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One of the hottest areas of litigation today concerns responsibility for environmental cleanup costs. The controversy often involves insurance policyholders who are seeking indemnification under comprehensive general liability policies ("CGLs") for costs incurred under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"). Superfund has placed on its National Priorities List, 1236 contaminated sites which the federal government has deemed so dangerous that they must be cleaned up immediately, or as soon as allowed by the protracted process of investigation, notification, litigation, cleanup and reimbursement. The Environmental Protection Agency ("EPA") chooses the site, names the potentially responsible parties ("PRPs"), performs the necessary containment and cleanup, and bills the PRPs for all cleanup costs.

Cleanup costs are tremendous, with estimates ranging from $500 billion to $750 billion overall and $25 million for each site. Unfortunately, the costs of cleaning up even a portion of one site can bankrupt a small business, and the costs of cleanup plus litigation can ruin

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1. 42 U.S.C. §§ 9601-9675 (1988). Superfund was enacted by Congress in 1980 for the purpose of establishing a $1.6 billion trust fund to clean up the country's hazardous waste dump sites over a five year period and to respond to accidents that release hazardous substances into the environment. Ruth Gastel, Environmental Pollution: Insurance Issues, April 1992, INS. INFO. INST. REPORTS. Additionally, Superfund empowered government agencies to recover trust fund monies spent in the cleanup process and to order responsible parties, including site owners and operators, waste transporters and site users, to clean up the sites independently. Id. The act was financed by a tax on chemical feedstocks, crude oil and imported petroleum products. Id.
2. Gastel, supra note 1.
4. See Lisa Gibbs, Pollution Liability Spurs Insurer-Insured Disputes; Carriers are Denying Requests for Coverage from Business Owners, N.J.L.J., Dec. 16, 1991, 4 (costs to clean up Superfund sites are estimated at $500 billion to $750 billion).
5. Gastel, supra note 1.
a much larger business. The PRPs attempt to bill their insurance companies, who generally refuse to defend or indemnify the responsible companies. The insurance industry has warned Congress that the present system is unworkable. With total surplus and reserves of the United States insurance industry estimated at only $130 billion, the industry cannot finance a massive cleanup of the environment.

Precisely because the stakes are so high, litigation is especially fierce. Disagreements among states and among circuits exist on every major issue. Regrettably, the United States Supreme Court is unable to introduce uniform standards and policies because state law governs insurance contract law. Disagreements among courts also have created the possibility of forum shopping, as Continental Insurance Co. v. Northeastern Pharmaceutical Co. and Independent Petrochemical Corp. v. Aetna Casualty & Surety Co. illustrate. These cases both involve cleanup of the Times Beach toxic waste site in Missouri. In Continental, the United States Court of Appeals for the Eighth Circuit found that an insurer had no obligation to indemnify the insured for cleanup costs which were not included in the term "damages" as used in the standard general liability insurance policy.

7. See Gibbs, supra note 4.
Although neither party was incorporated in the District of Columbia, the insureds in *Independent Petrochemical* were able to bring their case to the United States Court of Appeals for the District of Columbia because the District of Columbia Superintendent of Insurance accepted service of process for the defendant insurers.\(^{15}\) The D.C. Circuit court explicitly rejected the holding of the Eight Circuit panel, concluding that the insurers were legally obligated to reimburse the insureds for cleanup costs.\(^{16}\)

This article addresses the state of the law regarding environmental cleanup costs in the federal and state courts in the region of the Fourth Circuit.\(^{17}\) Five primary issues form the basis of most suits between insureds and insurers for defense and indemnification. Each issue requires courts to interpret CGL clauses used throughout the industry.

The first issue is whether a PRP notification letter serves as notice of a suit, and whether an administrative proceeding constitutes a suit. Second, the court must define "damages"\(^{18}\) and state whether that term includes equitable damages such as the cost of remedial and prophylactic measures, or only legal monetary damage to property. Third, a court must determine the applicability of the Owned Property Exclusion to cleanup of the insured's own property. Whether contamination is likely to spread to a neighbor's property affects the reading of the Owned Property Exclusion clause. The Pollution Exclusion, barring coverage for pollution that was not "sudden and accidental," forms the fourth issue of contention.\(^{19}\) Finally, the court must decide whether a CGL provision excluding coverage for any "occurrence" that was the "expected or intended" outcome of insured's action bars coverage.\(^{20}\)

One or more of these issues presents itself in every case regarding

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16. *Id.* at 946. ("Deference is one thing; blind adherence quite another . . . we will not follow another circuit's decision if that court 'ignored clear signals emanating from the state courts' or 'clearly misread state law'.") (citation omitted).
17. The states composing the Fourth Circuit are: Maryland, North Carolina, South Carolina, Virginia, and West Virginia.
20. See Feder, *supra* note 6 (discussing courts' various interpretations of the meaning of occurrence).
an insured's coverage for environmental cleanup. This article serves as a summary of the issues involved in such cases and the ways in which the state and federal courts in the region of the Fourth Circuit have resolved these issues.

MAJOR ISSUES IN INSURANCE LITIGATION

1. The "Suit" Requirement
   a. Plain Meaning Definition of a "Suit"

Property insurance policies typically provide for defense and indemnification in any lawsuit involving property damage. Insurers argue for a bright-line test and a narrow interpretation of policy language limiting coverage to occasions on which an actual lawsuit is filed against the insured. Under this strict interpretation, a PRP letter from the EPA or a state agency notifying an insured of potential liability for environmental damage and cleanup costs does not constitute a "suit" within the meaning of the policy.

In support of this position, insurers point to language in the policy distinguishing between the mandatory duty to defend "suits" from the option to investigate an insured's claims. Additionally, insurers warn courts that by adopting the broader interpretation of the policy advocated by policyholders, courts obscure the bright line between complaints and all other claims, thereby causing one of two undesirable results. Either the courts will have to make the determination of when a claim becomes a suit on a regular basis, or insurers will be forced to defend all claims against insureds, a result not intended by the parties to the contract. Finally, insurers contend that liberal construction of policy terms merely serves to foster litigation. Courts which adhere to the general rule of contract interpretation, that unambiguous words should be given their "plain meaning," agree with insurers and limit the meaning of suit to the filing

21. Id.
22. Aetna Casualty and Surety Co. v. Pintlar Corp., 948 F.2d 1507, 1517 (9th Cir. 1991); Ryan v. Royal Ins. Co. of America, 916 F.2d 731, 735 (1st Cir. 1990).
23. Ryan, 916 F.2d at 742.
24. Aetna, 948 F.2d at 1517.
25. Id.
26. Id.
of a complaint.\textsuperscript{27}

b. \textit{A Reasonable Person's Definition of a "Suit"}

At the opposite end of the spectrum, policyholders claim that an insurer's duty to defend arises whenever a state or federal agency determines that an environmental condition needs improvement and notifies the policyholder of that determination.\textsuperscript{28} Insureds argue that because the policies do not define the term "suit," courts should apply a reasonable person test and thereby refrain from limiting the meaning of the term.\textsuperscript{29} Under the reasonable person theory, an ordinary insured would consider a PRP notice as itself prompting the need to defend, thus initiating a "suit."\textsuperscript{30}

Insureds distinguish a PRP letter from a typical demand letter by noting that a PRP notice contains "immediate and severe implications."\textsuperscript{31} In a tort action, a plaintiff cannot affect a PRP's rights adversely between the occurrence of the tort and the filing of the complaint.\textsuperscript{32} By contrast, a PRP's "substantive rights and ultimate liability are affected from the start of the administrative process."\textsuperscript{33} A PRP often finds it more cost-effective to perform environmental studies and cleanup measures itself, rather than wait for the EPA to perform the work and initiate a cost recovery

\textsuperscript{27} \emph{See, e.g.}, Braswell v. Faircloth, 387 S.E.2d 707, 709 (S.C. Ct. App. 1989) ("Policy language must be given its plain, ordinary, and popular meaning."); Continental Ins. Co. v. Northeastern Pharmaceutical and Chemical Co., 811 F.2d 1180, 1188 n.21. (8th Cir. 1987) ("Citation to meaning given ordinary language in a respected dictionary is particularly relevant in a case involving the construction of insurance policy terms because of the well-established principle that insurance policy language must be given the meaning that it would convey to an ordinary insured") (citation omitted); Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co., 172 S.E.2d 518, 522 (N.C. 1970).

\textsuperscript{28} \emph{Ryan}, 916 F.2d at 742.

\textsuperscript{29} \emph{Aetna}, 948 F.2d at 1516.


\textsuperscript{31} \emph{Aetna}, 948 F.2d at 1516.

\textsuperscript{32} \emph{Id.}

\textsuperscript{33} \emph{Id.} (citing Avondale, 697 F. Supp. 1314, 1321 (S.D.N.Y. 1988) ("Adverse consequences can befall an insured during the administrative pollution cleanup process."); \emph{aff'd}, 887 F.2d 1200 (2d Cir. 1989)).
action. Failure to cooperate with the EPA can result in increased liability for an insured, including paying the EPA's litigation costs. Based on the incentives to comply with the EPA upon receipt of a PRP notice, some courts have held that an "ordinary person" would understand a PRP notice to be the commencement of a "suit" requiring a legal defense. The insureds' contend that the purpose of liability insurance is to protect against risk of loss of assets through liability; the manner of loss (litigation, administrative proceeding or other) remains irrelevant to an insured because they all have the same economic impact.

c. The Fourth Circuit and Other Courts' Definition of "Suit"

Courts typically have sought a middle ground between these extreme approaches and have consequently developed other tests to determine when the duty to defend arises. Most courts place a significant initial burden on the policyholder of a CGL by requiring proof that the claim was made in terms of coerciveness or adversariness. A substantially similar test finds the duty to defend when the government makes a serious effort to force the insured to take action or makes clear that serious consequences will follow the failure to act. Both of these tests focus on the probability of liability. A third theory studies whether the defense is required because of an implied serious offense or whether the insured has been "legally threatened."

State courts within the geographic region of the Fourth Circuit have examined each of these theories. Maryland courts have held that an insurer's duty to defend arises when there is a "possibility" of liability. North Carolina courts, by contrast, have found that a compliance order from a state agency ordering a lessor and a lessee to remove hazardous waste from the leased premises meets the suit requirement of a CGL policy when the order represents an attempt by a state "to gain an end by

34. Aetna, 948 F.2d at 1517.
35. Id.
36. Id.
37. Ryan, 916 F.2d at 740.
39. Id.
40. Id. at 739 (citing Avondale, 887 F.2d at 1206 and Continental Cas. Co. v. Cole, 809 F.2d 891, 898-9 (D.C. Cir. 1987).
41. Maryland Casualty Co. v. Armco, 822 F.2d 1348, 1354 (4th Cir. 1987) (citing Continental Casualty Co. v. Bd. of Educ. of Charles County, 489 A.2d 536 (Md. 1985)).
In Spangler, the North Carolina Supreme Court noted that because "suit" was not defined in the policy it "should be given that meaning it has acquired in ordinary speech." The court reasoned that a person in the position of the insured may not have understood the term "suit" as limiting "[the insurer's] duty to defend" to actual litigation.

2. Defining Damages

The definition of "damages" has been at least as highly litigated as the definition of "suit," and for similar reasons. Debate focuses on the plain and ordinary meaning of the word "damages." Not only must words in an insurance contract be given their plain meanings, but when terms can have more than one meaning, they are construed in favor of the insured because the insurers write the policies. Courts have interpreted "plain meaning" in two distinctly different ways.

CERCLA empowers the government to sue PRPs for "all costs of removal or remedial action incurred by the United States" as well as for

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43. Id. at 570.
44. Id.
45. Policzer, supra note 18, at 28 (discussing how courts split over the definition of "damages").
(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for --
(A) all costs of removal or remedial action incurred by the United States Government or a State . . . not inconsistent with the national contingency plan;
(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.
"damages or injury to, destruction of, or loss of natural resources."\textsuperscript{48} Because CERCLA is a federal statute, its interpretation is a question of federal law.\textsuperscript{49} Courts have agreed that CERCLA response cost suits are equitable, rather than legal in nature.\textsuperscript{50}

a. The Fourth Circuit's Definition of Damages

In \textit{Maryland Casualty Co. v. Armco},\textsuperscript{51} a Fourth Circuit panel interpreted section 9607(a)(1)-(4)(A) as providing the government with the equitable remedy of restitution.\textsuperscript{52} In \textit{Armco}, the insurer sought a declaratory judgment that it had no duty to defend its insured in a CERCLA suit for reimbursement and injunctive relief brought by the EPA because of an alleged endangerment to the environment at a hazardous waste site in Missouri.\textsuperscript{53} The insured argued that "damages" included almost any claim for monetary relief, because the applicable state law provided that "the terms of an insurance policy are to be construed according to the meaning a reasonably prudent layman would infer."\textsuperscript{54} The court, however, stated that "damages" should be construed in accord with its "accepted technical meaning in law."\textsuperscript{55} Interpreting the statute under the law of Maryland,\textsuperscript{56} the court held that a CGL with a standard coverage clause did not impose upon the insurer either a duty to defend or

\begin{itemize}
\item \textsuperscript{48} \textit{Id.} at §9607(C).
\item \textsuperscript{49} Cincinnati Ins. Co. v. Milliken and Col, 857 F.2d 979, 980 (4th Cir. 1988).
\item \textsuperscript{50} Maryland Casualty Co. v. Armco, 822 F.2d 1348, 1351 (4th Cir. 1987) (citing district court opinion).
\item \textsuperscript{51} 822 F.2d 1348 (4th Cir. 1987).
\item \textsuperscript{52} \textit{Id.} at 1352 (following Mraz v. Universal Insurance Co., 804 F.2d 1325 (9th Cir. 1986) as to interpretation of § 9607). The court held that a claim pursuant to CERCLA was a claim for "equitable, remedial relief." \textit{Id.}
\item \textsuperscript{53} \textit{Id.} at 1350. In the Missouri suit, United States v. Conservation Chemical Co., 653 F. Supp. 152 (W.D. Mo. 1986), the United States sued both the owners of a waste storage facility and the "original waste generator" defendants; one of those defendants was Armco. The complaint alleged that faulty storage of hazardous waste at the site had resulted in contamination of soil, groundwater and nearby rivers. \textit{Id.}
\item \textsuperscript{54} \textit{Id.} at 1352 (citing Pacific Indem. Co. v. Interstate Fire & Cas. Co., 488 A.2d 486, 488 (Md. 1985)). \textit{But see} Aetna Cas. and Surety Co. v. Hanna, 224 F.2d 499, 503 (5th Cir. 1955) ("'damages' as distinguished from claims for injunctive or restitutionary relief, includes only payments to third persons when those person have a legal claim for damages . . .").
\item \textsuperscript{55} Maryland Casualty Co., 822 F.2d at 1352 (quoting Aetna Casualty and Surety Co. v. Hanna, 224 F.2d 499, 503, (5th Cir. 1955)).
\item \textsuperscript{56} \textit{Id.} at 1354.
\end{itemize}
a duty to indemnify the insured against the government’s claim for restitution, because the clause covered legal but not equitable "damages." The appellate court affirmed the district court’s conclusion that "[b]lack letter insurance law holds that claims for equitable relief are not claims for ‘damages’ under liability insurance contracts" and then agreed that claims under CERCLA section 107(a) were equitable in nature.

The Fourth Circuit applied South Carolina law in Cincinnati Insurance Co. v. Milliken and Co. but found "no material distinctions between South Carolina and Maryland laws in the construction and interpretation of insurance policies." South Carolina, like Maryland, followed the plain meaning rule of interpretation of insurance contracts when terms do not appear ambiguous. The court in Cincinnati Insurance held that the term "damages" was not ambiguous in the insurance context, and clearly referred to legal, not equitable claims. Other courts, however, have held that a claim for apparent equitable relief for reimbursement of environmental cleanup expenses constitutes a claim for "damages" within the terms of a standard CGL.

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57. Id. at 1351-54. Accord Continental Ins. Co. v. Northeastern Pharmaceutical and Chemical Co. (NEPACCO), 842 F.2d 977 (8th Cir. 1988) (applying Missouri law). But see Independent Petrochemical Corp. v. Aetna Cas. and Surety Co., 944 F.2d 940 (D.C. Cir. 1991) (directly contradicting 8th Cir. on same question of Missouri law and holding that equitable and legal damages were covered by CGL).

58. Maryland Casualty Co., 822 F.2d at 1352 (citing district court’s opinion).

59. Id. at 1351 ("Every court that has considered the question has held that CERCLA response cost suits fall on the equity side of the line") (citation omitted).

60. 857 F.2d 979 (4th Cir. 1988).

61. Id. at 980-81.


63. Cincinnati Ins. Co., 857 F.2d at 980 (distinguishing "All sums which the insured shall become legally obligated to pay" from sums insured becomes equitably obligated to pay to the government and citing NEPACCO, 842 F.2d at 985-87; Armco, 822 F.2d at 1352).

64. A Georgia district court, after certifying a question to the Georgia Supreme Court, held that a landowner’s primary and excess liability insurance carriers were liable for "damages" incurred in undertaking such remedial pollution measures as the EPA ordered for cleanup of a Virginia site. Claussen v. Aetna Casualty and Surety Co., 754 F. Supp. 1576 (Ga. 1990).
As a whole, these cases illustrate the Fourth Circuit's reluctance to hold insurance companies liable for insureds' costs under CERCLA, but such reluctance is far from unanimous among the state and federal courts nationally.

b. **Other Courts' Definition of Damages**

In contrast to Fourth Circuit precedent, the United States Court of Appeals for the Second, Third, Ninth and District of Columbia Circuits, as well as several state courts, have held that response costs do represent "damages" within the meaning of a CGL.65 In *United States Aviex Co. v. Travelers Insurance Co.*,66 a Michigan state court held that "damages" encompassed monies recovered to reimburse the government for costs of investigating and correcting chemical contamination of percolating waters.67 In rejecting the insurer's argument for a narrow interpretation of damages limited to compensation for injury or loss, the court reasoned that the "merely fortuitous" event that the state had decided to remove the


67. Id. at 843.
contamination itself and then sue for reimbursement, rather than initially
suing for damages, should not permit the insurer to escape liability under
its policy.68

 Courts have offered other arguments for inclusion of equitable
remedies. The holding in Continental Insurance Co. v. NEPACCO69
supports the proposition that environmental damage constitutes property
damage within the meaning of a CGL.70 In dicta, the Eighth Circuit held
that "damages" included equitable relief because the measure of damages
was the same for both legal and for equitable damages.71 Insureds have
proposed a second theory to demonstrate that CGLs cover response costs,
arguing that such costs are "mitigation" costs, because they save money for
the insurer by preventing legal damages which the CGL would cover.72
This theory only applies, however, when an insurance policy specifically
obligates the insured to reimburse expenses undertaken to mitigate the
amount of damages.73

 The Aviex court measured damages as the cost of restoring the
contaminated water to its original condition.74 The court in Armco later
criticized this approach.75 According to the court, the problem with
determining the extent of liability without regard to whether a party sues
for costs or for damages is that restoring a damaged marsh may cost far
more than paying damages for a loss.76 Additionally, insurance
companies traditionally have been very reluctant to cover costs of
prophylactic measures (e.g., safety precautions) because such expenses are
subject to the discretion of the insured, and are not related to any harm to

68. Id.
69. 811 F.2d 1180 (8th Cir. 1987), reh'g granted, 815 F.2d 51 (8th Cir. 1987) (en banc).
70. Id. at 1187.
71. Id. at 1187-88.
72. Maryland Casualty Co. v. Armco, 822 F.2d 1348, 1354 - 55 (citing Consolidated
Rail Corporation v. Certain Underwriters at Lloyds, No. 84-2069, slip opinion (E.D.Pa.
73. Id.
74. Id.
75. See supra notes 51-59 and accompanying text (discussing Armco).
76. Maryland Casualty Co. v. Armco, 822 F.2d 1348, 1352 (referring to Peevyhouse
(1963) (in which the costs of restoring stripmined land was more than four times its
potential value in restored condition)).
particular third parties.\textsuperscript{77} The insurance industry bases all of its calculations on certainty as to the extent of its liability, and the industry intends for insurance policies to embody this certainty.\textsuperscript{78}

3. \textit{The Owned Property Exclusion}

Liability insurance usually serves to cover harm to third parties, rather than to the insured.\textsuperscript{79} The owned property exclusion refers to a provision in the standard CGL which refuses to cover damage to "property owned or occupied by or rented to the insured."\textsuperscript{80} Generally, the insured in a response costs case owns or operates the property which is to be cleaned, and thus some courts hold that such ownership prevents coverage.\textsuperscript{81} In order for insurance to cover property damage caused by pollution, the damage somehow must reach the property of third parties.\textsuperscript{82}

Courts often do find coverage, however, and hold that remedial measures are performed to prevent harm to third parties,\textsuperscript{83} particularly when groundwater is involved because its transitory nature precludes control by the insured.\textsuperscript{84} Two California cases demonstrate the limits of this exception. The United States District Court for the Northern District

\textsuperscript{77} Id. at 1353.
\textsuperscript{78} Id. Insurers view the government’s investigative and remedial actions regarding potential environmental hazards as prophylactic measures. The fundamental purpose of such actions, regardless of whether some damage has already occurred, is to prevent or mitigate the (re)occurrence of hazardous contamination, a prophylactic purpose. \textit{Id.} at 1353-54. \textit{Compare} Aetna Casualty and Surety Co. v. Pintlar Corp., 948 F.2d 1507, 1515 (9th Cir. 1991) ("Response costs in this case are remedial. They are incurred as a result of responding to contamination; they are not simply a government-imposed cost of doing business for firms which release hazardous substances. They are not imposed to prevent property damage, rather, they are imposed "because of ... property damage."). \textit{See also} Aerojet-General Corp. v. Superior Court of San Mateo County (Cheshire and Companies), 211 Cal. App. 3d 216, 234 (1st Dist. 1989) ("[P]rophylactic costs are not incurred ‘because of injury to, or loss, destruction or loss of use of property’ . . . .").

\textsuperscript{79} Eubank, \textit{supra} note 3, at 204.
\textsuperscript{80} Intel Corp. v. Hartford Accident and Indemnity Co., 692 F.Supp. 1171, 1182 (N.D. Cal. 1988).
\textsuperscript{81} \textit{See} Eubank, \textit{supra} note 3, at 208.
\textsuperscript{84} \textit{Id.}
of California, in *Intel Corp. v. Hartford Accident and Indemnity Co.*, held that a CGL covered groundwater cleanup costs reasoning that groundwater is the property of all Californians and its contamination constitutes injury to third parties. The California Eastern District Court, however, refused to extend that rationale to cover contamination of soil on the insured's own property. Courts within the Fourth Circuit's geographic region have not yet addressed these issues directly.

4. **The Pollution Exclusion**

In response to courts' rulings that various policyholders were covered by their CGLs for millions of dollars in cleanup costs, the insurance industry has sought to limit its liability by creating the pollution exclusion. The provision limits coverage to "occurrences" that were "sudden and accidental." Not surprisingly, courts, insurance companies, and insureds have interpreted these terms in a wide range of ways.

Prior to 1966, CGLs strictly limited coverage to personal injury and property damage caused by accident. Courts defined "accident" expansively but insurers intended the term to mean "an identifiable event which is sudden, detrimental and fixed in time and place, rather than . . . gradual injury or damage." The massive environmental damage and personal injury awards that insurers had feared if gradual losses were covered materialized when companies cashed in on coverage for damage

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86. *Id.* at 1183.
88. The standard pollution exclusion reads as follows:
   
   It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

89. See *Rosenkranz*, *supra* note 19, at 1237. (discussing the enormity of potential liability in environmental cleanup and the response of the insurance industry).
90. *Id* at 1242.
91. *Id*. at 1241.
92. *Id* at 1237 (distinguishes insurer's intended meaning of the word "accident" from courts' actual interpretation of the word).
created by years and even decades of negligence.93

Generally courts have shown sympathy to insureds under the pollution exclusion and foiled the insurance industry's attempt to limit liability.94 A variety of definitions for "accident" have developed through litigation.95 Courts are divided on whether or not an "accident" as defined in an accident-based policy has to be sudden.96

The leading case interpreting the pollution exclusion, Lansco v. Department of Environmental Protection,97 dealt with the central question surrounding the clause: from whose perspective should a court view the suddenness and degree of expectation of the event.98 In Lansco, the insured filed a declaratory judgment action seeking coverage under a CGL for costs of cleaning up an oil spill.99 Lansco had leased riverfront property in New Jersey on which it maintained tanks storing asphaltic oil.100 On a December night in 1974, one or more unknown persons opened the valves on two storage tanks, releasing 14,000 gallons of oil onto the property and eventually into the Hackensack River.101 The court found this occurrence to be "both sudden and accidental within the ordinarily accepted meaning of those words"102 and found coverage

93. See, e.g., Waste Management v. Peerless Ins. Co., 323 S.E.2d 726 (1984), rev'd, 340 S.E.2d 374 (N.C. 1986). One of the most difficult problems in Superfund litigation is assembling the defendants and then tracing the forms of pollution each created at a given site over a specific period of use. A particular site, for example, may have been a tannery, an industrial factory and a chemical laboratory at various points over a fifty year period; see also Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325 (4th Cir. 1986).

94. For an extreme example of a court's sympathy, see Ashland Oil Co., Inc. v. Miller Oil Purchasing Co., 678 F.2d 1293, 1320 (5th Cir. 1982) (per curiam) (adopting and reprinting trial court opinion). In that case a disposer of hazardous waste injected the waste into the pipelines of customers without their knowledge. This party, however, received insurance coverage for resulting damage because although the insured expected and intended the results, Louisiana law considered "accident" from the perspective of the injured party unless a term in the policy directed otherwise).

95. See Rosenkranz, supra note 19 at 1243 nn.34-36 (noting that some courts precluded coverage for losses they found "foreseeable" while others required only that the event be "unexpected and unintended" in order to receive coverage).

96. Id. at 1245.


98. See Rosenkranz, supra note 19 at 1245.


100. Id.

101. Id.

102. Id. at 523.
under the policy. The court in *Lansco* held that the event should be examined from the standpoint of the insured and held that "sudden" meant "unforeseen" while "accident" meant "unintended."!

a. **The Fourth Circuit's Treatment of the Pollution Exclusion**

The first case to address this issue in the Southeast, *Waste Management of Carolinas v. Peerless Insurance Co.*, stated that any ambiguities within the pollution exclusion should be resolved in favor of the insured, and found that the insurer had a duty to defend. Although the North Carolina Supreme Court subsequently reversed this decision, the intermediate court's holding represents the majority view.

In *Waste Management*, a trash collector, Trash Removal Services, Inc. ("TRS"), intentionally dumped toxic waste materials into a landfill over a period of six years, thereby causing the unintended and unexpected leaking of contaminants from the waste materials into the groundwater beneath the landfill. The federal government brought a Resource Conservation and Recovery Act ("RCRA") action against the owners and operators of the landfill. The defendants brought third-party complaints against TRS seeking indemnity for or contribution to whatever liability they incurred in the RCRA suit and alleging negligence by TRS in transport and disposal of the materials. TRS then sought a declaration of coverage in a suit against its own liability insurers.

The CGLs, identical in pertinent part, did not define "accident," so

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103. *Id.* at 523, 526.
104. *Id.* at 524.
106. *Id.* at 732.
107. *Id.* at 733.
108. The North Carolina Supreme Court and the Appeals Court used the "comparison test" to determine whether a duty to defend existed. *Waste Management*, 340 S.E.2d at 378. Under that test "the pleadings are read side-by-side with the policy to determine whether the events as alleged are covered or excluded. Any doubt as to coverage is to be resolved in favor of the insured." *Id.* (citing Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co., 172 S.E.2d 518 (N.C. 1970); Stout v. Grain Dealers Mutual Ins. Co., 307 F.2d 521 (4th Cir. 1962)).
109. *Id.* at 726.
110. *Id.* at 734.
111. 42 U.S.C. § 6901-6992k (1988) This suit was filed under §7003.
113. *Id.* at 729.
114. *Id.*
The intermediate court applied its standard definition: "that which happens by chance or fortuitously, without intention or design, and which is unexpected, unusual and unforeseen." In determining that the insureds owed a duty to defend, the court held that "what determines whether an accident has occurred are intent and expectation of bodily injury and property damage, and . . . whether the event is unexpected or unintended should be determined 'from the standpoint of the insured.'"

In reversing the intermediate court's decision, the Supreme Court of North Carolina expressly found that the provisions at issue were not ambiguous and thus the court gave the words their plain and ordinary meanings. The court found that the leaking of contaminants into the groundwater was "arguably unexpected and unintended," or accidental, but that the events fell within the pollution exclusion because the complaint did not allege that the leaking was "sudden." The court noted that the exclusion focused on the nature of the damage more than on the accidental nature of the occurrence. The court noted that "the exclusion limits the insurer's liability for accidental events by excluding damage caused by the gradual release, escape, discharge, or dispersal of irritants, contaminants, or pollutants." The court warned that if courts considered the release of contaminants alone to be the key to the clause, the sudden and accidental exception could be "bootstrapped onto almost any allegations that [did] not specify a gradual release or emission."

The policy behind the clause is to eliminate the incentive of the

115. Id. at 731 (citing City of Wilmington v. Pigott, 307 S.E.2d 857, 859 (N.C. App. 1983) (citations omitted)).
116. Id. (quoting Edwards v. Akion, 279 S.E.2d 894, 896 (1981), aff'd per curiam, 284 S.E.2d 518 (N.C. App. 1981)). The court noted that the inquiry into the intent or expectation should be a subjective rather than an objective one ("whether the insured 'should have' expected the resulting damage"). Id. But compare Harleysville Mut. Cas. Co. v. Harris & Brooks, Inc., 235 A.2d 556, 559 (Md. 1967) (using an objective test and holding no accident occurred where contractor burned pile of trees, underbrush and tires for thirty-six hours and should have foreseen that smoke and soot would damage property).
117. Waste Management, 340 S.E.2d at 380. See supra notes 22 and 44 and accompanying text for discussion of plain meaning rule of contract interpretation.
118. Id. at 380. Moreover, the damaging act itself, not the discovery of the damages must be sudden. Id. at 380 n.7.
119. Id. at 380 (stating that the "focus of the exclusion is not upon the release but upon the fact that it pollutes or contaminates.").
120. Id.
121. Id.
insured to be uninformed and negligent regarding the transport, disposal and containment of hazardous materials.\textsuperscript{122} This court did not intend to punish insureds who were regularly vigilant in their care of hazardous materials and had a single mishap. The court sought to avoid rewarding those who dealt regularly with hazardous materials but did so in a careless manner; coverage should not apply to these insureds for their mishaps. Policy issues strongly influence courts in their interpretation of the key words and phrases of CGLs.

5. \textit{The Definition of "Occurrence"}

In order for a policyholder to be entitled to indemnification from its insurer, the complaint against the insured which prompts the policyholder to seek coverage must allege an occurrence within the meaning of the CGL.\textsuperscript{123} The word "occurrence," as used in the pollution exclusion clause and other provisions of the standard CGL, has turned out to be another ambiguous contract term requiring court interpretation. Courts generally analyze this term in conjunction with the terms "sudden" and "accidental."\textsuperscript{124} The insurance industry claims that the definition of "occurrence" was not meant to include pollution-related losses that were "natural and obvious consequence[s] [of] the regular operation of a business."\textsuperscript{125}

The controversy surrounds the determination of when the occurrence happens and whether the event falls within the policy period of the CGL. The general rule states that 
"[t]he time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed but the time when the complaining party was actually damaged."\textsuperscript{126} Many of the Superfund cases "involve a wrongful act that produces no harm for a period of time and then suddenly manifests


\textsuperscript{123} Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1327-28 (4th Cir. 1986).


\textsuperscript{125} See Rosenkranz, supra note 19, at 1248 (citations omitted).

\textsuperscript{126} Mraz, 804 F.2d at 1328 (citing U.S. Fidelity & Guaranty Co. v. American Ins. Co., 345 N.E.2d 267, 270 (1976)).
itself in a burst of damage."\textsuperscript{127} In other cases the damage occurs but remains undetected for an extended period of time.\textsuperscript{128} In such cases, determining exactly when the damage began can be difficult, if not impossible.\textsuperscript{129} When confronted with this difficult determination, some courts have decided that the occurrence took place when the injuries first became apparent or were discovered.\textsuperscript{130}

\begin{quote}
a. \textit{The Fourth Circuit's Definition of "Occurrence"}

The Fourth Circuit adopted the discovery rule for hazardous waste burial cases in \textit{Mraz}.\textsuperscript{131} The Mrazes, seeking to recover their cleanup and removal costs incurred as a result of a leaking underground storage tank, sued their insurance company under the theories of a duty to defend and to indemnify.\textsuperscript{132} The Mrazes' policy defined "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage, neither expected nor intended from the standpoint of the insured" and also required that the event occur during the policy period.\textsuperscript{133} The court followed the "discovery" rule which states that "[t]he time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed but the time when the complaining party was actually damaged."\textsuperscript{134} Under the "discovery" rule, the complaint failed to allege an occurrence because the date of discovery did not fall within the policy period.\textsuperscript{135}
\end{quote}


\textsuperscript{128} \textit{See}, e.g., Mraz, 804 F.2d at 1325.

\textsuperscript{129} \textit{Id.} at 1328.

\textsuperscript{130} \textit{See} Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 62 (3d Cir. 1982); \textit{c.f.} Bartholomew v. Appalachian Ins. Co., 655 F.2d 27, 28 (1st Cir. 1981) (when the defect takes place or is discovered); Aetna Cas. & Surety Co. v. PPG Industries, Inc., 554 F. Supp. 290, 294 (D. Ariz. 1983) (coverage is based upon the time the damage was discovered).

\textsuperscript{131} 804 F.2d 1325 (4th Cir. 1986).

\textsuperscript{132} \textit{Id.} at 1326.

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} \textit{Id.} at 1328 (citing United States Fidelity & Guaranty Co. v. American. Ins. Co., 345 N.E.2d 267, 270 (Ind. App. 1976)).

\textsuperscript{135} \textit{Id.}
The Court of Appeals of South Carolina also considered the definition of occurrence under a policy considerably identical to the policy in *Mraz.* In *Braswell* the plaintiff-lessee sued his former lessee and the lessee’s insurer seeking coverage of an award against lessee for damages caused by a chemical spill on the leased property, an award on which lessee had defaulted. In this case, the trial court focused on the deliberateness of the lessee’s breach of the lease, as evidenced by abandonment of the property and deliberate and knowing abandonment of hazardous waste in various forms on the property. In the court’s view, these intentional acts did not constitute "an accident . . . neither expected nor intended from the standpoint of the insured." The plaintiff sought to persuade the court to focus on the chemical spill, rather than the breach of the lease, as the occurrence. The Court of Appeals found that such an event constituted an occurrence within the meaning of the policy. Additionally, the court determined that the spill caused property damage within the meaning of the policy but that the mere storage of chemicals on the land did not.

In a situation similar to *Braswell,* the Fourth Circuit agreed that the date of discovery rule properly applied to a case in which a discovery was made that a gasoline tank had been leaking for some time and had contaminated a third party’s water supply. With its holding in *Mraz* and subsequent cases, the Fourth Circuit has joined the majority of courts who have adopted the date of discovery rule when defining "occurrence" in the CGL policy.

137. Id. at 708-709.
138. Id. at 709.
139. Id. (quoting defendant-lessee’s insurance policy).
140. Id.
141. Id. at 709-710.
142. Id. at 711.
143. Safeco Ins. Co. of America v. Federated Mutual Ins. Co., No. 89-2822, slip. op. (D. S.C. Dec 16, 1990). Water was first found in the gasoline tank in 1972. Use of the tank was then discontinued but the owner continued to purchase gasoline for the store on that site through 1982. The contamination of a neighbor’s water supply was discovered in 1983. The companies which insured the owner from 1977 to January 1, 1983 were not liable for any damages. The insurer whose CGL began to run on January 1, 1983 was liable for all damages to the third party in a settlement negotiation.
CONCLUSION

The federal and state courts in the geographic region of the Fourth Circuit have not dealt directly with all of the issues discussed in this Article, but based on the relevant rulings the state and federal courts in this district have made, some conclusions can be drawn. Most courts will find that a "suit" exists sufficient to invoke an insurer's duty to defend when some reasonable possibility of liability exists, based on the terms of the policy and the terms of the complaint. Courts have more difficulty, though not an insurmountable reluctance, to find that PRP notices and other means less direct than litigation fulfill the suit requirement. Courts within the geographic region of the Fourth Circuit seem to have decided that insurance companies should not bear the costs of equitable damages in the absence of extraordinary circumstances. Increasing pressure from other circuit courts, however, could cause a reversal on this point; the trend, though barely discernable, is to make the insurance company pay for the response costs under CERCLA. Insureds may have to use creative arguments or forum shop, or perhaps remove the case to the D.C. Circuit court if possible, in order to win on this point presently. The terms "sudden," "accidental" and "occurrence" all work together in the pollution exclusion and are interpreted in relation to each other. In the end a court's predisposition to which party should bear the costs of environmental cleanup informs its decision.

Today, the market for traditional liability insurance has changed radically as most firms no longer carry CGLs and new companies have begun to fill the need; such insurance, however, can be prohibitively expensive. The old policies continue to haunt us as new pollution sites are discovered regularly and old policies must be interpreted in a climate much different from the one during which they were written.