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Recommended Citation

https://repository.law.uic.edu/lawreview/vol22/iss3/8

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CONTINENTAL INSURANCE COMPANIES v. NORTHEASTERN PHARMACEUTICAL & CHEMICAL COMPANY:* CLEANUP COSTS ARE NOT "DAMAGES" UNDER A STANDARD LIABILITY POLICY

Without dispute, the cost to eradicate this country's environmental contamination will be exorbitant. A dispute remains, however, as to who will pay the bill. Among the likely candidates are insurance companies that issued policies to polluters being held liable today for their disposal practices of yesterday. The liability of these polluters is predicated on federal law, which authorizes the government to quickly respond and remedy the environmental contamination, and then seek reimbursement of its costs from poten-

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1. Environmental contamination in this country is widespread. *Superfund: Looking Back, Looking Ahead*, 13 EPA J., Jan.-Feb. 1987, at 17. As of January 1987, 951 sites had either been listed on the Environmental Protection Agency's National Priorities List or proposed for listing. Id. The National Priorities List identifies the worst hazardous waste sites in the United States according to a variety of risk factors, such as the type, quantities, and toxicity of the wastes involved, the number of people potentially exposed, the likely pathways of exposure, and the importance and vulnerability of the surrounding natural resources. Id. Besides the sites listed on the National Priorities List, there are 25,000 additional potentially hazardous waste sites that have been reported to the Environmental Protection Agency. Id.

The potential for future environmental contamination is also significant. Id. at 14. Hazardous waste is produced in this country at the rate of 700,000 tons per day, or 250 million tons per year. Id. Yet, this figure is only a small fraction of the total amount of wastes generated in the United States: more than six billion tons every year. Id.


3. As little as two years ago, there were barely ten reported decisions in the country that directly addressed environmental insurance coverage issues. Pendygraft, Plews, Clark & Wright, *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 IND. L. REV. 117, 139 (1988). As of 1988, there are over fifty such decisions with hundreds pending. Id.
tially responsible parties. In Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Company, the Federal Court of Appeals for the Eighth Circuit, sitting en banc, addressed the issue of whether an insurer must indemnify its insured for successful judgments obtained by the government in these reimbursement actions. Finding no duty to indemnify, the court held governmental actions that seek reimbursement of cleanup costs are not


Although RCRA is generally prospective in nature, courts have nonetheless applied it retroactively to hold past non-negligent off-site generators and transporters strictly liable for pre-RCRA polluting activities. United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 741 (8th Cir. 1986), cert. denied, 108 S. Ct. 146 (1987). Such liability is predicated on § 7003 of RCRA, 42 U.S.C. § 6973 (1982). This section allows the Administrator of the Environmental Protection Agency to bring suit on behalf of the United States, or to take such other actions as may be necessary, to immediately restrain and stop any person contributing to the handling, storing, treating, transporting, or disposing of hazardous wastes when an imminent and substantial endangerment to health or the environment is present. Id. Liability under RCRA may include reimbursement of cleanup cost incurred by the United States government in responding to the contamination. Northeastern Pharmaceutical & Chem. Co., 810 F.2d at 750.

In addition to the imposition of retroactive liability under RCRA, courts may also impose it under CERCLA. Under CERCLA, retroactive liability for environmental contamination is expressly delineated for four classes of responsible persons: past and current owners and operators of hazardous waste facilities, generators, and transporters. 42 U.S.C. § 9607 (1982). Such persons may be compelled, at their own cost, to undertake environmental cleanup themselves, 42 U.S.C. § 9606 (1982), or they may be required to reimburse the United States for cleanup costs when the United States elects to respond to a prohibited release. 42 U.S.C. §§ 9604, 9607 (1982).


5. 842 F.2d 977 (8th Cir. 1988) (en banc).

6. Id. at 983.

7. The term “cleanup costs” as used here, is meant to include “removal” costs and “remedial action” costs as those terms are defined under CERCLA and the corresponding federal regulations. See 42 U.S.C. § 9601 (1982); 40 C.F.R. § 300.6 (1988). Although the terms’ definitions are overlapping, the difference between the two terms rests in the relative durational scope of each. See generally Superfund, Looking Back, Looking Ahead, 13 EPA J., Jan.-Feb. (1987), at 17-21. Remedial actions are cleanup activities that have a long term outlook, such as confinement or neutralization, or permanent relocation of residents. Id. at 17. On the other hand, removal actions are short term, and include installing security fencing and removing wastes for
safe disposal. Id.

8. The comprehensive general liability ("CGL") policy is generated by the Insurance Services Offices ("ISO") (formally known as the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau). McGlinchey & Masinter, When Does Damage Occur Under CGL Policies, 36 Fed’N. Ins. & Corp. Couns. Q. 139, 139 n.1 (1986). The ISO writes policy language, and then turns over the policies to member companies for marketing. The CGL policy was first made uniform in 1966, and was later amended in 1973 and in 1976. Id.

9. The present volume of environmental insurance litigation is demonstrated by the number of decisions which have directly addressed the issue of whether cleanup costs are covered under CGL policies.


From 1970-1972, Continental Insurance Company ("Continental") insured the Northeastern Pharmaceutical & Chemical Company ("Nepacco") under three consecutive, similar CGL policies. The CGL policies provided in part that Continental would pay on behalf of its insured all sums which the insured became legally obligated to pay as "damages" because of property damage. During these policy periods, Nepacco manufactured hexachlorophene in a small Missouri town. The production of hexachlorophene yielded dioxin as a hazardous by-product. Nepacco made various arrange-
ments to dispose of these by-products, including their burial at a nearby farm site.16

In 1980, contamination at the farm site was discovered.17 Subsequently, the United States sued Nepacco seeking injunctive relief and recovery of past and future cleanup costs pursuant to the Resource Conservation and Recovery Act ("RCRA"), and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").18 This suit resulted in a judgment holding Nepacco liable for the environmental contamination, and requiring the company to reimburse the United States for costs incurred in responding to the contamination.19

cause death to some laboratory animals when given in lethal doses. *Id.* at 31. In non-lethal doses, dioxin produces chronic effects on laboratory animals such as cancer and deformed offspring. *Id.* at 32. However, the precise chronic effects that dioxin has on human beings is uncertain. *See generally Id.* (author reviews results of studies researching the chronic effects of dioxin on human health and concludes results are uncertain).

16. In mid-July 1971, Nepacco employees deposited and buried approximately eighty-five 55-gallon drums containing dioxin-bearing wastes in a large trench at a nearby farm site (the "Denny Farm Site"). *Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. at 830. In October 1979, the Environmental Protection Agency ("EPA") received an anonymous tip indicating that waste materials from the Nepacco plant had been discarded at the Denny Farm site. *Id.* at 830. The EPA conducted an investigation, revealing alarmingly high concentrations of dioxin in the soil surrounding the buried drums. *Id.* at 831. As a result of the contamination at the Denny Farm site, the United States sued Nepacco for reimbursement of its costs incurred in remedying the pollution. *Id.* at 826. This suit forms the basis for the declaratory judgment action filed by Continental.

Besides the disposal arrangement at the Denny Farm site, Nepacco made other arrangements that resulted in more severe contamination. In 1971 or 1972, Nepacco hired Independent Petrochemical Corporation ("IPC") to dispose of more dioxin-contaminated wastes. *Continental Ins. Co.*, 811 F.2d at 1182. IPC then hired Russel Bliss who sprayed these wastes as a dust suppressant on the roads of Times Beach, Missouri, and on various horse ranch premises. *Id.* In March of 1973, contaminated soil from one of the ranch premises was used by a Mr. Minker as fill material at his residence and at various other locations ("the Minker/Stout/Romaine Creek site"). *Id.* As a consequence of this extensive dioxin contamination, multiple suits were filed. See *United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987)* (holding Nepacco, IPC, and Bliss liable for cleanup costs at the ranch premises); *Capstick v. Independent Petrochemical Corp., No. 83-20453 (City of St. Louis, Mo. Cir. Ct., filed Mar. 7, 1983)* (suit instituted by families residing on properties adjacent to contaminated property); Missouri v. Independent Petrochemical Corp., No. 83-3670-C (E.D. Mo. filed Nov. 23, 1983) (suit filed by state pursuant to CERCLA and Missouri common law of public nuisance regarding contamination at the Minker/Stout/Romaine Creek site).


19. The district court held that CERCLA may constitutionally apply retrospectively to hold non-negligent generators and transporters strictly liable for pre-CERCLA polluting acts. *Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. at 839-41. However, the district court refused to allow the United States to recover any
In February 1984, Continental filed an action in federal court against Nepacco seeking a declaration of its potential liability arising from its status as Nepacco's insurance carrier during the time the hazardous wastes were discarded. Shortly thereafter, the State of Missouri intervened, and filed a counterclaim against Continental alleging that, as Nepacco's liability insurer, Continental was liable for any judgment rendered against Nepacco and in favor of the state. In June 1985, the district court entered judgment for Continental, ruling that its policies did not cover the governmental claims for cleanup costs since the costs were incurred after the policies expired. On appeal, the Court of Appeals for the Eighth Circuit reversed, holding that the government sustains harm when hazardous wastes are improperly released, not when the cleanup costs are incurred. Furthermore, the court held that cleanup costs incurred to

cleanup costs incurred before CERCLA's enactment, and also refused to apply RCRA retroactively to pre-RCRA polluting acts. Id. at 837, 843. On appeal to the Court of Appeals for the Eighth Circuit, the Eighth Circuit affirmed in part, reversed in part, and remanded. Northeastern Pharmaceutical & Chem. Co., 810 F.2d at 729. It affirmed the retroactive application of CERCLA, and acquiesced in the imposition of strict liability under it. Id. at 732-34. However, it reversed the district court's ruling that pre-CERCLA cleanup costs were not recoverable. Id. at 734-37. It also reversed the lower court's ruling that RCRA could not apply retroactively to hold past non-negligent generators and transporters strictly liable for hazardous waste releases. Id. at 737-42. Lastly, the Eighth Circuit held that the district court may, upon remand and in its discretion, grant recovery to the United States for its cleanup costs under § 7903 of RCRA, 42 U.S.C. § 6973. Id. at 750.

20. Continental's suit sought a declaratory judgment. The purpose of these actions is to have a court declare whether an insurer is liable to defend a suit brought against its insured, and whether it will be liable for any judgment subsequently rendered against its insured. See generally 18 G. COUCH, COUCH, CYCLOPEDIA OF INSURANCE LAW § 74:117 (2d ed. 1983) (describing nature of declaratory judgment action in insurance setting).


22. Id.

23. Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co., 24 Env't Rep. Cas. (BNA) 1868 (W.D. Mo. 1985). The district court granted summary judgment to Continental ruling it neither had the duty to defend nor indemnify Nepacco against the claims filed by the United States nor the counterclaim filed by the State of Missouri. Id. at 1873. The Court's rationale was that under Missouri law, the governmental complaints did not allege an "occurrence" as required by Continental's CGL policies. Id.

The district court noted that under the policies issued to Nepacco, an "occurrence" was defined as "an accident, including continuous or repeated exposure to conditions which results, during the policy period, in bodily injury or property damage. . . ." Id. at 1868. It further noted that under Missouri law, the time of an occurrence within the meaning of a CGL policy is the time the loss or damage was sustained and not the time when the negligence or wrongful act was committed. Id. at 1874. The court posited that since the governmental entities did not seek compensation for bodily injury or property damage, but rather reimbursement of cleanup costs, there was no occurrence, because the harm of which they complained (cleanup costs), did not occur until after the policies' expiration. Id. at 1872-73.

remedy environmental contamination are damages which governmental entities may recoup because they are merely a measure of the harm sustained. As a result, the Eighth Circuit panel found that claims seeking reimbursement of cleanup costs may be compensable under these CGL policies.

The Eighth Circuit granted both parties' petitions for rehearing en banc and focused only on the narrow issue of whether governmental claims that seek reimbursement of cleanup costs pursuant to RCRA and CERCLA are claims that seek "damages" within the terms of a CGL policy. The court concluded that because the governmental claims sought equitable monetary relief in the form of restitution and not monetary damages for harm to property, and because black letter insurance law precludes coverage for suits seeking equitable relief, governmental claims seeking reimbursement of cleanup costs under RCRA and CERCLA are not claims for "damages" under these CGL policies. Therefore, the court held that Continental was under no obligation to indemnify Nepacco for such sums.

The court began its analysis by noting that whether cleanup
costs constitute “damages” involves the construction of an insurance contract under Missouri law. Under Missouri law, terms in an insurance policy are given a “plain” meaning. If the plain meaning of a term is ambiguous, in that it is reasonably open to different constructions, the court will construe the term according to how a reasonable insured would interpret it.

The court next emphasized the context in which the term “damages” appears. It noted that outside the insurance context, the term “damages” is ambiguous because it is capable of including both legal damages and equitable monetary relief. Thus, from the standpoint of the reasonable insured, the term “damages” could include all monetary claims. When given its “plain” meaning in the insurance context, however, “damages” refers only to legal damages and does not include equitable monetary relief. In support of its conclusion, the court claimed that “black letter” insurance law holds that claims for equitable relief are not claims for “damages” under liability insurance contracts.

33. Id. at 985. The application of Missouri law was apparently not disputed by the parties.
34. Id.
35. Id.
36. Id. The court cited a dictionary to support its conclusion that the word “damages” outside the insurance context included both legal damages and equitable monetary relief. Id. This dictionary defined damages as “the estimated reparation in money for detriment or injury caused by a violation of a legal right.” Id. (quoting Webster’s Third New International Dictionary, 571 (1971)).
38. Id. at 985-86. The court argued the term “damages” has an accepted technical meaning in law, citing Aetna Casualty & Sur. Co. v. Hanna, 224 F.2d 499 (5th Cir. 1955). In Hanna, fill material from the insured’s vacant lot was deposited on a neighboring lot after a flood. Id. at 500. The neighbors brought suit, seeking an injunction to compel the insured to remove the fill material, and to undertake measures to prevent future encroachment. Id. at 500-01. No monetary damages of any kind were sought. Id. at 501. The court ruled, under similar policy language, that no coverage existed for the insured. The basis for this ruling was the court’s premise that “damages” has an accepted technical meaning in law, and does not include injunctive relief. Id. at 503.
39. The court’s statement that black letter insurance law precludes coverage for claims that seek purely equitable relief was taken from Maryland Casualty Co. v. Armco, 643 F. Supp. 430 (D. Md. 1986), aff’d, 822 F.2d 1348 (4th Cir. 1987), cert. denied, 108 S. Ct. 703 (1988). In Armco, the United States brought suit under CERCLA for injunctive relief and reimbursement of response costs. Id. at 432. The court held, under similarly worded policies, no coverage existed. Id. at 435. The Armco court’s use of the “black letter” terminology was based on four insurance cases which held that coverage does not exist for suits against an insured which seek equitable relief and not damages: Aetna Casualty & Sur. Co. v. Hanna, 224 F.2d 499 (5th Cir. 1955) (action seeking injunction to compel removal of fill material and the undertaking of measures to prevent future encroachments); Haines v. St. Paul Fire & Marine Ins. Co., 428 F. Supp. 435 (D. Md. 1977) (securities action seeking injunctive relief and possible restitution of attorneys’ fees); Ladd Constr. Co. v. Insurance Co. of N. Am., 73 Ill. App. 3d 43, 391 N.E.2d 568 (1979) (no coverage for suit seeking injunction compelling insured to remove debris encroaching on railroad’s tracks); and Desrochers v. New York Casualty Co., 99 N.H. 129, 106 A.2d 196 (1954) (no coverage
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The court next asserted that its limited construction of the term "damages" comported with the language of the insurance contract as a whole. To support this assertion, the court returned to the language of the insurance agreement, which provided that Continental agreed to pay "all sums which the insured became legally obligated to pay as damages." It noted that if cleanup costs were recoverable under the policy, the term "damages" would be obliterated from the contract. The court reasoned that an insurer does not agree to pay all sums which the insured shall become legally obligated to pay, but rather agrees to pay only those sums that constitute "damages." Similarly, the court reasoned that if "damages" were given an expansive reading, the phrase "all sums" would become mere surplusage, because any obligation to pay would be covered. Such constructions, the court concluded, would be inconsistent with an interpretation of the policy as a whole.

The court also supported its limited construction of the term "damages" by referring to the CERCLA statutory scheme. It noted that under CERCLA, the government can elect to sue either for damages for injury or destruction of natural resources, or for reimbursement of cleanup costs. This legislative distinction within the


41. Id. at 979.
42. Id. at 986.
43. Id.
44. Id.
45. Id.
46. Id.
47. The ability of the government to sue for reimbursement of cleanup costs or to sue for damages for injury to or destruction of natural resources is provided under CERCLA. CERCLA Section 107 of 42 U.S.C. § 9607 (1982), provides that any past or present owner or operator of a hazardous waste facility, or any generator or trans-
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CERCLA statutory scheme led the court to conclude that actions seeking cleanup costs cannot be the equivalent of actions seeking compensatory damages for injury to the environment.\textsuperscript{48} The \textit{Continental} court stressed that this distinction within the CERCLA statutory scheme was critical to the resolution of the issue before it, because an insurance policy covers only legal damages and not equitable relief.\textsuperscript{49} Consequently, because reimbursement actions under CERCLA are essentially equitable actions for monetary relief in the form of restitution or reimbursement, they are not claims for "damages" under Continental's policies.\textsuperscript{50} Accordingly, the court held that governmental actions that seek reimbursement of cleanup costs pursuant to RCRA or CERCLA are not claims that seek "damages" under Continental's CGL policies.\textsuperscript{51} Therefore, the court affirmed the order of the district court by declaring Continental had no obligation to pay under its policies.\textsuperscript{52}

The \textit{Continental} court incorrectly held that the term "damages" does not include governmental cleanup costs incurred under RCRA or CERCLA. This conclusion was incorrect for three reasons. First, the court frustrated the nature of a comprehensive general liability policy by failing to distinguish between first and third party insurance contracts. Second, the court failed to apply traditional property damage remedy concepts to the new area of environmental contamination litigation. Third, the court failed to properly apply

porter of hazardous waste, is 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; and (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.


49. \textit{Id.} at 987.
50. \textit{Id.} To support its conclusion that reimbursement actions under CERCLA are claims for equitable relief, the court referenced its opinion in United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 749 (8th Cir. 1986). \textit{Id.} There, the Eighth Circuit held that for seventh amendment purposes, a reimbursement action under CERCLA is an action that seeks equitable relief in the form of restitution. \textit{Northeastern Pharmaceutical & Chem. Co.}, 810 F.2d at 749. As a result, a CERCLA defendant does not have a right to a jury trial. \textit{Id.} See also Developments in the Law-Toxic Waste Litigation, 99 Harv. L. Rev. 1458, 1493 (1986) ("In light of accumulated precedents confirming this view, courts should completely avoid unnecessary delays by summarily striking demands for jury trials sua sponte in a section 107(a) action."). At least one court has argued that reimbursement actions cannot be equitable for seventh amendment purposes while simultaneously being legal damages for insurance purposes. Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. at 435 (D. Md. 1986). The persuasiveness of this argument however, is subject to doubt. What constitutes "damages" under an insurance policy and what actions allow for jury trials for seventh amendment purposes are questions unrelated with each other.

52. \textit{Id.}
Missouri's principles for construing insurance contracts.

The court's conclusion that governmental actions seeking cleanup costs are not actions that seek "damages" is erroneous because it is based on an analysis that improperly failed to recognize the distinction between first party and third party insurance contracts. First party coverage and third party coverage contemplate different risks. In a first party insurance contract, an insurer underwrites risks which requires it to pay the insured, rather than third persons, monies for losses caused by the occurrence of an agreed upon risk. On the other hand, a CGL policy is third party in nature, since an insurer agrees to pay third persons all sums the insured becomes legally obligated to pay such persons due to the occurrence of an agreed upon risk. The language of the CGL policy illustrates this distinction, requiring the insurer to "pay all sums on behalf of the insured" rather than "all sums to the insured."

In this case, Nepacco has been held liable to the United States for a sum of money. Requiring Continental to indemnify Nepacco for this sum of money results only in enforcing Continental's promise to indemnify Nepacco for harm caused by a third party risk; a risk Continental intended to insure through its issuance of the CGL policy. Thus, by allowing Continental to avoid its obligation to

54. Uptegraft v. Home Ins. Co., 662 P.2d 681 (Okla. 1983). In Uptegraft, the court stated:
Because it is a promise by the insurer to pay its own insured, rather than a promise to its insured to pay some third party, the uninsured motorist coverage is understood, in insurance parlance, as "first party coverage"—much like collision, comprehensive, medical payments or personal injury protection—and not as "third party coverage," such as personal injury or property damage coverage of public liability insurance. Id. at 684. See also Federal Ins. Co. v. Liberty Mut. Ins. Co., 190 N.J. Super. 605, 464 A.2d 1197, 1200 (N.J. Super. Ct. App. Div. 1983) ("First-party coverage is said to be coverage for an insured's own loss or injury . . . in contrast to third-party coverage which insures against liability of the insured for injury to a third party . . . .").
56. For the language of a typical CGL policy, see supra note 12. The CGL policy has many exclusions which reflect the insurance industry's intent to exclude from general liability coverage an insured's first-party losses. For example, the CGL policy excludes property damage to property owned by the insured, property damage in the care, custody, and control of the insured, property damage to the insured's products arising out of such products or any part thereof, and property damage to work performed by the insured arising out of such work. See 2 R. Long, The Law of Liability Insurance, §§ 10.01-10.28 (1989).
57. The court in CPS Chem. Co. v. Continental Ins. Co., 222 N.J. Super. 175, 536 A.2d 311 (1988) found the difference between first and third party risks to be dispositive. In CPS, the court noted that CGL policies do not purport to protect an
Nepacco, the court frustrated the very nature and purpose of the CGL policy: to insure third party risks. 58 The court's second error was its improper characterization of reimbursement actions under RCRA and CERCLA as essentially equitable in nature. This erroneous characterization arose from two flaws in the court's analysis. The first flaw was the court's failure to recognize the historic availability of two distinct methods for measuring injury or harm to property. 59 The first method measures the injury to a property interest as the difference in property value immediately before and immediately after the injury. 60 The second method allows the injured party to recover the cost of restoring the realty to its condition prior to injury. 61 These two alternative measures of recovery are recognized by Missouri common law, which allows a person with a tortiously injured property interest to recover the lesser of the diminution in value or the cost of restoration. 62 His-

insured against the perils of business life. Id. at 179, 536 A.2d at 316. Thus, the consequences of not performing a contract, such as the repair or replacement of faulty goods, would not be a covered loss. Id. Such losses are first-party in nature, since they are based upon a first party risk. Id. However, if that same product causes harm to others, liability coverage under a liability policy is appropriate because such a third-party risk is precisely what a liability policy is designed to insure. Id.

58. The Continental decision represents an extremely strict interpretation of the term "damages." In Continental, the court refused to recognize coverage for a sum of money the insured was legally obligated to pay a third party. Continental Ins. Co. v. Northeastern Pharmaceutical Chem. Co., 842 F.2d 977, 987 (8th Cir. 1988) (en banc). As discussed in part I of the analysis, this sum represents a third party risk which Continental intended to insure. See supra notes 55-58 and accompanying text. Prior to Continental, courts interpreting the term "damages" failed to include within its definition sums the insured was compelled to incur as a consequence of complying with an injunctive decree. See, e.g., Aetna Casualty & Surety Co. v. Hanna, 224 F.2d 499 (5th Cir. 1955) (action seeking injunction to compel removal of fill material and the undertaking of measures to prevent future encroachments). These cases correctly interpret the term "damages" to exclude coverage for sums of money the insured incurs, because liability policies do not insure these first party losses. Other cases have liberally construed the term "damages" to include coverage for first party losses. See, e.g., Broadwell Realty v. Fidelity & Casualty Co., 218 N.J. Super. 516, 528 A.2d 76 (1987) (abatement measures taken by an insured in response to a state agency directive designed to halt the continued migration of hazardous wastes onto adjacent lands were recoverable under a CGL policy). These latter cases frustrate the first-party third-party distinction, but the courts have nonetheless found coverage to exist.

59. The historic availability of two distinct methods of measuring injury to property centers on the permanency of the injury. See J. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES, §§ 1017-1018 (4th ed. 1916). If the wrong is permanent, the diminution in value test is the proper method for measuring the harm. Id. However, if the harm to the property is remediable, the cost of restoration test is the proper measure of the harm. Id.

60. Id. See also 22 AM. JUR. 2d Damages § 401 (1986) (noting traditional availability of two methods for valuing the injury to or destruction of real property).

61. 22 AM. JUR. 2d Damages § 401 (1986).

62. The Continental court recognized that Missouri law measures injury to property by either the diminution in value method or the cost of restoration method. See Continental Ins. Co., 842 F.2d at 987 (citing Jack L. Baker Cos. v. Pasley Mfg. & Distrib. Co., 413 S.W.2d 268 (Mo. 1967)). Obviously, Missouri's recognition of two methods of measuring harm to property did not effect the court's decision.
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Historically, then, compensatory damages for tortious injury to property could be measured by either the diminution in value method or the cost of restoration method.\textsuperscript{63} The ramification of this conclusion is that governmental cleanup costs under CERCLA and RCRA are nothing more than a measure of the harm the government has sustained under traditional damage remedies.\textsuperscript{64} Consequently, the Continental court's conclusion that these sums are anything but damages is misplaced.

The second flaw in the court's analysis was in its premise that actions which seek reimbursement of cleanup costs are necessarily equitable actions because they seek restitution, a traditional remedy in equity. Historically, the damages remedy did not ask \textit{when} restoration costs were incurred relative to the institution of a suit for recovery of damages caused by an ongoing harm.\textsuperscript{65} The only question was whether the expenses incurred by the injured party to remedy the harm were the result of the wrongful act to which the complaint was later addressed.\textsuperscript{66} If the expenses were incurred as a result of the wrongful creation of the ongoing harm, then they were recoverable in that action.\textsuperscript{67}

This historic indifference to when restoration expenses were incurred relative to the institution of a suit demonstrates that the Continental court incorrectly labelled the action brought by the United States as equitable in nature. The United States' suit sought nothing more than a judgment representing the amount of money required to restore its property to the condition in which it existed prior to Nepacco's creation of the environmental pollution.\textsuperscript{68} Since a

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\item \textsuperscript{63} See, e.g., Jack L. Baker Cos., 413 S.W.2d at 271.
\item \textsuperscript{64} The Continental court was incorrect in stating that the availability of the government to sue for reimbursement of restoration costs was anything but a damages remedy. The legislative history of CERCLA demonstrates that the two historic methods of measuring harm to property were to be available to the government. See Developments in the Law-Toxic Waste Litigation, 99 Harv. L. Rev. 1459, 1565-73 (1986) (noting legislative history of CERCLA provides that the two traditional methods of measuring harm to property would be available to the government).
\item \textsuperscript{65} See 4 J. Sutherland, A Treatise on the Law of Damages, § 1041 (4th ed. 1916) ("The question is not when the money was paid, whether before or after suit; but was the liability to those expenditures occasioned by the acts complained of? . . . If they are the result and consequence of the wrongful act complained of they are to be recovered in that action . . .").
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Id.
\item \textsuperscript{68} The judgment awarded against Nepacco requiring it to reimburse the United States for cleanup costs is no different from the legal obligation that burdens any party who has been held liable to pay damages and recompense an injured party in order to restore that party to the condition prior to the occurrence of the tortfeasor's conduct. CPS Chem. Co. v. Continental Ins. Co., 222 N.J. Super. 175, 179, 536 A.2d 311, 316 (N.J. Super. Ct. App. Div. 1988). Similarly, the sum to be paid by Nepacco is little different from damages measured in terms of medical and hospital bills designed to restore an accident victim to health. Id. Both the judgment awarding medical expenses, and the judgment awarding reimbursement of cleanup costs, re-
\end{itemize}
judgment awarding reimbursement of restoration costs historically constituted "damages," the government's suit in Continental sought nothing more than traditional "damages."

Finally, the Continental court failed to properly apply Missouri's principles for construing insurance policies. In its opinion, the court noted that Missouri law required it to apply a "plain" meaning approach in interpreting Continental's policies.69 However, the Missouri Supreme Court would most likely take a different approach.70 In Robin v. Blue Cross Hospital Service, Inc.,71 the Missouri Supreme Court implicitly adopted the reasonable expectations doctrine for construing insurance policies.72 This doctrine provides that an insurance policy will be construed in order to effectuate the reasonable expectations of the insured even though a meticulous study of the policy might indicate a lack of coverage.73 The basis for

present that sum of money designed to make the injured party whole. Id.

In CPS, the insured was compelled to pay a state agency a sum of money which the agency was then bound to apply to restoration measures. Id. at 177, 536 A.2d at 313. The court held such a monetary award was compensable under a CGL policy. Id. at 178, 536 A.2d at 314. In reaching its conclusion, the CPS court emphasized that the only obligation upon the insured was to pay money. Id. at 179, 536 A.2d at 316. This obligation is no different than that imposed upon Nepasco in this case. Thus, it should make no difference whether the payment is restitutional in nature, or precedes the incurring of response costs, since a CGL policy is designed to insure this obligation to pay. See id.

69. See supra notes 33-35 and accompanying text for a discussion of the court's interpretation of Missouri's principles for construing insurance contracts.

70. There is no federal common law for interpreting insurance contracts. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Thus, a federal court sitting in diversity must follow the law directed by the supreme court of the state whose law is found to be applicable. Plummer v. Lederle Laboratories, 819 F.2d 349 (2d Cir. 1987).

If there is no direct decision by the highest court of that state, the federal court should determine what it believes that state's highest court would find if the issue were before it. Id.

71. 637 S.W.2d 695 (Mo. 1982) (en banc).

72. In Robin v. Blue Cross Hosp. Serv., Inc., 637 S.W.2d 695 (Mo. 1982) (en banc), the Missouri Supreme Court was faced with the issue of whether to adopt the reasonable expectations doctrine or to retain the "plain" meaning approach. Id. at 696. The reasonable expectations doctrine requires the court to give credence to the insured's objective, reasonable expectations of coverage under the policy, even though a meticulous study of the policy would negate these expectations. Id. at 697. The basis for the doctrine is that standardized insurance contracts are contracts of adhesion offered to the public on a take it or leave it basis by insurance companies. Id. As a result of this lack of bargaining power, a policy is construed in order to effectuate the insured's reasonable expectations. Id.

In Robin, the court refused to adopt the doctrine because, under the facts before it, the parties to the contract had equal bargaining power. Id. at 697-98. It nonetheless concurred, in dicta, in the doctrine's application by the Missouri Courts of Appeal which had applied it in two cases where the insured lacked bargaining power. Id. (citing Spychalski v. MFA Life Ins. Co., 620 S.W.2d 388 (Mo. App. 1981); Estrin Constr. Co. v. Aetna Casualty & Sur. Co., 612 S.W.2d 413 (Mo. App. 1981)). Therefore, a sound argument exists that the Missouri Supreme Court would adopt the reasonable expectations doctrine given the appropriate circumstances.

this doctrine is that standard form insurance contracts are contracts of adhesion offered to the public on a take it or leave it basis. As a result, Missouri courts do not interpret the policy in the manner a seasoned insurance underwriter would, but rather construe the policy to effectuate the reasonable expectations of the insured.

If the Eighth Circuit had employed the reasonable expectations doctrine to interpret Continental's policies, the court would have reached a different result. First, an insured does not reasonably expect that coverage for an otherwise covered liability would be excluded merely because of the nature of the relief sought, especially where no contract exclusion specifically addresses it. If the insurer had intended to so limit its coverage, it could have written a specific exclusion that prohibits coverage for all pollution-caused damage. Second, an insured does not reasonably expect such a limited construction of the policy in light of the purpose of a CGL policy. The purpose of a comprehensive general liability policy is to protect the

the evolution of the reasonable expectations doctrine, the impact of the doctrine, and suggesting alternatives).

74. Id.
75. Robin, 637 S.W.2d at 697.
76. The reasonable expectations doctrine could apply to the policies in this case. Nepacco was a closely held corporation primarily owned and operated by its president. United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 729 (8th Cir. 1986). There is no evidence to indicate that the president negotiated with Continental over the terms of the policy. Thus, Nepacco took Continental's policy on a take it or leave it basis, and a reasonable argument can therefore be made that the doctrine applies to the construction of Continental's policies.

77. "[T]he standard-form policy language does not limit coverage for property damage to claims asserted by fee simple owners of damaged property." CPS Chem. Co. v. Continental Ins. Co., 222 N.J. Super. 175, 184, 536 A.2d 311, 318 (N.J. Super. Ct. App. Div. 1988). "Neither does the language limit coverage . . . to strictly common-law tort liability for property damage." Id. If the insurance industry had intended to limit property damage coverage to the diminution measure of damage, the industry should have written their policies to clearly reflect such an intent. Id.

78. The argument that coverage would exist for these governmental reimbursement actions using the reasonable expectations doctrine is made even stronger where the policy in question contains a pollution exclusion. Of the three insurance policies issued to Nepacco, only the second and third contained a standard form pollution exclusion. Continental Ins. Co., 842 F.2d 977, 980 (8th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 66 (1988). Neither of these two policies were triggered. For a discussion of why only the first policy was triggered, see supra note 24 and accompanying text. Under the pollution exclusion, a CGL insurer promises to indemnify its insured for property damage caused by the release of pollutants if such release is sudden and accidental. See generally, Note, The Pollution Exclusion Clause Through the Looking Glass, 74 Geo. L. J. 1237 (1986) (discussing evolution of exclusion and concluding exclusion applies to releases which span a period of time even though harm is not expected or intended). Given a sudden and accidental release, an insured reasonably expects the insurer to cover the costs of cleaning up the pollution. An insurance company can avoid this argument by employing a pollution exclusion that excludes coverage for all types of pollution releases. Indeed, such an exclusion exists in the 1984 version of the standard CGL policy promulgated by the Insurance Services Offices. See 2 R. Long, THE LAW OF LIABILITY INSURANCE 10-144 (1988). This exclusion excludes all pollution-caused damage. Id.
insured against liability for property damage which the insured might become legally obligated to pay. The words of the coverage grant indicate that the insurance industry intended to cover the infinite number of ways liability could arise, subject only to specific exclusions. Indeed, the policy title - Comprehensive General Liability - indicates this much. Therefore, under the reasonable expectations doctrine, Continental's policies cover actions seeking reimbursement of CERCLA cleanup costs.

Given the extent of environmental contamination and the congressional estimate of cleanup costs, the United States will continue to bring cost recovery actions. Polluters held liable for these costs are likely to turn to their liability insurers for indemnification. Thus, the issue of whether these actions seek "damages" will continue to be hotly contested. No doubt, insurers will cite Continental as support for their argument that there is no coverage for cleanup cost reimbursement actions. Reliance on Continental may be persuasive because it is a high ranking federal appellate court decision. Its persuasiveness is limited however, because the decision misapplies Missouri's principles of construing insurance contracts, and ig-

79. Chesler, Rodburg & Smith, Patterns of Judicial Interpretation of Insurance Coverage For Hazardous Waste Site Liability, 18 Rutgers L.J. 9, 14 (1986) [hereinafter "Patterns"].

80. Continental's policy obligated it to pay "all sums which the insured shall become legally obligated to pay as damages because of property damage or bodily injury." For the full terms of Continental's policy, see supra note 12. This language provides coverage for "the broadest spectrum of property damage and personal injury claims brought by third parties arising out of day to day business operations ...." Patterns, supra note 79, at 14. Moreover, the CGL's breadth of coverage is demonstrated by the exclusion of risks covered by other types of liability policies. Id. at 15. The CGL policy is generally intended to cover those risks not covered by these other types of liability policies, hence its name. Id.


82. Even if the court correctly failed to apply the reasonable expectations doctrine, the court misapplied Missouri's rules of construing insurance policies. Missouri applies the plain meaning approach when interpreting insurance contracts. Under this approach, Missouri courts "do not necessarily accept the construction accorded to policy terms by astute insurance specialists or perspicacious counsel, but rather are concerned with the meaning which the ordinary insured of average intelligence and common understanding reasonably would give to the words or language under consideration." McMichael v. American Ins. Co., 351 F.2d 665, 669 (8th Cir. 1965). Under the plain meaning approach, cleanup costs should be covered damages because, "from the viewpoint of the lay insured, the term 'damages' could reasonably include all monetary claims, whether such claims are described as damages, expenses, costs, or losses." Continental, 842 F.2d at 985. See also Id. at 988 (Heaney, J., concurring and dissenting) (majority misapplied Missouri rule of construction by ignoring lay definition of "damages" and substituting in its place technical insurance definition).

83. For a discussion of the extent of this country's environmental contamination, see supra note 1.

84. For a discussion of the congressional appropriations intended to combat environmental contamination, see supra note 2.
notes the historic availability of measuring harm to property by the cost of restoration - a traditional damages remedy.

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