Triggering the Liability Insurer's Duty to Defend in Environmental Proceedings: Does Potentially Responsible Party Notification Constitute a "Suit"?

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TRIGGERING THE LIABILITY INSURER’S DUTY TO DEFEND IN ENVIRONMENTAL PROCEEDINGS: DOES POTENTIALLY RESPONSIBLE PARTY NOTIFICATION CONSTITUTE A “SUIT”?

One of the most distressing results of legislative efforts to remedy the nation’s hazardous waste problem has been the enormous amount of collateral litigation between liability insurers and their insured polluters. Typically, this litigation has focused on the

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The CERCLA scheme, also known as “Superfund,” is designed to effect cleanup of hazardous waste by empowering the government, currently through the United States Environmental Protection Agency (“EPA”), to identify hazardous waste sites and to pursue remedial activities. See id. § 8.1, at 475-78. The government may itself perform the remediation and then seek compensation from the parties responsible for the pollution, or have the polluters themselves complete the necessary cleanup work. See infra notes 11-14.


terms and construction of comprehensive general liability ("CGL") policies, primarily on the scope of the indemnity provided. However, litigation has also centered on the extent of the insurers' other primary obligation—the duty to defend.

The language of the CGL duty to defend clause requires the insurer to defend the insured in "any suit" purportedly covered by the policy. An insurer's obligations and liabilities regarding its

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3 See James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273, 278 (Ky. 1991). The court gave an overview of the CGL policy: The primary purpose of a comprehensive general liability policy is to provide broad comprehensive insurance. Obviously the very name of the policy suggests the expectation of maximum coverage. Consequently the comprehensive policy has been one of the most preferred by businesses and governmental entities over the years because the policy has provided the broadest coverage available. All risks not expressly excluded are covered, including those not contemplated by either party. Id.; see also Salisbury, supra note 2, at 359 n.6 (discussing principal elements of CGL policies).

4 CGL policies began to appear in the 1940s as a broad-based replacement for the specific risk policies that preceded them. Pasich, supra note 2, at 1132. The drafting of CGL policies was conducted by insurance industry trade organizations resulting in standard forms in 1941, 1947, 1955, 1966, and 1973. Salisbury, supra note 2, at 363. Instead of limiting coverage to "accidents," as in previous versions, the 1966 standard form provided coverage for any "occurrence," which it defined as "an accident, including injurious exposure to condition, which results, [in injuries or damages] . . . neither expected nor intended from the standpoint of the insured." Id. (emphasis added). At the time of the revisions, the insurance industry explained that coverage was being expanded and would include pollution claims. See id. at 364-68. As an update, it should be noted that the insurance industry responded to the current wave of litigation in 1986 by drafting a stricter CGL standard form. See Joel R. Mosher, Insurance Issues in Hazardous Waste Cases, 39 Drake L. Rev. 881, 883, 893 (1989) (explaining that current CGL standard form contains stricter duty to defend clause and absolute pollution exclusion).

5 See, e.g., Pasich, supra note 2, at 1137. One of the issues commonly raised in environmental coverage litigation is whether cleanup costs incurred by the insured are "damages" within the meaning of a CGL policy and thus indemnifiable. Id. ("More than 100 courts . . . have decided this issue nationally."). Another common dispute concerns the applicability of the pollution exclusion to preclude coverage. See Salisbury, supra note 2, at 393-400 (survey of pollution exclusion cases).


7 See Donald E. Sharpe & Jean K. Shaffer, The Parameters of an Insurer's Duty to Defend, 19 Forum 555, 556 (1984). The 1973 standard CGL policy provides that "the company shall have the right and duty to defend any suit against the insured seeking damages
duty to defend are fairly well-established. However, the applicability of the term “suit” to pre-litigation or administrative proceedings is not so easily resolved, particularly as to proceedings conducted pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).

on account of such [covered] bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent.” Id.

See Ezell v. Hayes Oilfield Constr. Co., 693 F.2d 489, 493 (5th Cir. 1982) (“The primary consideration in evaluating an insurer’s duty to defend is whether the pleadings allege a claim within the scope of the coverage of the insurance policy.”), cert. denied, 464 U.S. 818 (1983). “It is generally recognized that as long as there is ‘potential’ coverage of the claim, the insurer must defend the interests of the insured.” 1 WARREN FREEDMAN, RICHARDS ON THE LAW OF INSURANCE § 5A:3, at 526 (6th ed. 1990). Furthermore, the duty to defend is triggered so long as any part of the allegations are covered. See WINDT, supra note 5, § 4.01 at 129-30.

Ordinarily, upon service of process, the insured has a duty to forward to the insurer any complaint or other legal documents so that the insurer may promptly make a coverage determination and proceed accordingly. See 14 GEORGE J. COUCH, COUCH ON INSURANCE 2d § 51:123, at 629-30 (Mark S. Rhodes rev. ed. 1982). If the insurer determines the claim to be potentially within the policy coverage, the duty to provide a defense is triggered. See WINDT, supra note 5, § 2.06, at 32. Such a defense should be conducted subject to a reservation of rights to later contest coverage. Id. Alternatively of course, the insurer may simply deny coverage outright and consequently not proffer any defense. Id. at 33.

See generally 14 COUCH, supra note 7, § 51:54-77 (discussing unjustified refusal to defend). If the insurer unjustifiably refuses to defend, it will be liable for any “judgment rendered against the insured, or . . . any settlement made in good faith by the insured.” Id. § 51:58, at 525. These damages are usually capped by the policy limits since that is the insured’s maximum expectancy. Id. § 51:59, at 530.

In contrast, damages for breach of the insurer’s duty to defend may include “all the expenses [the insured] incurred in making [its] defense.” Id. § 51:60, at 531 (emphasis added). Since the insurer may include defense costs in policy limits, the absence of such a provision requires the insurer to assume responsibility for all costs. See also WINDT, supra note 5, at 200-02. Good faith is not a defense for the insurer. See 14 COUCH, supra note 7, § 51:54, at 509 (“[S]uch a refusal [to defend], even though based on an honest mistake of the insurer, constitutes an unjustified refusal.”); see also WINDT, supra note 5, § 6.38 (discussing tortious “bad faith” denial of coverage and penalties imposed on insurers).

See WINDT, supra note 5, § 2.07, at 33 (“A question arises, however, as to what the insurer’s responsibilities are if it is notified of an occurrence before any lawsuit is filed.”) (emphasis supplied). The traditional rule is that “merely asserting a demand against an insured [is] not sufficient to ‘trigger’ the duty to defend; instead, the obligation attaches only when an actual lawsuit [is] filed.” 1 FREEDMAN, supra note 7, § 5A:4, at 532.

Insofar as it includes only formal lawsuits, the traditional rule has been criticized as unnecessary “hairsplitting.” Id. § 5A:4, at 533. It has also been suggested that the duty to defend should be measured by the insurer’s ability to make a coverage determination rather than the form of the legal proceeding pending against the insured. See WINDT, supra note 5, § 2.07, at 33; see also id. § 4.12, at 159 n.108 (asserting that “‘suit’ . . . should be held to encompass adjudicatory proceedings before an administrative agency”).

While the United States Environmental Protection Agency ("EPA") may under CERCLA bring a cost recovery suit,11 or a suit for injunctive relief,12 the CERCLA scheme emphasizes the performance of a prompt cleanup, for which the government may look to the responsible polluters.13 The instrumentality by which polluters are first involved in the cleanup process14 is known as a "po-


11 See 42 U.S.C. § 9607(a) (1988). CERCLA imposes strict liability on present and past owners and operators of hazardous waste sites, as well as generators and transporters of hazardous waste. §§ 9607(a)(1)-(4). This liability provides for recovery of costs incurred by the government to cleanup the site, §§ 9607(a)(4)(A)-(B), in addition to damages for injury to natural resources, § 9607(a)(4)(C), and health assessment costs, § 9607(a)(4)(D). See also § 9613 (civil proceedings).

12 See 42 U.S.C. § 9606(a) (1988). Where a hazardous waste release creates "an imminent and substantial" danger, "such relief as may be necessary" to abate the danger may be granted by a United States district court. Id.

13 See 42 U.S.C. §§ 9604(a)(1), 9622(a) (1988). If there is substantial risk created by a hazardous substance release, the government is authorized to take such "response measure[s]" as are necessary. § 9604(a)(1). Toward this end, the government may allow a "responsible party," see supra note 11, to execute the cleanup if it is determined that it would be "done properly and promptly." § 9604(a)(1). Additionally, § 122 of CERCLA advances the execution of prompt cleanup by authorizing the EPA to enter into settlements with responsible parties. See § 9622(a). Section 122 expressly asserts CERCLA's "anti-litigation" policy by providing that "[w]henever practicable ... [EPA] shall act to facilitate [settlement] agreements ... in order to expedite effective remedial actions and minimize litigation." Id. It should be readily acknowledged that the EPA "prefers [responsible parties] to undertake response actions rather than doing so itself [since t]his saves ... [the] EPA from spending money to clean up sites and then spending additional money to sue [responsible parties] for the costs of cleanup." Andrew H. Perellis & Mary E. Doohan, Superfund Litigation: The Elements and Scope of Liability, in ENVIRONMENTAL LITIGATION 1, 4 (Janet S. Kole & Larry D. Espel eds., 1991).

14 See 40 C.F.R. §§ 300.400 to .440 (1992) (Hazardous Substance Response); Perellis & Doohan, supra note 13, at 5-6.

After preliminary assessment of the site has determined the need for response, 40 C.F.R. § 300.420, the next step in the cleanup process is a "remedial investigation" ("RI")—a "detailed technical study designed to determine the exact extent of contamination at the site." Perellis & Doohan, supra note 13, at 5-6. "The RI is followed by an engineering analysis of technologically available alternatives that might be employed to clean up the contamination, and is known as a feasibility study ("FS")." Id. at 6. Once these studies are completed, the EPA will set forth the remedial action to be conducted in a formal Record of Decision. Id. In connection with these measures, the EPA must establish an "administrative record," 42 U.S.C. § 9613(k)(1) (1988), and provide for public participation. Id. § 9613(k)(2)(B).

It should be recognized that a CERCLA cleanup ordinarily takes years to complete—"[t]he RI/FS process may take three years alone." Perellis & Doohan, supra note 13, at 6. In fact, "[a]s of September 1990, only 5 percent of . . . [the EPA's] high-priority [sites] had been cleaned up." Don J. DeBenedictis, How Superfund Money Is Spent, A.B.A. J., Oct. 1992, at 30.
tentially responsible party” (PRP) letter. At this point, assuming
cently been completed. See $52 Million Cleanup, NAT'L L.J., Feb. 1, 1993, at 6 (reporting
finalization of work at Lipari and Helen Kramer landfills, respectively nos. 1 and 4 on
NPL).

15 See generally Interim Guidance on Notice Letters, Negotiations, and Information
notice letters, and other PRP communications). Notice letters are one of the primary
methods by which EPA and PRPs communicate and interact, leading to voluntary settle-
ments, one of CERCLA’s fundamental goals. Id. at 5298-99. Special notice letters are used
prior to commencement of an RI/FS or remedial action, see supra note 14, as a method of
concluding negotiations and seeking “good faith offer[s]” from PRPs to complete required
work. 53 Fed. Reg. at 5301-02. In comparison, a general notice letter is utilized “to inform
PRPs of their potential liability for future response costs, to begin or continue the process
of information exchange, and to initiate the process of ‘informal negotiations.’” Id. at 5300.
A general notice letter is commonly the first formal contact the EPA has with PRPs and is
sent “as early in the process as possible . . . [in order to] ensure that PRPs have adequate
knowledge of their potential liability as well as a realistic opportunity to participate in settle-
tment negotiations.” Id. at 5301.

The PRP, by a general notice letter, is given notice of potential liability as follows:

The United States Environmental Protection Agency (EPA) has documented
the release or threatened release of hazardous substances, pollutants, or contami-
nation at the above-referenced site. EPA has spent, or is considering spending,
public funds on actions to investigate and control such releases or threatened re-
leases at the site. Unless EPA reaches an agreement under which a potentially
liable party or parties will properly perform or finance such actions, EPA may
perform these actions pursuant to Section 104 of CERCLA.

Under Sections 106(a) and 107(a) of CERCLA, 42 U.S.C. Sections 9606(a)
and 9607(a), . . . and other laws, potentially liable parties may be ordered to perform
response actions deemed necessary by EPA to protect the public health, wel-
fare or the environment, and may be liable for all costs incurred by the govern-
ment in responding to any release or threatened release at the site. Such actions
and costs may include, but are not limited to, expenditures for conducting a Re-
medial Investigation/Feasibility Study (RI/FS), conducting a Remedial Design/
Remedial Action (RD/RA), and other investigation, planning, response, oversight,
and enforcement activities. In addition, potentially liable parties may be required
to pay for damages for injury to, destruction of, or loss of natural resources, in-
cluding the cost of assessing such damages.

EPA has evaluated information in connection with the investigation of the
site. Based on this information, EPA believes that you may be a potentially re-
ponsible party (PRP) with respect to this site. Potentially responsible parties
under CERCLA include current and former owners and operators of the site as
well as persons who arranged for disposal or treatment of hazardous substances
sent to the site, or persons who accepted hazardous substances for transport to the
site. By this letter, EPA notifies you of your potential liability with regard to this
matter and encourages you to voluntarily perform or finance those response activi-
ties that EPA determines are necessary at the site.

In accordance with CERCLA and other authorities, EPA has already under-
taken certain actions and incurred certain costs in response to conditions at the
site. These response actions include . . . EPA may expend additional funds for
response activities at the site under the authority of CERCLA and other laws.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MODEL GENERAL NOTICE LETTER
the PRP becomes involved, the PRP needs immediate legal representation for negotiations with not only the EPA, but other PRPs as well.

Faced with protracted involvement in a CERCLA cleanup, and its corresponding high costs, PRPs have looked to their CGL insurers for performance of the duty to defend. Arguing that a PRP letter does not constitute a "suit" within the meaning of the CGL duty to defend clause, some insurers have refused to provide PRPs with representation. Notably, insurers risk little by challenging the timing of their duty to defend, as opposed to its existence, because they a) appear to escape the penalties of an erroneo-

(1989) (on file with St. John's Law Review, along with other model notice letters). The general notice letter may also inform the PRP of future special notice, activities taken or planned, other PRPs, and might request information from the PRP. See id.

See Perellis & Doohan, supra note 13, at 4. While a PRP may of course ignore the government's notification and take its chances in a cost recovery action, it is more likely that PRPs will cooperate since "PRPs can perform the desired investigatory studies at less cost." Id. "[B]etter control [of] the decision-making process of selecting the remedy" is also something to be sought by PRPs since "remediation cost[s] can vary widely depending on the remedy selected." Id.


See Perellis & Doohan, supra note 13, at 4-5. Certain types of hazardous waste sites, for instance, landfills, may involve hundreds of PRPs. Id. Such numbers do not negate the premise that PRPs are better suited to complete the cleanup, see supra notes 13, 16, but rather create the necessity for agreements between the PRPs. Perellis & Doohan, supra note 14, at 4. Within the scope of these agreements, a major problem is the allocation of costs. Id. at 5. Although factors such as "volumetric contribution" or "toxicity of waste" can be utilized to fairly calculate each PRP's share, gaps and disparities in the records of the parties prevent a truly objective apportionment. Id.

See Perellis & Doohan, supra note 13, at 6 ("The average cost of a Superfund site cleanup is probably between $20 and $40 million."); see also DeBenedictis, supra note 14, at 30 (noting insurers spent approximately $200 million in 1989 "defending PRPs from claims by the EPA and other PRPs").

In Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 790 F. Supp. 1318 & 1340 (E.D. Mich. 1992) (two orders accepting magistrate's reports) [hereinafter Ex-Cell-O III], the court determined that certain cleanup costs were reimbursable as defense costs. Significantly, the court held that costs incurred for consultants and scientific studies could be reimbursable as defense costs. Id. at 1321. "Defense costs include not only those reasonable and necessary to defeat or limit liability, but also those costs, including consulting fees, that are reasonable and necessary to limit the scope and/or costs of remediation, even if similar or identical studies have been ordered by the government." Id. Also included in defense costs were "[l]egal services undertaken to determine and evaluate how other entities on other sites negotiated and resolved issues" similar to the instant dispute. Id. at 1342.

See Pasich, supra note 2, at 1131-32; Appelquist, supra note 2, at 289-90.

See, e.g., Arco Indus. Corp. v. Travelers Ins. Co., 730 F. Supp. 59, 62 (W.D. Mich. 1989) ("[T]he insurers argue that the PRP letter does not trigger their duty to defend because they are only obligated to defend [the insured] against 'suits' and the PRP letter is not a suit.").
ous coverage determination,\textsuperscript{22} b) may avoid the duty to defend altogether based on a subsequently favorable coverage declaration,\textsuperscript{23} and c) at worst would merely have to pay defense costs retroactively.\textsuperscript{24} In response to these challenges, the courts have split over the issue whether a PRP letter constitutes a “suit” triggering the insurer’s duty to defend.\textsuperscript{25}

This Note attempts to resolve this controversy by analyzing the various rationales applied by the courts and determining which approach better effectuates CERCLA’s ultimate goal of a clean environment. Part One assesses the pro-insurer cases which delay triggering the duty to defend. Most of these cases rely on the “clear and unambiguous” rule of policy construction\textsuperscript{26} to justify their narrow reading of the subject policies. Part Two evaluates the pro-insured cases. The theories upon which these courts rely include the unreasonable results exception to the clear and unambiguous rule and the reasonable expectations doctrine. Part Three analyzes the policy considerations associated with including insurers in the cleanup process. In conclusion, this Note suggests that the pro-insurer position is more appropriate as a matter of law and further that the consequences of a pro-insurer rule are more likely to advance CERCLA’s goals.

\textsuperscript{22} See supra note 8 (describing insurer’s liability for unjustified refusal to defend).
\textsuperscript{23} See supra note 7 (discussing when duty to defend exists). The duty to defend would not exist in the case of a declaratory judgment of non-coverage since a claim must be at least potentially covered for the duty to defend to be triggered. Id.
\textsuperscript{24} See Detrex Chem. Indus., Inc. v. Employers Ins. of Wausau, 681 F. Supp. 438, 447 (N.D. Ohio 1987) (“[D]efense costs . . . expended by [the insured] in developing the administrative record would then become reimbursable by [the insurer], once the EPA action is filed.”).
\textsuperscript{26} See 2 Couch, \textit{supra} note 7, § 15:4 at 122 (“[W]here the policy language is clear and unambiguous the court must enforce it as written . . . . ”).
I. Pro-Insurer Cases—Duty to Defend Not Triggered by PRP Letter

A. Plain and Ordinary Meaning

While the pro-insurer cases are not in agreement on all matters, they generally commence with an application of the “clear and unambiguous” rule of policy construction. Basically, the rule provides that “[i]f the language . . . is plain and susceptible of but one meaning, . . . that language will control. . . .”

The initial step necessitated by this rule is to determine whether an ambiguity exists, as measured by the understanding of “a reasonably prudent person.” In order to establish the proper


28 See, e.g., Arco, 730 F. Supp. at 66 (“If the policy language is clear and unequivocal . . . its terms must be enforced; the courts will not rewrite the contract.”) (quoting Usher v. St. Paul Fire and Marine Ins. Co., 337 N.W.2d 351, 353 (Mich. Ct. App. 1983)); Detrex Chem., 681 F. Supp. at 442 (“The court examines the policy provisions mindful that ‘where the meaning of the writing is clear and unambiguous upon its face, the words therein are to be understood in their plain, ordinary and popular sense.’”) (quoting United States Fidelity & Guar. v. Guenther, 281 U.S. 34, 37 (1930)); cf. Pintlar Corp., 948 F.2d at 1516 (pro-insured case) (“[A] court looks to the plain meaning of the policy language.”).

29 2 COUCH, supra note 7, § 15:10, at 151-52. See generally id. §§ 15:1-:24 (standards of policy construction); Windt, supra note 5, § 6.02 (same). The clear and unambiguous rule of policy construction is necessary to give effect to basic contract principles whereby parties are bound by their intentions as objectively manifested. See 2 COUCH, supra note 7, § 15:9, at 146; see also 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 538 (1951) (discussing objective theory of contract interpretation). Therefore, where the policy language is clear, that language should be taken as accurately representing the parties intentions and so govern their relationship without rewriting by the court. See 2 COUCH, supra note 7, § 15:4, at 122-23.

The “clear and unambiguous” rule is not, however, without caveat: an “unreasonable or absurd result” will vitiate the court’s duty to impose a literal interpretation of the unambiguous language. See id. § 15:10, at 151-52; Windt, supra note 5, § 6.02, at 279-80. Moreover, the notion that any ambiguity should be construed against the insurer as drafter of the policy, known as contra proferentum, is well established. See Windt, supra note 5, § 6.02, at 281-87 (but criticizing per se application of rule resulting in coverage neither expected nor intended by either party). Nevertheless, “[t]he most basic rule in construing insurance contracts is that policy language should be given its popular and ordinary meaning, unless it is apparent from a reading of the whole instrument that a different or special meaning was intended.” Id. § 6.02, at 279.

30 2 COUCH, supra note 7, § 15:84, at 416; see also Windt, supra note 5, § 6.02, at 288-
scope of this understanding, some courts have reviewed common
dictionaries or considered well-established meanings. Based on
such evidence, these courts have found the term "suit" to unam-
biguously refer to "some type of court proceeding." These courts
have therefore held that a mere PRP letter does not constitute a
"suit" triggering the duty to defend.

89 ("[A]n ambiguity arises if the language used is susceptible of more than one meaning to a
reasonably prudent layperson.").

A question arises as to whether the large commercial entities frequently involved in
environmental insurance disputes should be treated as ordinary persons. See Eugene R. An-
derson et al., Policyholder Claims for Insurance Coverage Because of Environmental Dam-
ages, in 1 ENVIRONMENTAL LITIGATION 427, 513-22 (ALI-ABA 1989) (discussing "sophisti-
cated policyholder" exception to contra proferentum rule). Courts recognizing the exception
have in large part based their departure from the general rule on the particular insured's
role in the negotiation or drafting of the policy. See Smith v. Hughes Aircraft Co., 783 F.
547 (D.N.J. 1986), aff'd, 831 F.2d 287 (3d Cir. 1987); American Home Prod. Corp. v. Liberty
(2d Cir. 1984). Absent a showing of such extrinsic evidence, however, courts interpreting
standard form language have generally adhered to the contra proferentum principle without
distinguishing the type of policyholder. See Anderson et al., supra, at 515-22.

Mich. 1990). The court enumerated various lay and legal dictionary definitions of the word
"suit":

An action or a process in a court for the recovery of a right or claim . . . . Action to
secure justice in a court of law; attempt to recover a right or claim through legal
action . . . . A proceeding in a court of law or chancery, in which a Plaintiff de-
mands the recovery of a right or the redress of a wrong . . . . Any Proceeding in
court to recover a right or claim . . . . Case in a court of law; application to a court
of justice . . . . [A] generic term, of comprehensive signification, referring to any
proceedings by one person or persons against another or others in a court of jus-
tice in which the Plaintiff pursues, in such court, the remedy which the law affords
him for the redress of an injury or the enforcement of a right.

Id. (alteration in original); see also Ray Indus., Inc. v. Liberty Mut. Ins. Co., 974 F.2d 754,
761 (6th Cir. 1992) (quoting dictionary definitions); Detrex Chem., 681 F. Supp. at 442 n.4
(same).

32 See Arco, 730 F. Supp at 66 ("While the contracts do not define the term 'suit,' the
term has a well-accepted ordinary meaning. In plain language, the term refers to court pro-
("The Court finds that a 'suit' in this context plainly means some type of court proceed-
ings."); Central Quality Serv. Corp. v. Insurance Co. of N. Am., No. 87-CV-74473-DT, 1989
U.S. Dist. LEXIS 17368, at *22-*23 (E.D. Mich. Sept. 6, 1989) (finding no ambiguity in the


34 See Ray Indus., 974 F.2d at 764; Upjohn, 768 F. Supp. at 1199; Arco, 730 F. Supp. at
68; Harter, 713 F. Supp. at 233; Central Quality Serv., 1989 U.S. Dist. LEXIS 17368, at *23;
see also Hi-Mill Mfg. Co. v. Aetna Casualty & Sur. Co., No. 90-72494 (6th Cir. Mar. 18,
1993) (unpublished disposition available in WESTLAW) (following Ray Indus., refusing to
certify PRP letter as "suit" issue to Michigan Supreme Court). At the PRP letter stage,
Additional support for a narrow definition of the term “suit” is found in the distinct uses of the terms “claim” and “suit” within the CGL policy language. The general rule of construction is that all policy language should be given effect. This rule would be controverted were the court to construe the term “suit” to include "claims" in the face of policy language distinguishing the two terms, since such an incorporation would render the distinction superfluous.

B. "Suit Seeking Damages"

Two courts have taken an even narrower view of the duty to defend trigger by focusing their analyses on the phrase “suit against the insured seeking damages,” rather than just the term “suit.” In Patrons Oxford Mutual Insurance Co. v. Marois, the court held that an administrative order directing the insured to take remedial action did not trigger the insurer’s duty to defend. While noting the term “suit” itself might arguably include pro-
ceedings leading to injunctive relief, the court concluded that the pertinent language, "suit against the insured seeking damages," precluded such an interpretation because damages are not an element of injunctive relief.

When applied in a jurisdiction where cleanup costs do not constitute damages, the "suit seeking damages" rationale will allow insurers to avoid providing a defense even in cost recovery actions, as illustrated by A. Johnson & Co. v. Aetna Casualty & Surety Co. The Johnson court held that a suit seeking response costs was not one seeking damages, but indicated that had the complaint alleged damage to a natural resource it would have been a suit seeking damages within the meaning of the CGL policy.

C. Intermediate Approaches

Other approaches, focusing on the nature of the proceeding rather than its technical form, were developed by the courts in Detrex Chemical Industries, Inc. v. Employers Insurance of Wausau and Ryan v. Royal Insurance Co. of America. In Detrex Chemical, the court decided that the issue was whether the proceeding in question could cause the insured to become legally

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42 See supra notes 31-38 and accompanying text (describing cases construing "suit" as legal proceedings). But see Ray Indus., 974 F.2d at 761 ("We reject any attempt to allow phrases that appear in the definitions of 'suit' such as 'legal process,' to expand this term beyond its traditional meaning to include ... administrative orders . . . .").


44 Id. The court stated that because neither the state nor effected third parties made claims seeking actual money damages, there was no "suit . . . seeking damages." Id. The state could have sought indemnification for any monetary outlay it may have incurred in abating the pollution and third parties who suffered from the migration of contaminated groundwater could have brought suit for reimbursement. Id.


47 See id. at 305-06. Under CERCLA, such a pleading requirement could be satisfied as parties may be held liable for damages to natural resources. 42 U.S.C. § 9607(a)(4)(C) (1988).


49 916 F.2d 731 (1st Cir. 1990).
obligated to pay damages. Accordingly, since a PRP letter itself cannot cause an insured to become legally obligated, it lacks "the attributes of a 'suit'" and therefore did not trigger the duty to defend. Significantly, however, the court stated in dicta that the duty to defend would be triggered by not only a cost recovery action, but also an action for injunctive relief or an administrative proceeding.

In Ryan, the First Circuit held that notice and requests for cooperation sent by the New York Department of Environmental Conservation (DEC) did not constitute a suit triggering the duty to defend. Applying New York law, the court did, however, find

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51 Id. at 446 ([A] claim for damages made against [the insured] that might result in its legal liability is not synonymous with a 'suit' so as to trigger [the insurer]'s duty to defend . . . .” (emphasis added)).
52 Id. (indicating that duty to defend would be triggered by § 9607 cost recovery action).
53 Id. (“Until, pursuant to [s]ection 9606, the EPA resorts to a court injunction or to a mandatory court order to enforce a section 9606(a) administrative order, . . . a ‘suit’ would not be brought against [the insured] that would trigger [the insurer]'s duty to defend.”); see also id. at 459-60 (asserting that duty to defend is triggered by “order directing compliance with the request” for information and access from PRP, 42 U.S.C. § 9604(e)(5) (1988)); accord Time Oil Co. v. Cigna Property & Casualty Ins. Co., 743 F. Supp. 1400, 1420 (W.D. Wash. 1990) (holding EPA administrative order constituted “suit”).
54 See Detrex Chem., 681 F. Supp. at 452-55. The court found that notice of a state administrative proceeding would trigger the duty to defend where an agency was empowered to hold a hearing, take evidence, and perform other traditional judicial activities, because the agency would thus be acting in a judicial capacity. Id. at 454-55; cf. Colonial Tanning Corp. v. Home Indem. Co., 780 F. Supp. 906, 916-917 (N.D.N.Y. 1991) (filing of formal administrative complaint constitutes “suit”).
55 See Ryan, 916 F.2d at 742-43. The court found it “simply too much of a stretch to bind Royal by the CGL policy's duty-to-defend language to the acceptance of NYDEC's implied invitation to voluntary action.” Id. at 742. Furthermore, the court noted that “the mere possibility of future litigation, indefinite and unfocused, cannot trigger the duty to defend under a CGL policy.” Id. at 743.
56 See id. at 736-37. While other courts applying New York law have addressed the issue, the New York Court of Appeals has not directly considered whether a PRP letter is sufficient to trigger the duty to defend. Id. at 737. The Appellate Division, Second Department, has held that an EPA PRP letter does not trigger the duty to defend. See Technicon Elecs. Corp. v. American Home Assurance Co., 533 N.Y.S.2d 91, 105 (App. Div., 2d Dep't 1988) (“The letter was an invitation to voluntary action on [the insured]'s part and is not the equivalent of the commencement of a formal proceeding within the meaning of the subject [CGL] policies.”), aff'd, 542 N.E.2d 1048 (1989). The Second Circuit, however, reached the conclusion that a notice letter did trigger the duty to defend. See Avondale Indus., Inc. v. Travelers Ins. Co., 887 F.2d 1200, 1206 (2d Cir. 1989) (distinguishing Technicon because instant case involved “demand” letter rather than “invitation”), cert. denied, 496 U.S. 906 (1990). More recently, the Appellate Division, Third Department, followed the Second Department and held that a PRP letter did not trigger the duty to defend, since it requests
the rule requiring a formal suit to be overly rigid. In its place, the court developed a four-part test to determine whether notice was the functional equivalent of a suit by measuring the notice's "coerciveness [and] adversariness, [as well as] the seriousness of the effort with which the government hounds an insured, and the gravity of imminent consequences." After articulating the test, the Ryan court found lacking the elements of coerciveness and a serious government effort because the DEC letter merely invited the insured to participate in remedial efforts. Given the scope of the CERCLA scheme and the power of the federal government, it might appear that an EPA PRP letter presumptively meets the Ryan test; predictably, courts applying Ryan to an EPA notification have split.


See Ryan, 916 F.2d at 739-41. While the court acknowledged that the requirement of a formal suit is one method by which to protect the insurer against fraud, it questioned whether such an inflexible standard unnecessarily limited the scope of coverage. Id. at 740 (While "requiring a suit... as [a condition] precedent" to the duty to defend may safeguard the insurer, it may be "that so rigid a rule jettisons the baby with the bath water."). The court observed that "a considerable part [of cleanup activities] may be spent prior to the initiation of suit, for example, in negotiations or administrative hearings... [and that] hazardous waste liability does not always—or even often—hinge upon the filing of a formal complaint in court." Id. at 741. The court thus concluded that, "[w]here pollution coverage is concerned, there is precious little to commend an inflexible suit-cum-judgment rule as opposed to a standard anchored in the probability that a potential liability will actually materialize in the immediate future." Id. at 740.

See supra notes 11-19 (discussing CERCLA cleanup process); infra notes 77-80, 87-91 (discussing EPA's coercive posture).

Compare Professional Rental, Inc. v. Shelby Ins. Co., 599 N.E.2d 423, 428-31 (Ohio Ct. App. 1991) with City of Edgerton v. General Casualty Co. of Wis., 493 N.W.2d 768, 775-77 (Wis. Ct. App. 1992), review granted, 479 N.W.2d 130 (Wis. 1993). In Professional Rental, despite its recognition of EPA's "confrontational and seemingly coercive posture," the court found that a PRP letter was not the functional equivalent of a "suit" because the PRP was "not forced to respond." 599 N.E.2d at 430 (emphasis in original). In contrast, the Edgerton court concluded that an EPA PRP notification satisfied the Ryan test. 493 N.W.2d at 776-77 (noting "EPA's... adversarial posture... devastating financial consequences... government's coercive actions").
II. Pro-Insured Cases—Duty to Defend Triggered by PRP Letter

A. Alternate Clear and Unambiguous Analysis

The clear and unambiguous rules of policy construction will not always yield a pro-insurer result, as illustrated by the ruling in *C.D. Spangler Construction Co. v. Industrial Crankshaft Engineering Co.* Since the policy at issue did not define the term “suit,” the court reasoned that it was free to assign “suit” its ordinary meaning. Despite noting many of the narrower definitions used to support pro-insurer results, the *Spangler* court adopted the broader definition of “the attempt to gain an end by legal process” and thus held that compliance orders of the state environmental agency triggered the duty to defend. Although other courts have accepted the *Spangler* reasoning, the broad definition seems tenuous because, first, it goes against the weight of authority, and second, it was arguably unnecessary to justify these courts’ holdings because the proceedings at issue were of an ad-

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62 See supra notes 31-38 (discussing pro-insurer results based on narrow definition of “suit”).
63 388 S.E.2d 557, 570 (N.C. 1990) (finding ordinary meaning of “suit” to be broad and holding duty to defend triggered by state compliance orders).
64 Id. at 569.
65 Id. at 570 (“Thus we conclude ['suit'] is a nontechnical word and should be given that meaning it has acquired in ordinary speech.”).
66 Compare id. (listing dictionary definitions) with supra note 31 (same).
67 *Spangler*, 388 S.E.2d at 570.
68 Id.
69 A.Y. MacDonald Indus., Inc. v. Insurance Co. of N. Am., 475 N.W.2d 607, 627-28 (Iowa 1991); *Coakley v. Maine Bonding & Casualty Co.*, 618 A.2d 777, 786-87 (N.H. 1992). The *MacDonald* court, after reviewing various definitions, found the term “suit” to be ambiguous and adopted the broader meaning. 475 N.W.2d at 627-28. Thus, the Iowa court held that the EPA actions at issue, which included an administrative complaint and hearing resulting in a consent decree, constituted a “suit” sufficient to trigger the duty to defend. *Id.* at 629. Similarly, the court in *Coakley* deemed that the PRP notice had triggered a process to ultimately determine liability. 618 A.2d at 786. The New Hampshire court likewise found that the administrative order of the state agency initiated a sequence of events resulting in legal liability. *Id.* at 787.
70 See *MacDonald*, 475 N.W.2d at 627. The definition upon which *MacDonald* relied is a second entry in the dictionary in which it appeared. *Id.; Spangler*, 388 S.E.2d at 570. Furthermore its “weight of authority” is minimal as it diverges from a multitude of other dictionary definitions. See supra note 31. Lastly, as even one of the pro-insured courts appears to admit, application of the clear and unambiguous rule must yield a pro-insurer result. See *Hazen Paper Co. v. United States Fidelity & Guar.*, 555 N.E.2d 576, 579 (Mass. 1990) (“Literally, there is no suit.”).
ministrative nature—indicated by some courts, even under a narrower definition of the term "suit," to trigger the duty to defend.\(^7\)

**B. Results and Expectations from the Insured’s Perspective**

More often, pro-insured results are obtained through application of the unreasonable results exception to the clear and unambiguous rule\(^7\) and through the reasonable expectations doctrine.\(^7\) Under the former, a "clear and unambiguous" construction will not control if it produces an unreasonable result in the context of the surrounding circumstances.\(^7\) The reasonable expectations test similarly reflects surrounding circumstances by defining the policy language as that which one in the insured's position would reasonably have expected it to mean.\(^7\) The relevant circumstances of which a court must take notice\(^7\) include the EPA/PRP relationship\(^7\) in

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\(\text{\textsuperscript{71}}\) See supra note 54 (discussing triggering of duty to defend by compliance order).

\(\text{\textsuperscript{72}}\) See supra note 29 (discussing abrogation of plain meaning where unreasonable result obtains).

\(\text{\textsuperscript{73}}\) See Windt, supra note 5, § 6.03, at 290 ("A growing number of courts have held, in the context of interpreting insurance policies, that the insured's reasonable expectations must be given effect."); 2 Couch, supra note 7, § 15:16, at 174 ("[T]he construction adopted is that which a reasonable person in the position of the insured would have understood the language to mean."). Judicial commentary on the increasing acceptance of the doctrine and its underlying rationale includes the following:

The doctrine of reasonable expectations is rapidly becoming standard insurance law. At least twenty states have adopted the rule of reasonable expectations .... Scholars have embraced the doctrine as well .... Abundant policy reasons support the adoption of the doctrine of honoring reasonable expectations. First, insurance policies are lengthy, complicated documents, which frequently are not read by the insured. Second, insurance policies are classic examples of adhesion contracts, leaving the consumer with minimal bargaining power. Third, protecting reasonable expectation frequently prevents an unconscionable result. Fourth, if insurance is procured for a specific reason and the insurance company could reasonably ascertain this reason, the expectations of the insured should be protected. Nelson v. Becton, 929 F.2d 1287, 1293 (8th Cir. 1991) (Heaney, J., dissenting) (citations omitted).

\(\text{\textsuperscript{74}}\) See 2 Couch, supra note 7, § 15:10, at 151-52; Windt, supra note 5, § 6.02, at 279-80.

\(\text{\textsuperscript{75}}\) See Aetna Casualty & Sur. Co. v. Pintlar Corp., 948 F.2d 1507, 1516 (9th Cir. 1991). Under this doctrine, the focus is on the insured's understanding of the term at issue, so the pertinent query in an environmental insurance case becomes whether the insured would consider a PRP letter to be a suit. Id. The Pintlar court observed that "an ordinary PRP would view a PRP notice as triggering the need to defend itself and as thus instituting a 'suit.'" Id. It may be asserted that the reasonable expectations of a large commercial insured are less than those of an ordinary person. See supra note 30 (discussing "sophisticated policyholder" exception).

\(\text{\textsuperscript{76}}\) See, e.g., Pintlar Corp., 948 F.2d at 1517 (noting PRP cooperation incentives and CERCLA settlement goals); American Motorists Ins. Co. v. Levelor Lorentzen, Inc., Civ. No.
which the PRP “ha[s] no practical choice other than to [be] respons[ive].” 77 Thus, some courts have held that a PRP letter triggers the duty to defend because, first, the result compelled by a “clear and unambiguous” construction is unrealistically narrow given the strict nature of the CERCLA scheme, 78 and second, a PRP, being aware of the EPA’s powers under CERCLA, reasonably treats PRP notification as the equivalent of a lawsuit. 40

The unreasonable results concept is illustrated in American Motorists Insurance Co. v. Levelor Lorentzen, Inc. 81 Taking notice of the potential exposure created by CERCLA’s joint and several liability and treble damages, the court concluded that accepting the insurer’s argument that the term “suit” meant the filing of a complaint would produce an “absurd” result. 82

The pro-insured cases sometimes utilize an unannounced combination of the two rationales to support their holdings. For exam-


77 See supra notes 16-19 and accompanying text (describing involvement and exposure of PRP during CERCLA cleanup process).

78 Hazen Paper, 555 N.E.2d at 582. It is “an underlying principle [of CERCLA]... that Congress must facilitate cleanups of hazardous substances by the responsible parties.” H.R. REP. No. 253(I), 99th Cong., 2d Sess. 55 (1986), reprinted in 1986 U.S.C.C.A.N. 2835, 2837; see also id. at 100, reprinted in 1986 U.S.C.C.A.N. at 2882 (“The Committee believes that encouraging such negotiated cleanups will accelerate the rate of cleanup and reduce its expense by tapping the technical and financial resources of the private sector.” (emphasis added)).

Moreover, in a subsequent enforcement action, judicial review of EPA’s conduct is limited to the administrative record established during the cleanup. 42 U.S.C. § 9613(j)(1) (1988). One federal district court has recognized that this limitation compels early PRP involvement as a protective measure as to subsequent proceedings and on that basis found a PRP to be the equivalent of a “suit.” Village of Morrisville Water & Light Dep’t v. United States Fidelity & Guar., 775 F. Supp. 718, 733 (D. Vt. 1991).

79 See infra notes 81-82, 85-87 and accompanying text (noting cases finding unreasonable results produced by “clear and unambiguous construction”).

80 See Ryan, 916 F.2d at 741. If the government action meets the elements of the test, “then the functional equivalent of a suit may be in progress and the insured might reasonably expect the insurer to defend.” Id. (emphasis added); infra notes 88-91 (discussing cases relying on reasonable expectations of insured).


82 Id. at *6.
ple, nowhere in *Aetna Casualty & Surety Co. v. Pintlar Corp.* does the court mention the unreasonable results or reasonable expectations doctrines. Nevertheless, taking notice of the CERCLA scheme, the court concluded that a PRP letter is "unlike the garden variety demand letter," and that it should thus trigger the duty to defend. Additionally, the court acknowledged that, upon receipt of a PRP letter, an "ordinary person" would expect a liability insurer to provide a defense. This measuring of results and expectations is also present in *Hazen Paper v. United States Fidelity & Guaranty, Polkow v. Citizens Insurance Co. of America,* as well as other pro-insured cases to a lesser degree.

C. Overly Broad Approaches

In *Fireman's Fund Insurance Co. v. Ex-Cell-O Corp.* (Ex-
the court broadly defined "suit" as "any effort to impose on the policyholders a liability ultimately enforced by a court." Ex-Cell-O I supported its holding with the broad language in United States Aviex Co. v. Travelers Insurance Co., which indicated that the duty to defend would be triggered by any type of government action. The language from Ex-Cell-O I has been criticized, however, and rightly so, since "any effort" does not incorporate the notion of a court proceeding, nor does "ultimately enforce[able]" require imminent or immediate adversariness. Finally, a number of courts have justified pro-insured results by considering the public interest in CERCLA enforcement. It may, however, be more appropriate in these disputes for courts to limit themselves to the task of "determin[ing] the meaning of a private contract between the[ ] parties."

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Id. at 625.
See id. at 843. Although the governmental actions taken in this case would probably fit within the standards set forth in other pro-insured cases and thus justify a broad reading of "suit," the court proffered language that seems to obviate the need for any type of legal process to trigger the duty to defend:

If the state were to sue in court to recover in traditional "damages," including the state's costs incurred in cleaning up the contamination, for the injury to the groundwater, [the insurer]'s obligation to defend against the lawsuit and to pay damages would be clear. It is merely fortuitous that the state has chosen to have [the insured] remedy the contamination problem, rather than choosing to incur the costs of clean-up itself and then suing plaintiff to recover those costs.

Id.
See supra notes 31-33 and accompanying text (noting commonly-held definitions of "suit").
See supra notes 55-59, 61 and accompanying text (describing Ryan test).

Patrons Oxford Mutual Ins. Co. v. Marois, 573 A.2d 16, 17 (Me. 1990). The court observed that it was not their job to either "foster or retard environmental goals." Id. The EPA is in accord with this position. See Hearings, supra note 1, at 3 (testimony of James M. Strock, EPA) ("We view coverage issues as questions of private contract interpretation governed by state law." (emphasis added)).
Given the apparent merits of both the pro-insurer and pro-insured positions, it seems unlikely that a resolution of the split described in this Note is forthcoming. Not surprisingly, courts are also split over whether non-environmental administrative proceedings trigger the duty to defend.\(^{101}\) Looking to the Supreme Court for resolution of these issues is also likely to be futile since the Court has routinely denied certiorari in environmental insurance cases.\(^{102}\)

### III. POLICY CONSIDERATION AND IMPLICATIONS

One might conclude that the determinative factor in deciding whether a PRP letter triggers the duty to defend is whether the insurers are seen as villains\(^{103}\) or victims.\(^{104}\) Recognizing CER-

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\(^{103}\) See, e.g., United States Fidelity & Guar. v. Thomas Solvent Co., 683 F. Supp. 1139, 1173-74 (W.D. Mich. 1988) (criticizing insurers). After acknowledging the splits in authority on environmental insurance issues, Judge Enslen took issue with the insurers:

I do not think it wise or necessary that so much financial resources are spent trying these duty to defend issues . . . Insureds apparently must often seek insurance just to cover the cost of litigating against their own insurance company! The expenditure of such funds by the insured diminishes the amount available to actually clean up the environment and/or reimburse the government or private parties for the costs of cleaning up the environment—assuming liability is found. *Id.* Additionally, an antitrust action is currently pending in which nineteen states and numerous private plaintiffs allege that insurers, reinsurers, and other members of the insurance market conspired to restrict the availability of CGL coverage. *See In re Insurance Antitrust Litig.*, 723 F. Supp. 464, 468-70 (N.D. Cal. 1989) (discussing background of suit), rev'd on other grounds, 938 F.2d 919 (9th Cir. 1991), *aff'd in part, rev'd in part*, 125 L. Ed. 2d 612 (1993).

\(^{104}\) See Howell A. Burkhalter, Comment, Liability for CERCLA Cleanup Costs—Are Insurers the Victims of Judicial Activism?, 26 WAKE FOREST L. REV. 221, 221-36 (1991)
CLA’s current inefficiencies, however, it seems that any policy-based analysis of the duty to defend should turn on the remedial potential of the chosen result. Despite the appeal of deep-pocketed insurers being a required player in the CERCLA process, it is suggested that insurer involvement should be delayed until post-cleanup cost recovery suits are initiated.

With CERCLA “already mired in litigation,” one way to enhance its efficiency might be to remove the litigious insurers from the cleanup process. In the short-term, cleanup would operate more efficiently due to the absence of diversionary and expensive litigation, and cost recovery actions would be more effectively resolved due to a narrowing of disputed issues.

Furthermore, eliminating insurer involvement should produce long-term benefits. First, shifting costs to the insurer—the current

(arising from insurance policies)—produces many critics who believe that the current statutory scheme and the resulting insurance litigation are a time consuming, expensive and inefficient method to clean up the country’s environment.”

See Thomas A. Gordon, Practical and Economic Issues Related to Hazardous Waste Cleanup and Insurance Litigation, in Environmental Coverage: From Interpretation to Litigation 285, 290-91 (1991). “[T]here are many critics who believe that the current statutory scheme and the resulting insurance litigation are a time consuming, expensive and inefficient method to clean up the country’s environment.”

Id. at 290; see also Office of Technology Assessment, U.S. Congress, Coming Clean: Superfund Problems Can Be Solved... 85 (1989) (hereinafter Coming Clean: Superfund Problems Can Be Solved...); RAND Report Details Superfund’s Slow Progress, Risk Management, Oct. 1989, at 75, 78 (discussing CERCLA progress and expenditures); DeBenedictis, supra note 14, at 30 (same); Leslie Cheek III et al., Insurance Coverage for Superfund Liability Defense and Cleanup Costs: The Need for a Nonlitigation Approach, 19 Env’t L. Rep. 10,203, 10,203 (1989) (same). Perhaps the greatest problem with CERCLA is that too great a portion of funds has not been spent on cleanup. See Coming Clean, supra, at 28 (reporting that 60% of CERCLA expenditures were for non-cleanup expenses). Instead funds are diverted to litigation expenses. See id. at 29 (“[A] significant portion of legal spending is unnecessarily high or avoidable.”); Cheek et al., supra, at 10,203 (“[T]... cost[s] as much if not more to litigate the issues of liability and the nature of the remedy as... to do the actual cleanup.”). Insurance companies, albeit an unwilling player in the cleanup process, spend more than three-quarters of their CERCLA expenditures on litigation costs. See DeBenedictis, supra note 14, at 30 (“88 percent is spent on litigating claims”).

See, e.g., Aetna Casualty & Sur. Co. v. Pintlar Corp., 948 F.2d 1507, 1517 (9th Cir. 1991) (observing that insurer involvement is necessary ingredient in achievement of CERCLA goal of PRP cooperation).

RAND Report Details Superfund’s Slow Progress, supra note 105, at 78.

See DeBenedictis, supra note 14, at 30.

See supra note 105 (discussing inefficient CERCLA litigation).

See RAND Report Details Superfund’s Slow Progress, supra note 105, at 75 (“Through September 1988, ... less than 10 percent of” all costs had been recovered.).

See Hearings, supra note 1, at 101 (statement of John C. Butler, III) (observing that high transaction costs, including litigation, are due in part to incomplete site data).
practice—does not provide an incentive to polluters to modify future conduct.\textsuperscript{112} Second, imposing the burdens of present defense costs on the insurers will inhibit the evolution of pollution liability insurance,\textsuperscript{113} as mandated by CERCLA.\textsuperscript{114} Accordingly, it is submitted that the benefits of involving insurers in the cleanup process by triggering the duty to defend upon PRP notification are outweighed by the overall negative impact on the environmental cleanup scheme.

CONCLUSION

It would not be fair to conclude that either the pro-insurer position or the pro-insured position is legally insufficient. If a court chooses to apply the traditional clear and unambiguous rule of policy construction, its conclusion must be that the term “suit” means a court proceeding. Therefore the duty to defend any “suit” cannot be triggered by a mere PRP letter. On the other hand, if a court decides to adopt the contemporary reasonable expectations doctrine, upon its taking notice of the EPA/PRP relationship the court would naturally find a PRP letter to be the equivalent of a suit. In addition, policy considerations present a difficult choice between drawing a deep-pocket insurer into the costly cleanup pro-

\textsuperscript{112} See Burkhalter, supra note 104, at 235.

\textsuperscript{113} See id. at 235-36. If insurers cannot properly conduct risk management as a result of judicial decisions providing coverage unanticipated by the policies, the availability of future coverage will be limited. Id.; see also Cheek et al., supra note 105, at 10,203 (discussing problems associated with thwarting risk management). The availability of pollution liability or environmental impairment insurance has been severely limited. See General Accounting Office, Liability Insurance: Effects of Recent “Crisis” on Businesses and Other Organizations 18-19 (1988) (reporting that many insurance buyers are unable to procure environmental liability insurance); see also Hearings, supra note 1, at 255-66 (Environmental Liability Market Survey prepared by Johnson & Higgins) (showing only three companies writing pollution liability insurance).

Although of greater concern with regard to related indemnification issues, see supra note 4, the potential for insurance industry insolvency is another matter to be considered in the analysis of current cost-shifting principles. See Hearings, supra note 1, at 131 (statement of Prof. Howard C. Kunreuther) (“Superfund threatens to impose substantial burdens on the insurance industry, possibly leading to insolvency of some companies and severely disrupting the economy if insurers are held financially responsible for cleanup costs under CGL policies.”); see also id. at 9 (testimony of Peter Gueroro, GAO) (noting increased loss ratio of CGL insurers due to environmental claims); id. at 90-93 (statement of Amy Bouska) (remarking on implications of insurers’ CERCLA liability). See generally id. at 164-79 (statement of Crum & Forster Ins. Cos.) (reporting on financial status of insurance industry and possible effects of CERCLA liability). But see generally id. at 192-201 (statement of Eugene R. Anderson, Esq.) (asserting that insurance industry exaggerates danger).

cess and the inefficiency resulting from the insurer's presence. Ultimately, however, three pro-insurer arguments stand out. First, forgetting the environment, the issue is plainly one of contractual interpretation. Second, remembering the environment, prompt and efficient cleanup, which does not occur when the insurers are involved, should be the controlling consideration. Third, looking to the future, the nation's industry will require some type of pollution liability insurance, the evolution of which has been inhibited by the overly-broad construction of CGL policies. Hence, the plain and ordinary meaning of the term "suit" as some type of legal proceeding must prevail such that PRP notification, standing alone, does not trigger the CGL insurer's duty to defend.

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