In order to engage in this inquiry the court must first find that the CGL provisional usage of "suit" is ambiguous.⁶⁰

A. *Minority "Literal" Approach*

The three-state minority ends their analysis here—refusing to construe the pre-CERCLA CGL policy's usage of the word "suit" as ambiguous.⁶¹ The literal approach rejects the notion that the word "suit" is ambiguous in pre-CERCLA CGL policies, and instead considers the agreements in light of the "literal" definition of suit.⁶² As such, courts employing the literal approach refuse to extend coverage to clean-up damages arising from the EPA's administrative actions on the grounds that the actions do not fall under the pre-CERCLA connotation of "suits" (an actual court proceeding initiated by the filing of a complaint).⁶³ The practical effect of this approach is that the insured is left with the burden of paying the costs associated with releases of hazardous materials under CERCLA.⁶⁴ Some courts have distinguished "claim" and "suit," and held that the duty to defend is not triggered by a "claim" (as distinguished in the policy from "suit").⁶⁵ Further, some courts impose a sort of quasi-duty upon the insurer to investigate the viability of an administrative action triggering their duty to defend under an individual policy.⁶⁶

(5) Kentucky; (6) Massachusetts; (7) Michigan; (8) Minnesota; (9) Nebraska; (10) New Hampshire; (11) North Carolina; (12) Texas; (13) Vermont; (14) Wisconsin. Conversely, the number of states that have adopted what is considered a "literal" approach remains three: (1) California; (2) Illinois; (3) Maine.

⁵⁸ GRAD, *supra* note 34, Ch. 4A § 02 fn. 319; *McGinnes Indus. Maint. Corp.*, 477 S.W.3d at 792. Note that a substantial number of Courts have also entertained whether clean-up costs constitute "damages."

⁵⁹ GRAD, *supra* note 34, Ch. 4A § 02 fn. 51.

⁶⁰ *Id.* at Ch. 4A § 02(1)(k).

⁶¹ This threshold claim that "suit" is ambiguous is suspect, and will be discussed in further detail *infra* Section III.

⁶² See *McGinnes Indus. Maint. Corp.*, 477 S.W.3d at 800 (Boyd, J., dissenting).

⁶³ *Id.* at 802–03.

⁶⁴ *Id.*

⁶⁵ *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.*, 959 P.2d 107, 115–16 (Cal. 1998).

⁶⁶ *Id.* at 115; see also *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 655 N.E.2d

B. *Majority “Hybrid,” “Functional Equivalent,” and “Effectively Redefined”⁶⁷ Approaches*

The ultimate result of all of these majority approaches is liability attaching to the insurer as a result of an EPA proceeding constituting a suit.⁶⁸ All three majority approaches seem to be an attempt to make up for the lack of equitable considerations in CERCLA rather than a genuine assignment of liability under the CGL insurance policy. As mentioned previously, these approaches all rely on a threshold finding that the word “suit” is ambiguous.⁶⁹ Some courts have gone so far as to base a finding of ambiguity not upon the actual parties’ understandings of the term but upon “the fact that another reasonable interpretation of the term ‘suit’ exists simply creates an ambiguity.”⁷⁰

1. *Majority: Functional Equivalent⁷¹ and Hybrid Approaches*

Under the Functional equivalent approach, courts treat “any receipt of a PRP Letter or other pre-complaint environmental agency activity constitutes a “suit.”⁷² The Hybrid approach provides slightly more consideration. Under the Hybrid approach a PRP Letter (or similar item) must be significantly coercive to go beyond a “mere notification” to constitute a “suit.”⁷³ The difference in the approaches is essentially a nominal matter of timing; to qualify as coercive the insured merely needs to be noncompliant until the EPA attempts to force compliance at which point the PRP Letter will be sufficiently coercive.⁷⁴

842, 847 (Ill. 1995) (discussing the need for insurers to investigate whether “suit” is triggered under their specific policy).

⁶⁷ As of the time of this Note, the approach employed by the majority in *McGinnes Indus. Maint. Corp.*, 477 S.W.3d at 786 has not received a common colloquial title such as “hybrid” or “Functional equivalent” as such this Note will refer to the approach as the “effectively redefined” approach.

⁶⁸ *McGinnes Indust. Maint. Corp.*, 477 S.W.3d at 794 (maintaining that there is a need for uniformity when considering the issue on certified question from the 5th Circuit).

⁶⁹ *Foster-Gardner, Inc.*, 959 P.2d at 118 (quoting *Morrisville Water & Light Dep’t v. U.S. Fid. & Guaranty Co.*, 775 F. Supp. 718, 734 (D. Vt. 1991)).

⁷⁰ *Id.*

⁷¹ The approach is also sometimes referred to as the “Functional Approach.”

⁷² *Foster-Gardner, Inc.*, 959 P.2d at 117.

⁷³ *Id.*

⁷⁴ The PRP process will be discussed in detail *infra* Section III.

2. Texas “Effectively Redefined” Approach

In 2015, the 5th Circuit sent the issue of coverage to the Texas Supreme Court.⁷⁵ In *McGinnes*, the Court began by agreeing with the minority of courts that “suit” as used in a standard-form CGL insurance policy was unambiguous.⁷⁶ However, the Court still concluded that “‘suit’ in CGL policies at issue must also include CERCLA enforcement proceedings by the EPA.”⁷⁷ In arriving at its conclusion, the Court expressly rejected the rationale that a “suit” is the “Functional Equivalent” either by its inherent nature or depending upon its coerciveness.⁷⁸

Despite acknowledging that Texas could not “‘rewrite the parties’ contract nor add to its language,” the Court felt content claiming that CERCLA could—ultimately holding that the revolutionary nature of CERCLA’s liability structure effectively redefined the word “suit.”⁷⁹ The Court claimed that CERCLA’s regulatory structure was effectively so dynamic that it retroactively changed the nature of the word “suit.”⁸⁰ As such, Texas held that “EPA proceedings” are not just the “Functional equivalent of a suit,” they are, “in actuality, the suit itself, only conducted outside a courtroom.”⁸¹

In support of its finding, Texas provided three justifications: “(1) CERCLA did not exist when the parties entered their contract; (2) Environmental cleanup costs can qualify as “damages” under the policies; (3) Most other courts have reached a similar conclusion.”⁸² At 5–4, the case was a close call, and the majority opinion was accompanied by a scathing dissent.⁸³

III. ANALYSIS

McGinnes not only represents the latest example of such a majority ruling, but also represents arguably the most progressive and aggressive

⁷⁵ *McGinnes Indus. Maint. Corp.*, 477 S.W.3d 786, 786 (2015).

⁷⁶ *Id.* at 791 (“We agree with the Insurers that ‘suit’ commonly refers to a proceeding in court.”).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 794.

⁸⁰ *McGinnes Indus. Maint. Corp.*, 477 S.W.3d at 799 (Boyd, J. dissenting) (quoting *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003)).

⁸¹ *Id.* at 800.

⁸² *Id.*

⁸³ *Id.* at 794.

applications of Legal Functionalism.⁸⁴ The Texas Supreme Court managed to hold that a word whose meaning should have arguably been solidified by the intentions of the parties at the time the contract was written, was retroactively changed by what ultimately amounts to an unforeseen circumstance (i.e., CERCLA itself).⁸⁵ Such a holding is not only utterly repugnant to any prior body of established contract analysis, it serves no greater policy consideration apart from the five-judge majority's sense of equity. In order to understand the absurdity of the Court's decision, this Note will analyze these majority positions from both a traditional Formalist approach as well as a more progressive Functionalist approach.

A. *Majority Approaches Analyzed Under Legal Formalism*

1. Threshold: Finding "Suit" Vague

Perhaps unsurprisingly, the majority's position has no basis in traditional Formalist contract analysis; however, admittedly the act of analyzing an insurance contract under traditional standards is somewhat misguided in modern jurisprudence. Of course some jurisdictions maintain (or at least claim to maintain) a Formalist perspective on all contracts.⁸⁶ As has been mentioned previously, the majority's position requires a threshold finding of "suit" to be vague/ambiguous as contained in the pre-CERCLA CGL policy.⁸⁷ From the perspective of Formalist analysis of vagueness/ambiguity the finding is unwarranted.

Historically, courts limited their interpretation to the traditional "four-corners" of a contract.⁸⁸ The "four-corners" rule means that a court merely looks to enforcing the meaning of the contractual terms as the parties' mutual intent as expressed within the four-corners of the document.⁸⁹ Practically, the only manner a court could engage in an interpretive analysis of the terms depended upon the possibility that parties may have mutually intended a term to mean something other than its plain-English meaning.⁹⁰ If the parties agree to a mutual meaning, the court

⁸⁴ *Id.*

⁸⁵ *Id.* at 797.

⁸⁶ See Swisher, *supra* note 6.

⁸⁷ *Morrisville Water & Light Dep't v. U.S. Fid. & Guaranty Co.*, 775 F. Supp. 718, 734 (D. Vt. 1991).

⁸⁸ See *Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co.*, 139 N.E. 470, 472 (N.Y. 1923).

⁸⁹ *Id.*

⁹⁰ 2–20 LN PRACTICE GUIDE: FL CONTRACT LITIGATION 20.05 (2015). It is worth noting

simply accepts that meaning and applies it.⁹¹ Obviously, opposing parties often disagree with the other side's applied meaning, in such cases the traditional default analysis was to proscribe the term its plain English meaning.⁹² If the term were vague or ambiguous the court would engage in an analysis to attempt to clear up the issue, if no solution could be met, the court would hold that the agreement lacked mutual intent and therefore never took effect.⁹³

Absent a finding of ambiguity or vagueness, the application of the four-corners doctrine to pre-CERCLA contracts would allocate the clean-up costs to the insured insofar as a "suit" in the context of a pre-CERCLA agreement likely carried the plain English connotation of a proceeding filed in court.⁹⁴

a. Vagueness/Ambiguity

Analyzing the CGL policies under either an ambiguity or vagueness analysis also does not justify the majority's desired result. A court inquiry into ambiguous/vague clauses/words does not involve stretching the meaning of a word to benefit one party (in this case, the insured). Traditionally, a court's analysis of ambiguity centers upon whether the parties intended the term to mean the same thing.⁹⁵ In the event that both parties construe the term in utterly different manners—then the contract does not exhibit mutual assent and theoretically the document is not a contract.⁹⁶

Under this structure, the majority's liability shifting result would rely upon one party (the insurer) being aware of the insured's contradictory meaning.⁹⁷ Within the context of a CGL insurance transaction this result is virtually impossible. The insured would have to construe "suit" to include an EPA administrative process that did not exist yet.⁹⁸ Further, the insurer would have to be aware of the insured's impossible

that this perspective really applies more to U.C.C. contracts, wherein U.C.C. § 1-303(e) (2014) provides a hierarchy of extrinsic evidence.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Fischer, *supra* note 11, at 1005. *See generally* Raffles v. Wichelhaus, (1864) 159 Eng. Rep. 373 (Ct. Ex.) (creating the classic resolution to ambiguity).

⁹⁴ Fischer, *supra* note 11, at 1049.

⁹⁵ *See* People v Bank of N.Y. Mellon Corp., 977 N.Y.S.2d 668, 668 (N.Y. Sup. Ct. 2013).

⁹⁶ RESTATEMENT (SECOND) OF CONTRACTS §§ 19–20 (AM. LAW INST. 1981).

⁹⁷ *See id.* at § 20(2)(a).

⁹⁸ *See* McGinnes Indus. Maint. Corp., 477 S.W.3d 786, 799 (2015) (Boyd, J., dissenting).

construction of the term.⁹⁹ To justify the inclusion of administrative actions on the basis of ambiguity would essentially be accepting the ludicrous conclusion that not only did the insured have the foresight to hold an impossible intention to the definition and that the insurer was aware of the insured's impossible construction.¹⁰⁰ Prior to CERCLA's passage, the definition of "suit" could not have included administrative actions.¹⁰¹ Hybrid courts are essentially using the ambiguity analysis to give "suit" a connotation that it never had, nor could have reasonably been capable of having.

A similar result occurs if the majority is construing the term "suit" as vague. In the event of a vague term, courts apply the "objective" or "plain meaning" usage of the term in order to resolve an issue of relativity.¹⁰² Issues of vagueness generally arise when a contract fails to sufficiently specify the quality of the good.¹⁰³ As such, the analysis is seemingly inappropriate in the context of an insurance contract insofar as the quality of the insurer's duty is typically straightforward.¹⁰⁴ Courts employ a hierarchy of outside sources to clarify and interpret the vagueness.¹⁰⁵ If the actual agreement is of no use, then doctrinally courts look to the course of performance.¹⁰⁶ If analyzed from this perspective of pre-CERCLA insurance performance, insurers generally defended an insured in traditional courts from damages arising from property. It seems illogical to suggest that the insurer's course of performance could imply coverage under non-existent administrative actions insofar as the insurer's duty to defend had never been triggered in such instances prior.¹⁰⁷

As such, there is no discernable traditional doctrinal basis for reading in a court-created definition. The broader definition of "suit" is essentially a court creation that, at best, relies upon broader modern intuitions of what could possibly be considered a suit.¹⁰⁸ Within the context of a pre-CERCLA CGL contract, the court supplied definition appears absurdly broad.

⁹⁹ RESTATEMENT (SECOND) OF CONTRACTS § 20(2)(a) (AM. LAW INST. 1981).

¹⁰⁰ *Id.*

¹⁰¹ The primary counterargument would be that the insured could have gauged the state of legislative developments in environmental law, and anticipated the coming regulatory scheme. Such a hypothetical relies on heavily attenuated and unlikely situation.

¹⁰² *Hitt v. Lord*, 391 S.E.2d 681, 682 (Ga. Ct. App. 1990).

¹⁰³ RESTATEMENT (SECOND) OF CONTRACTS, § 20(1) (AM. LAW INST. 1981).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Foster-Gardner, Inc.*, 952 P.2d 107, 273–75 (Cal. 1998).

¹⁰⁸ *Id.*

b. Is an EPA Proceeding Functionally a Suit?

Ignoring the somewhat obvious conclusion that traditional contractual analysis provides little assistance to effectuating the majority's desired result, the primary argument that serves as the bedrock for the majority's desire to attach liability to the insurer appears to be that an EPA proceeding (regardless of whether or not it satisfies the traditional definition) functions the same as a suit—and therefore should be treated as a suit for purposes of analyzing liability under CERCLA.¹⁰⁹ When viewed from the perspective of a pre-CERCLA insured, the argument is ultimately weak.

An understanding of the PRP process is necessary in order to access the viability of this claim. Two aspects of EPA collection proceedings run contrary to the functional equivalent argument that administrative actions are functionally equivalent to pre-CERCLA "suits": (a) the structure of the EPA's collection is vastly different from a lawsuit; (b) a pre-CERCLA party has virtually no viable defenses against the EPA, and a party's culpability for CERCLA damage need not have any causal relation to the actual pollution.

1) Structure of an EPA Collection Action

As previously mentioned, the EPA has a large amount of discretion in applying CERCLA. The timing of CERCLA-related controversies is exclusively controlled by the EPA insofar as CERCLA's relevant statute of limitation provisions generally toll upon the beginning of clean-up.¹¹⁰ The procedure for acquiring remedial costs for pollution is also left to the EPA to decide.¹¹¹ From the standpoint of administrative efficiency the EPA's discretion enables it to seek damages for environmental pollution dynamically.

Depending on its preference, the EPA may pursue one of four ways to collect clean-up costs.¹¹² (1) Assuming the PRP is compliant, EPA and PRP(s) may negotiate a settlement.¹¹³ (2) The EPA can clean-up the site and then seek reimbursement from the PRP(s) in a subsequent suit.¹¹⁴ (3) The EPA may file an abatement action in a federal district

¹⁰⁹ *Id.*

¹¹⁰ CERCLA § 113(g)(3).

¹¹¹ *McGinnes Indus. Maint. Corp.*, 477 S.W.3d 786, 800 (2015) (Boyd, J. dissenting).

¹¹² *Id.* at 801.

¹¹³ *Id.*

¹¹⁴ *Id.*

court to compel PRP(s) to conduct the clean-up.¹¹⁵ (4) Finally, the EPA may issue a unilateral administrative order instructing PRP(s) to restore the site.¹¹⁶

The actual number of steps required to collect under these four methods varies considerably. After identifying a property that potentially qualifies as a superfund site under CERCLA, the EPA will generally issue a potentially responsible party (“PRP”) letter.¹¹⁷ This letter serves to both notify the PRP of the EPA’s subsequent superfund investigation, and to facilitate compliance with the investigation.¹¹⁸ Often, the PRP letter will demand that the PRP pay costs associated with environmental feasibility studies.¹¹⁹ The letters also will generally alert the PRP to several disadvantages to non-compliance, such as treble damages.¹²⁰ The penalties for non-compliance play a substantial role in finding the letters coercive under the hybrid approach. Typically, the letter will offer the opportunity to enter into negotiations. If the PRP complies with the letter’s demands and joins in negotiations, the EPA and the PRP will come to a settlement, and costs will be allocated according to the terms of that settlement.¹²¹

Viewed as such, none of the processes the EPA employs for seeking liability functions like a suit in the traditional sense.¹²² For starters, the administrative proceeding’s structure and timing are primarily determined by the EPA, as the CERCLA’s statute of limitations provides a virtually unrestricted amount of timing discretion to the EPA.¹²³ The first iteration of CERCLA (prior to SARA) lacked any statute of limitations governing the time with which a recovery action could be commenced; however, the SARA amendments provide the EPA with a somewhat flexible statute of limitations period—whereby the statute of limitations applies differently for remedial cost recovery actions and contribution

¹¹⁵ *Id.*

¹¹⁶ *Id.* (discussing the various ways the EPA can seek damages under CERCLA).

¹¹⁷ GRAD, *supra* note 34.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See CERCLA § 107(c)(3) (non-compliance penalties).

¹²¹ 3–4A TREATISE ON ENVIRONMENTAL LAW § 4A.02 *passim*.

¹²² *Id.* It is worth noting that of these four options, only the last does not involve a court proceeding in the event of a PRP’s non-compliance; however, the unilateral order does not function like a typical court order insofar as the PRP may choose to “refuse to comply with the order,” in which case the EPA must bring an action in federal court. See 3–4A TREATISE ON ENVIRONMENTAL LAW § 4A.02 *passim*.

¹²³ CERCLA § 113(g)(2)(B).

claims.¹²⁴ Remedial cost recovery actions must commence within the latter of: (A) six years from the “physical initiation” of a remedial action; or (B) three years after the remedial action has been completed.¹²⁵ Contribution claims must be commenced within a tighter period of three years from “(A) the date of judgement in any action under [the] chapter, or (B) the date of an administrative order [‘de minimis’ settlements; cost recovery settlements; judicial-approved settlements].”¹²⁶

These statute of limitation periods provide the EPA with a generous amount of time to seek damages insofar as both limitation periods effectively toll upon a stage in which an administrative action has already been initiated and is virtually guaranteed to proceed.¹²⁷ Furthermore, courts evaluating the applicability of CERCLA’s statute of limitations generally construe the period “broadly” in favor of the EPA.¹²⁸

2) Limited Defenses to CERCLA Liability and Lack of Causation Requirement

Modern PRPs facing CERCLA liability are limited to a small list of defenses provided within CERCLA’s regulation.¹²⁹ Under §107(B) of CERCLA, PRP defenses are limited to: (1) acts of god; (2) acts of war; (3) third party negligence (“innocent landowner defense”¹³⁰), when the PRP proves he exercised due care with respect to foreseeable acts or omissions.¹³¹ At first glance, the available defenses in CERCLA proceedings will appear somewhat analogous to a standard *force majeure* provision insofar as the CERCLA defenses generally rely upon an unquestionably natural event or the negligence of an unrelated third party.¹³² However

¹²⁴ See *Velsicol Chemical Corp. v. Enenco, Inc.*, 9 F.3d 524 (6th Cir 1993) (citing CERCLA § 113(g)(2)).

¹²⁵ CERCLA § 113(g)(2)(B).

¹²⁶ CERCLA § 113(g)(3). For information regarding statute of limitations requirements for private invocation of CERCLA damages, see CERCLA § 112(d)(2)(A)–(B) (tolling on the later of the date of discovery of the loss or the date on which final regulations are promulgated under § 301(c)).

¹²⁷ At both stages, the action is well developed—the ultimate conclusion is virtually only a matter of proceeding down the procedural checklist.

¹²⁸ *Reardon v. United States*, 947 F.2d 1509, 1520 (1st Cir. 1991).

¹²⁹ CERCLA § 107(a)–(c).

¹³⁰ The CERCLA § 107(b)(3) defense was amended by SARA and is often referred to generally as the “innocent landowner defense.” See, e.g., *City of Gary v. Shafer*, 683 F. Supp. 2d 836, 854 (N.D. Ind. 2010).

¹³¹ CERCLA § 107(b)(1)–(3).

¹³² See generally 5–31 ENVIRONMENTAL LAW PRACTICE GUIDE § 31.02 (Michael B. Gerrard ed., Matthew Bender) (2015).

practically speaking, the defenses are further limited by court-created requirements and subsequent statutory adjustments.¹³³

The “act of god defense” is only available where the event is solely an “exceptional natural occurrence” and is neither foreseeable nor preventable.¹³⁴ This qualification is extremely limiting as it precludes several applicable natural occurrences, most principle of which is extreme or exceptional rainfall, which may often be the impetus behind the displacement of hazardous chemicals from a commercial entity.¹³⁵ As such, actual case law concerning the “act of god” defense is somewhat scant; however, heavy rain or hurricane downpours are generally held to be inapplicable due to preventative measures that could be taken to limit the effects.¹³⁶

The act of war defense is similarly limited to acts “solely” arising as a result of war.¹³⁷ As one might expect this defense has rarely been employed.¹³⁸ Limited analysis has provided that the defense must be employed against “direct acts of hostility or seizure or destruction of property in order to injure the enemy.”¹³⁹

The final defense may be asserted when a 3rd party is the sole cost of the contamination.¹⁴⁰ Court treatment of the popularly asserted defense varies considerably, the majority of courts require that the PRP have absolutely no connection to the actual polluter, and in recent years the defense has undergone significant revision.¹⁴¹ In 2002, The Small Business Relief and Brownfields Revitalization Act (“Brownfields Law”) substantially altered the standards and applicability of § 107(b)(3).¹⁴² As the act’s full name implies, Brownfields Law was designed to “provide

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *See, e.g.*, *United States v. M/V Santa Clara I*, 887 F. Supp. 825, 843 (D.S.C. 1995) (finding that a greater than predicted storm at sea was not an act of God); *United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987).

¹³⁷ CERCLA § 107(b)(2).

¹³⁸ For those who are interested, the principle case regarding an “act of war” defense is *Cedar & Washington Assocs., LLC v. Port Auth. of N.Y. & N.J.*, 751 F.3d 86 (2d Cir. 2014). The owners of the World Trade Center successfully employed the defense against clean-up costs associated with the 9/11 terrorist attacks.

¹³⁹ 5–31 ENVIRONMENTAL LAW PRACTICE GUIDE § 31.02, *supra* note 132 (quoting *United States v. Shell Oil Co.*, *aff'd*, 281 F.3d 812 (9th Cir. 2002)).

¹⁴⁰ CERCLA § 107(b)(3).

¹⁴¹ Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356, 2357 (2002).

¹⁴² *Id.*

certain relief for small businesses from liability under [CERCLA].”¹⁴³ While technically derivative of § 107(b)(3), practitioners distinguish three variants of the Brownfields Law defense: (1) “innocent landowner defense”; (2) bona-fide purchaser defense; (3) contiguous landowner defense.¹⁴⁴ Each of these defenses are further limited by the blanket limitations of non-foreseeability and unpreventability.¹⁴⁵ The most common assertion of this specific defense relates to improper handling of hazardous materials by an employee or party contracted for waste removal.¹⁴⁶ The majority treatment of the defense by courts suggests that this commonly occurring source of contamination would be precluded as the parties have contractual privity.¹⁴⁷ The viability of an “innocent landowner” defense generally tolls upon whether the PRP met the EPA’s established requirements for due care under the “All Appropriate Inquiry” test.¹⁴⁸ While these elements can potentially be *prospectively* met, the inquiry thoroughness is extremely cumbersome—requiring extensive amounts of diligent review of the property, previous owners, and the hiring of a “qualified environmental professional.”¹⁴⁹

Overall, the defenses themselves are significantly limited and provide PRPs with little ammunition to mount a genuine defense against CERCLA liability.¹⁵⁰ The act of god defense is rarely helpful to a PRP due to the inexhaustible list of precautions that could be taken to prevent contamination as a result of extreme weather.¹⁵¹ The act of war defense has rarely been relevant and hopefully continues to be irrelevant.¹⁵² The innocent landowner defense is often relevant; however, court imposed

¹⁴³ *Id.* at preamble.

¹⁴⁴ CERCLA § 107(b)(3).

¹⁴⁵ *Id.* § 107(b)(1)–(3). As mentioned previously, all defenses are subject to the limitation of being not foreseeable or preventable.

¹⁴⁶ 5–31 ENVIRONMENTAL LAW PRACTICE GUIDE § 31.02, *supra* note 132.

¹⁴⁷ *Id.*

¹⁴⁸ *See* 40 C.F.R. § 312.20 (2015).

¹⁴⁹ *Id.*

¹⁵⁰ *See, e.g.,* *Town of Munster v. Sherwin Williams Co.*, 27 F.3d 1268 (7th Cir. 1994) (ruling that laches could not bar a town’s private action to recover cleanup costs under CERCLA, and finding that defenses to CERCLA liability are only those enumerated in section 107(b), which does not include any equitable defenses).

¹⁵¹ *See* 5–31 ENVIRONMENTAL LAW PRACTICE GUIDE § 31.02(1)(b) (citing *United States v. Alcan Aluminum Corp.*, 892 F. Supp 648, 658 (M.D. Pa. 1995), *aff’d*, 96 F.3d 1434 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 2479 (1997)) (“Even a release caused by a hurricane was not excused under the act of God defense because the hurricane was not the sole cause of the release and the effects of the hurricane could have been avoided by the exercise of due care or foresight.”).

¹⁵² *See supra* note 131 and accompanying text.

limitations have severely lessened the strength and applicability of this defense.¹⁵³ Furthermore, a pre-CERCLA insured cannot meet the requirements of this defense because such requirements didn't exist and the insureds had no way of retrospectively meeting these requirements.

Beyond these defenses, a PRP cannot take any remedial action.¹⁵⁴ Even if the PRP chooses to not comply with the demands of the PRP letter, the EPA may effectuate clean-up and bring a collection suit within a federal district court.¹⁵⁵ Through the proceeding the EPA can virtually circumvent the PRP, which will be unable to defend itself until a formal court collection proceeding occurs—where defenses will be even more limited.¹⁵⁶

Unlike a traditional suit, the manner liability attaches within an administrative proceeding to a pre-CERCLA insured virtually guarantees success—ultimately, the EPA is not concerned with “who” floats the bill but merely that the bill be paid.¹⁵⁷ The invitation to engage in negotiations is predicated upon the PRP admitting fault for the pollution, which carries the practical effect of waiving all defenses that a PRP is theoretically capable of asserting under § 107(b).¹⁵⁸ The negotiating power of the PRP is further limited by the fact that the negotiations themselves are subject to ultimate approval by the EPA, who at any time can cease negotiations and pursue its other options to attach liability.¹⁵⁹ Again, the PRP cannot contest EPA rejections of their feasibility plan.¹⁶⁰ If the PRP chooses to not comply with the letter, the PRP faces treble penalties under § 106.¹⁶¹ These damages accrue until the resolution of the CERCLA litigation.¹⁶² The fear of accruing treble damages serves as the admittedly coercive backbone to PRP letters. Non-compliance carries significant penalties, which ultimately (regardless of the jurisdiction) may fall outside the scope of CGL coverage.¹⁶³ The processes by which the EPA acquires clean-up

¹⁵³ *Id.*

¹⁵⁴ *See generally* CERCLA § 107, 42 U.S.C. § 9607 (2012).

¹⁵⁵ 3-4A TREATISE ON ENVIRONMENTAL LAW § 4A.02.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ CERCLA § 107(b)(1)–(3).

¹⁵⁹ Mark S. Dennison, Annotation, *What Constitutes “Suit” Triggering Insurer’s Duty to Defend Environmental Claims—State Cases*, 48 A.L.R.5th, 355 (1997).

¹⁶⁰ *Id.*

¹⁶¹ CERCLA § 106; *see also* 3-4A TREATISE ON ENVIRONMENTAL LAW § 4A.02.

¹⁶² CERCLA § 106.

¹⁶³ *See generally* *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 56 Cal. App. 4th 204 (2d Dist. 1997). As a practical matter, treble damages often will exceed available funds under many CGL policies.

costs from PRPs is tailored very favorably for the EPA—the process almost guarantees that clean-up costs will be recovered.

Ultimately, the large discretionary statute of limitations, the structure and practical limitations of the defenses under § 107(b), and the general coerciveness of the PRP process reflects CERCLA's primary concern of finding a party to pay for the contamination. The aim and efficiency with which CERCLA accomplishes its aim is undoubtedly commendable; however, the ultimate result comes at the cost of providing PRPs with significant recourse. The hybrid approach would suggest that the one-sided nature/structure of CERCLA is coercive but this point alone does not provide a satisfactory justification to the larger question as to whether the system functions as a "suit." CERCLA's purpose inevitably lent itself to imposing hardships upon polluters.¹⁶⁴ The obvious cost of instituting a polluter-pay system is that polluters are going to have to pay.¹⁶⁵ While speculating upon legislative intent is rarely productive, the structure of CERCLA exhibits an almost inherent comment upon Congress's intent—that Congress found that the value of creating a hyper-efficient clean-up procedure outweighed the hardships that numerous individuals would inevitably experience under a liability structure as broad as CERCLA's. The fact that the structure is coercive does not support the conclusion that the structure is a "suit" under pre-CERCLA CGLs. Arguably all regulatory penalties are coercive, the penalties are meant to inspire compliance. Furthermore, it is unclear why shifting liability away from polluters is a more equitable resolution. If there is an issue with innocent parties being fined under CERCLA, then the solution to such a problem clearly rests in redefining PRPs under CERCLA.

B. *Majority Analysis Under Legal Functionalism*

One major obstacle to analyzing the Majority's approach to pre-CERCLA CGL policies from a Functionalist perspective is that Functionalist approaches vary significantly depending on which jurisdiction (or even which court) is interpreting the agreement.¹⁶⁶ As such, prior to generally applying the "reasonable expectations" test, this section will consider whether the Majority's analysis of pre-CERCLA CGL policies serves the same underlying policy concerns of Legal Functionalism. Generally, courts apply the broader interpretive Functionalist strategies to correct two equitable issues that may arise from a traditional interpretation.

¹⁶⁴ See generally CERCLA, H.R. 510, 96th Cong. (1980).

¹⁶⁵ *Id.* CERCLA self-describes itself as a "polluter pay system."

¹⁶⁶ Swisher, *supra* note 6, at 544.

First, Legal Functionalism seeks to correct stark imbalances of bargaining power that manifest themselves as a result of the application of narrower Formalist analysis to “adhesion”¹⁶⁷ contracts.¹⁶⁸ As mentioned in the introduction, the standardized nature of insurance contracts lends the agreements to significant Functionalist criticism.¹⁶⁹ Courts often construe the standardization of insurance contract terms as a per se indication that an insured consumer lacks the ability to engage in substantial bargaining.¹⁷⁰ While this criticism may ultimately be misplaced,¹⁷¹ the courts’ perspective recognizes the commercial reality that the average consumer insurance contract will likely not materially depart from the draft initially presented to the consumer.¹⁷² As such, insurers are seen as offering policies on a “take-it-or-leave-it” basis.

Legal Functionalism also attempts to correct the discrepancy between the insureds’ and insurers’ levels of sophistication. While the concern is most prevalent when the insured is an average consumer of limited education, courts tend to presume that sophistication is an ever-present concern.¹⁷³ In most cases, the presumption is likely justified as any insured would likely be less sophisticated than an insurer in regards to insurance policies.¹⁷⁴ While Legal Functionalism’s concerns may be legitimate in relation to an average consumer insurance contract, the underlying policy concerns are irrelevant to pre-CERCLA CGL policies.

In light of the circumstances leading to inequity, the Majority’s appeal to Legal Functionalism is somewhat ironic. The Majority employs

¹⁶⁷ “A standard-form contract prepared by one party, to be signed by another party in a weaker position, [often] a consumer, who adheres to the contract with little choice about the terms.” Contract, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “adhesion contract”).

¹⁶⁸ Swisher, *supra* note 6, at 549 (explaining the perspective that insurance contracts are often adhesion contracts because the insurer has superior bargaining power). *But see* Fischer, *supra* note 11, at 1012 (challenging the notion that the standardized nature of insurance contracts renders them per se adhesive).

¹⁶⁹ Fischer, *supra* note 11, at 997.

¹⁷⁰ *Id.* at 1014 (“Courts often ignore or down-play evidence indicating that the insured was capable of bargaining for coverage but failed to do so.”).

¹⁷¹ *Id.* at 1013 (recognizing that courts often treat insurance policies as adhesion contracts, yet ultimately concluding that the insured’s lack of bargaining power is a product of a lack of sophistication, rather than a true inability of the insured to bargain for the coverage that they desire).

¹⁷² *Id.* at 1047–48.

¹⁷³ *See generally* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1253 (noting that while some courts do enforce adhesion contracts against parties on the basis of commercial sophistication, such a finding does not eliminate the possibility of unenforceability).

¹⁷⁴ Fischer, *supra* note 11, at 1047–48.

Legal Functionalism, a doctrine which attempts to correct prominent discrepancies within bargaining power and sophistication, to pre-CERCLA CGL insurance contracts because the EPA's ability to attach liability under CERCLA essentially leaves the unsophisticated PRP (a consequence of retroactive liability) with no bargaining power (ability to negotiate or defend liability). In a sense, the Majority's application of Functionalism does serve the underlying policy concerns; however, the culprit of the unequitable consequences is CERCLA itself—rather than the insurer.

Within the context of CGL policies, the underlying concern of sophistication is likely overstated. The parties contracting under CGL policies likely are not average everyday consumers. While courts have employed Functionalist doctrine to commercial parties, such an application does a major disservice to both the commercial entities and the market at large.¹⁷⁵ When a court promises commercial entities the contract the entity "expected" regardless of the contract's form, the court provides a disincentive for the entity to exert efforts to analyze the agreement or consider their particular coverage needs in relation to the policy being offered.¹⁷⁶ This incentive frustrates the insurer's commercial reliance upon standardization, which serves as an economic necessity for facilitating efficient modern insurance transactions.¹⁷⁷ Absent standardization, the costs associated with contracting for insurance would either rise to the point where the average consumer could no longer afford insurance or would cease to be economically viable all together.¹⁷⁸

The disincentive for commercial entities to at least attempt to understand the policy further frustrates the second concern of Legal Functionalism. Absent placing an extremely cumbersome duty upon insurers to inform,¹⁷⁹ how can a court expect an insured to exert any bargaining power over a contract that the insured is utterly incapable of

¹⁷⁵ See, e.g., *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975).

¹⁷⁶ The assumption here is that absent broader rules of construction, commercial entities seeking insurance will need to adjust how they engage with insurers in order to ensure proper coverage. While insurers may stand in a position to better absorb costs, placing the burden upon insurers to anticipate and incorporate the particular concerns of a commercial entity is somewhat strange.

¹⁷⁷ Swisher, *supra* note 6, at 572 ("[S]tandardized insurance contracts are indispensable instruments in conducting an insurance business in a mass society"); Fischer, *supra* note 11, at 1020 ("[B]enefits of standardization to the insured . . . include providing appropriate packages of coverage to individuals who usually are unable to define or describe the scope of coverage needed").

¹⁷⁸ See generally Fischer, *supra* note 11.

¹⁷⁹ For further information regarding proposed duty to inform, see *id.* at 1056 (discussing the rejection of a duty to advise/inform insureds on the scope of their policies).

understanding or unconcerned with? Furthermore, within the context of pre-CERCLA CGL policies the secondary concern of sophistication is inherently irrelevant—even if the insured were more sophisticated in the art of insurance, there is no realistic possibility that the insured could have negotiated a policy that indemnified itself from CERCLA’s unprecedented and radical retroactive liability.

1. Analysis of (un)Reasonable Expectations

“Reasonable expectation” tests vary significantly depending on the court applying it; however, the overarching concern is effectuating the “reasonable expectations of the insurance applicants . . . regarding the terms of the insurance contract.”¹⁸⁰ As such, the overarching driving question is whether a PRP under a pre-CERCLA CGL policy could have reasonably expected his/her policy to cover CERCLA clean-up costs.

The main logical problem for the Majority’s position is that it is difficult to imagine a world in which the parties reasonably expected the sort of broad liability structure and damages that would arise under CERCLA. While pre-CERCLA CGL policies did cover certain types of property damage, the policies themselves were not created for the purposes of indemnifying clean-up costs associated with CERCLA.¹⁸¹ CGL’s primary purpose has been to protect a business in the event its lessee’s commercial activities harm the leased premises.¹⁸² Furthermore, almost immediately after CERCLA’s passage ISO redrafted the standard-form CGL to explicitly exclude CERCLA damage.¹⁸³

Even supposing that the insured exerted extraordinary foresight (or exhibited commercially unreasonable stupidity) the simple fact remains that the payments made under the policy were not calculated for the indemnification of CERCLA damages; rather, the premiums reflected the coverage contemplated in a world prior to the advent of CERCLA.¹⁸⁴ When CERCLA’s radical regulatory scheme disrupted the commercial market, courts were faced with a difficult decision. Either lessen the blow by justifying an unrealistic expectation—no matter how unlikely, misguided, or non-mutual—or allow the parties to whom the regulation specifically

¹⁸⁰ *Id.* at 551.

¹⁸¹ *See generally* Swisher, *supra* note 6, at 600.

¹⁸² *Id.*

¹⁸³ *Id.* at 184–85.

¹⁸⁴ *See generally* Fischer, *supra* note 11, at 1062 (discussing the accurate relation between premium cost and coverage provided).

sought to attach liability to, absorb the costs associated with his/her actions. The Majority's choice to do the former, represents an arbitrary displacement of the costs that Congress intended the insured to bear.

CONCLUSION

While intentions driving the Majority's liability-shifting approach to Pre-CERCLA CGL policies may arise from well-intentioned moral sympathy for polluters who were adversely affected by CERCLA, ultimately the Majority's transposing of equity is ill-placed. Legal Functionalism should serve as the exception to the general rules of contracting. An exception that courts utilize to correct genuine cases of abuse that violate genuine equitable considerations. If the manner liability attaches to PRPs is inequitable, then the courts should have targeted the true source of that inequity—the legislation itself. In fact, the opportunity availed itself on numerous occasions.¹⁸⁵ Courts must accept the fact that certain equity will inevitably be lost in the advent of a regulatory scheme that carries retroactive effects. If this loss of equity is concerning then perhaps there needs to be a reevaluation of CERCLA's liability scheme by Congress.

The authority to fix equitable issues within CERCLA lies with Congress, not the courts. Within the context of transactional disputes, the courts' primary concern should be serving as a neutral interpretive body. The decision of the Majority to interpret these CGL contracts under the equitable doctrines does not carry a genuinely equitable result; rather, the decision is merely an arbitrary shifting of liability.

While a Functionalist approach may provide some relief when applied to undeniably¹⁸⁶ unconscionable contracts, any broad application is counterintuitive to the general purposes of facilitating an efficient market. While consumer protection is a genuine policy concern, this concern is best left to those designated by society to deal with those areas (i.e., Congress, FTC).

In conclusion, the application of "reasonable expectations" doctrine to pre-CERCLA CGL insurance policies merely shifts liability under an unexpected regulatory scheme, and fails to serve the policy concerns upon which the Legal Functionalism serves.

¹⁸⁵ See generally Alfred Light & David McGee, *Preenforcement, Preimplementation, and Postcompletion Preclusion of Judicial Review Under CERCLA*, 22 ELR 10397; David Jones & Kyle McSarrow, . . . *But Were Afraid to Ask: Superfund Case Law*, 1981-1989, 19 ELR 10430.

¹⁸⁶ One of the primary issues with the Functionalist approach is determining what is truly unconscionable.