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CITY OF EDGERTON: CREATING A FRIENDLIER FORUM FOR INSURANCE COMPANIES

I. INTRODUCTION

In June of 1994, a summer wind swept through Wisconsin carrying with it the sweet smell of change—sweet for insurance companies anyway.

In that month, the Wisconsin Supreme Court decided a case that significantly changed the direction of environmental law in Wisconsin called *City of Edgerton v. General Casualty Company*.¹ The case involved an ordinary dispute between the owners of a contaminated landfill and their insurance company. The owners were seeking coverage under their comprehensive general liability policy for any costs associated with the clean up of the contaminated site. From these ordinary facts arose a particularly extraordinary result: the court ruled for the insurer, holding that the comprehensive general liability policy did not cover any costs associated with the clean up of the landfill.

The decision, considered an anomaly under Wisconsin law,² caused an immediate reaction in the community. Over one hundred parties launched an amicus campaign by submitting several motions for reconsideration.³ The parties submitting briefs included “local and industrial/trade associations, municipal government associations or municipalities, the Wisconsin Department of Natural Resources and Department of Justice, individual Wisconsin businesses, and environmental advocacy/public interest groups.”⁴

Why did this case produce such an enormous reaction from the legal community? The answer is pessimistically simple: money. Environmental clean up programs are extremely expensive and could cause the financial demise of any party shouldering the burden.⁵ Therefore, a large portion of environmental litigation involves sorting out the liabilities between all the potentially responsible parties (“PRPs”),

1. 184 Wis. 2d 750, 517 N.W.2d 463 (1994), *cert. denied*, 115 S. Ct. 2615 (1995).

2. See Raymond R. Krueger & Cynthia E. Smith, *Maximizing Insurance Recovery for Environmental Damages After Edgerton*, ENVTL. L. UPDATE (State Bar Association of Wisconsin, Milwaukee, WI), March 2-3, 1995, at 1.

3. *Id.* (all the motions were denied).

4. *Id.*

5. Some sources estimate the total national cost of the all environmental cleanup programs to be \$160 billion per year. Paul L. Langer, *Environmental Insurance Coverage Issues in Illinois: Moving Toward Resolution*, 82 ILL. B.J. 90 (1994).

including the insurance companies.⁶ The court is left with the thankless job of interpreting the language of the insurance policies to determine whether the environmental claim is covered under the policy.

Environmental law is governed by the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").⁷ Congress passed CERCLA in 1980 and reauthorized the program in 1986 through the Superfund Amendments and Reauthorization Act ("SARA").⁸ The initial CERCLA statute came in response to many high profile cases that highlighted the growing problem of environmental pollution and fostered public concern in the late 1960s.⁹

CERCLA had an immediate effect on many industries and revolutionized both the process for cleaning hazardous waste sites and the distribution of the costs associated with a cleanup program. Prior to CERCLA, the few environmental statutes on the books focused on the control, distribution, and disposal of hazardous waste and granted little remedial power to the government to clean up the sites.¹⁰ CERCLA rectified this problem by giving the government the authority and funds

6. See Leslie Cheek III, David Graham & Karen Wardzinski, *Insurance Coverage for Superfund Disputes: The Need for A Nonlitigation Approach*, 19 ENVTL. L. REP. 10,203 (1989). The costs of litigating disputes between the insured parties and insurance companies has reached astronomical levels, where the parties could be "[s]pending \$30 million to \$50 million per site on cleanup and half again as much on litigation," therefore, the total cost of litigating and cleaning of "15,000 sites could cost anywhere from \$675 billion to more than a trillion dollars!" *Id.* at 10,204.

7. Comprehensive Environmental Response, Compensation, and Liability Act, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1994) [hereinafter CERCLA].

8. JAN PAUL ACTON, UNDERSTANDING SUPERFUND: A PROGRESS REPORT v (1989).

9. The expanding public awareness of environmental issues is attributed to three major events. Mitchell L. Lathrop, *Environmental and Toxic Tort Claims from the Insurer's Perspective*, in ENVIRONMENTAL AND TOXIC TORT CLAIMS: INSURANCE COVERAGE IN 1989 AND BEYOND at 2 (PLI Commercial Law & Practice Course & Book Series No. A4-260, May 1, 1989). The first event was the publication of Rachel Carson's epic work *The Silent Spring*, which raised awareness about the dangerous use of pesticides and herbicides. *Id.* The second event was the explosion of an offshore oil well that threw thousands of gallons of oil onto the beaches of Santa Barbara and Carpinteria. *Id.* The third major event was the infamous Love Canal site where local schools and homes were built on a site only to find that a chemical company buried drums of hazardous wastes in the ground. *Id.*

10. In 1969, Congress passed the National Environmental Policy Act that created the EPA and established a national policy regarding environmental problems. Lathrop, *supra* note 9, at 3. A few years later, Congress passed the more comprehensive Resource Conservation and Recovery Act of 1976. *Id.* The statute was concerned primarily with preventing parties from contaminating land by creating standards and regulations for disposing of hazardous waste. *Id.* The statute enforced the regulations with both civil and criminal liability on any party failing to comply with those standards. *Id.*

to identify and clean hazardous waste sites. In addition, CERCLA gave the government the authority to force particular parties to clean the contaminated site.¹¹

The purpose of this Comment is to explain and analyze the practical effects of the *City of Edgerton* decision. Part II provides a general overview of the procedures and administration of the liability scheme under the CERCLA statute and includes a discussion of how government agencies notify parties of potential environmental liabilities. The notification process serves an important function in understanding the court's interpretation of the insurance policy in the *City of Edgerton* case. Part III provides a brief discussion of the role of insurance companies and how they are associated with the environmental actions. This part also provides a general discussion of the debate between the insurance company and the insured parties on how the court should interpret the insurance policies. Part IV discusses the *City of Edgerton* case and how the court resolved the debate. Part V discusses the practical effect of the decision and how the courts have applied it to other fact patterns. Finally, Part VI provides a summary and conclusion to the Comment.

II. OVERVIEW OF CERCLA

CERCLA, commonly known as Superfund, is essentially designed to accommodate two forms of site cleanups.¹² The emergency response component of the act grants the Environmental Protection Agency ("EPA")¹³ the authority and money to respond to immediate hazards that threaten human health or substantially impair the environment.¹⁴ The second and more common form of site cleanup is the remediation component.¹⁵ This component focuses on the long term restoration of sites that do not pose an immediate or direct threat to the health of the people residing near the site.¹⁶

11. See *infra* note 51 and accompanying text.

12. ACTON, *supra* note 8, at v.

13. Congress actually gave the President of the United States the authority to respond to emergency situations. 42 U.S.C. § 9604 (1994). The President then granted this authority to the EPA under Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981).

14. ACTON, *supra* note 8, at v. According to a study conducted in 1989, the EPA has provided more than six million dollars worth of emergency response assistance to over 30 sites in the state of Wisconsin. KENDRA BONDERUD, CONTAMINATED LAND CLEANUP PROGRAMS 3 (1995) (Wisconsin Legislative Fiscal Bureau Series No. 60, 1995).

15. ACTON, *supra* note 8, at v.

16. *Id.*

CERCLA established a unique system of liability that continues to be the most controversial aspect of the statute.¹⁷ Congress realized that many cleanup projects would require unprecedented levels of money to rectify the problem. Therefore, it created a tort-like liability scheme to finance the projects.¹⁸ This system applies the principles of strict liability,¹⁹ joint and several liability,²⁰ and retroactive liability²¹ to broad classes of parties that were associated with the property in some manner.²² The goal of Congress in creating this liability scheme is remarkably similar to my mother's goal after seeing my brother and I knock over one of her house plants while wrestling in the living room: she did not care who created the mess, how it was created, or who was primarily responsible for the accident; she just wanted the mess cleaned up.²³

The liability scheme under CERCLA is a labyrinth of rules and regulations that leave even the most experienced environmental lawyer in unsurveyed territory. However, the basic process can be broken down into a series of general, if not oversimplified, stages that map the way through the restoration process. The initial stages primarily consist of the EPA assessing the existence and extent of pollution on the land. The second stages focus on the development of the most efficient and inexpensive way to actually clean the contaminated site.

17. See generally 42 U.S.C. § 9607 (1994).

18. ACTON, *supra* note 8, at vi.

19. Strict liability is the concept of "liability without fault." BLACK'S LAW DICTIONARY 1422 (6th ed. 1990). The doctrine is based on the idea that the party can still be liable for injuries or damages regardless of the level of care, or lack thereof, exercised by the party. *Id.* In the environmental context, a party can be liable for the costs associated with cleaning a contaminated property if they were associated with the land or hazardous substance in the past. See *infra* note 43 and accompanying text.

20. Joint liability is the concept that two or more parties can share liability to a third party. BLACK'S LAW DICTIONARY 838 (6th ed. 1990). Several liability, on the other hand, is the concept that one action can be brought against two or more parties separately, or against both of them together. *Id.* at 1374.

21. Retroactive liability involves applying current liability to past events, even if the event occurred in the distant past. *Id.* at 1317.

22. See *infra* note 43 and accompanying text.

23. See Environmental Protection Agency, *Superfund Enforcement Strategy and Implementation Plan*, 20 ENVTL. L. REP. 35,207 (1989). The report sets forth the EPA's policies and principles in enforcing CERCLA. The report states in relevant part that "parties may be liable under CERCLA without having violated any regulatory statutes. Thus, the primary purpose of the liability scheme is to compel cleanup." *Id.* at 35,209.

A. Assessing Damage on the Property

Obviously, the first step of any remediation program is to identify contaminated, or potentially contaminated, sites.²⁴ The EPA discovers potentially contaminated sites through citizen complaints, state government nominations,²⁵ and statutory reporting obligations.²⁶ The reporting obligation arises under section 9603 which requires that all parties handling toxic waste record and report their activities.²⁷ This requirement is a residual provision from the first generation of environmental statutes which focused on preventing and deterring environmental contamination.²⁸ However, the current generation of environmental statutes provide stronger enforcement provisions than its predecessor by creating both civil and criminal liability for parties failing to report such activities.²⁹

Once a potentially hazardous site is identified, the EPA conducts a preliminary site assessment to determine the extent and severity of the damage.³⁰ The EPA regional office assigns an on-scene coordinator ("OSC") to conduct the initial investigation, called a preliminary assessment.³¹ This investigation is a "paper exercise" in which the OSC examines technical documents to determine the probability that the property was ever exposed to hazardous chemicals.³² The preliminary assessment is conducted within the four walls of the EPA offices and does not include a physical inspection of the property.³³ For instance, the OSC may look to the owner's previous activities to see if he had engaged in a business that used hazardous substances.

After the investigation, if the OSC believes the site may have been exposed to hazardous substances, the EPA will conduct a formal site

24. ACTON, *supra* note 8, at 11.

25. The state nominates particular sites on the basis of groundwater tests. *See id.* at 11.

26. *Id.* at 11.

27. Essentially, the CERCLA statute imposes a duty upon any party associated with hazardous waste to notify the EPA of any releases, transport, or storage of waste. 42 U.S.C. § 9603 (1994). In addition, the parties have to keep strict records of their activities, which can be summoned by the EPA at any time. *Id.*

28. *See* Lathrop, *supra* note 9, at 3.

29. Criminal liability for a failure to report is created under section 9603(b). 42 U.S.C. § 9603(b) (1994). Civil liability for the costs associated with the clean up is under section 9607. 42 U.S.C. § 9607 (1994).

30. ACTON, *supra* note 8, at 11.

31. ALFRED R. LIGHT, CERCLA LAW AND PROCEDURE 39 (1991).

32. *Id.*

33. *Id.*

inspection on the property.³⁴ The formal site inspection determines the extent of the problem through a physical examination of the waste characteristics of any suspected chemicals on the land, the proximity of the lot to occupied housing and other improved lots, and the potential water sources or disposal pathways that could provide the chemicals a passage to adjoining properties.³⁵

The results of the site inspection allow the EPA to numerically rank the contaminated lot according to a scale called the "hazard-ranking."³⁶ This ranking represents the EPA's assessment of the potential danger the site poses to the surrounding community.³⁷ The hazard-ranking quantitatively determines whether the EPA will institute any further action to clean the contaminated site. If the ranking is sufficiently high,³⁸ the site will go on the dreaded National Priorities List ("NPL").³⁹ Placement on the NPL marks the end of the initial investigatory stage and sets the remediation process in motion. Once the property is listed on the NPL, the EPA is at the point of no return and it must pursue some action to clean the contaminated land.

Although the EPA provides a formal, and somewhat stoic, procedure to implement cleanup,⁴⁰ in reality the process intermingles many of the

34. See ACTON, *supra* note 8, at 12.

35. *Id.* at 28.

36. *Id.* at 12. According to the Wisconsin Legislative Bureau, the hazard ranking for a particular site is decided on six criteria: "(1) population at risk; (2) the hazardous potential of the substances; (3) the potential for contamination of drinking water supplies; (4) the potential for direct human contact; (5) the potential for destruction of sensitive ecosystems; and (6) other appropriate factors." BONDERUD, *supra* note 15, at 3-4, 29.

37. ACTON, *supra* note 8, at 12.

38. According to the EPA ranking system, a numerical value of 28.5 or above will qualify the site for a listing on the National Priorities List. LIGHT, *supra* note 31, at 40. Some commentators believe this value will be decreased in the future to increase the number of properties that are subject to CERCLA. ACTON, *supra* note 8, at 12.

39. The only good thing about being placed on the NPL is that it qualifies the site for federal funds to clean up the mess. LIGHT, *supra* note 31, at 40. However, this is a dubious advantage to the PRPs because they will be liable for the costs regardless of who initially pays for the cleanup.

The EPA considers a listing on the NPL to be a rule-making function under the Administrative Procedure Act and, therefore, gives the PRP an opportunity to comment on the proposed listing. *Id.* at 42 (citing 55 Fed. Reg. 51,532 (1990) (providing the latest EPA revision to listing procedures)). However, the hearing is of relatively little value to the PRPs since the EPA is unlikely to remove their name from the proposed list. *Id.* The PRPs get a second chance once they are placed on the NPL and assigned a portion of the costs. *Id.* At this point, they can bring a claim against the agency before the EPA Administrator. *Id.* (citing 40 CFR § 305.3 (1995)).

40. The EPA created a ten-step process to enforce CERCLA and fulfill the agency's goal of eliciting a private party response to the contamination. The ten steps are:

formal steps to fit the needs of the particular case. The one constant that remains in any particular clean up program is the immediate search for parties who will pay for the restoration process.⁴¹ Once the property is listed on the NPL, the EPA tries to track any person or entity that has ever been associated with the property or hazardous substance on the land.⁴² These parties are called potentially responsible parties.⁴³

B. The Remediation Process

The severity of the contamination and availability of PRPs dictates how the remediation process will begin. If the contamination poses a direct threat to the surrounding community, the EPA will begin the

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1. Identification of Potentially Responsible Parties,
 2. Information Exchange and Notification,
 3. Removal Enforcement,
 4. Private Party Remedial Investigations and Feasibility Studies,
 5. Negotiations,
 6. Settlement Authorities,
 7. Unilateral Enforcement Authorities,
 8. Administrative Records,
 9. Oversight and Compliance, and
 10. Cost Recovery.

Environmental Protection Agency, *supra* note 23, at 35,211.

41. The EPA's own search manual for PRPs states in relevant part that the "PRP search should be concurrent with the initiation of the National Priorities List (NPL) listing process." ENVTL. PROTECTION AGENCY OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, POTENTIALLY RESPONSIBLE PARTY SEARCH MANUAL FINAL REPORT 2 (1987) [hereinafter OSWER].

42. JAN PAUL ACTON, SUPERFUND AND TRANSACTION COSTS, THE EXPERIENCE OF VERY LARGE INDUSTRIAL FIRMS 3 (1992).

43. Title 42, section 9607(a) defines a PRP as:

1. the owner or operator of a vessel or facility [from which there is a release or threatened release of any hazardous substance];
2. any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
3. any person who by contract, agreement, or otherwise arranged for the disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
4. any person who accepts or accepted any hazardous substances for the transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance

42 U.S.C. § 9607(a) (1994).

remediation process immediately.⁴⁴ CERCLA authorizes the EPA to act in these emergency situations in what is called a fund lead.⁴⁵ Under a fund lead, the EPA initiates the cleanup process by taking money out of a government trust fund.⁴⁶ Once the site is sufficiently cleaned, the EPA locates all available PRPs to replenish the trust fund for any money spent on the cleanup program.

However, if the land does not require immediate attention, the remediation process begins with more intensive studies⁴⁷ of the property to evaluate all possible remediation programs.⁴⁸ Under these circumstances, the EPA will shift the costs of the cleanup to all available PRPs.⁴⁹ The ultimate goal of this program (called a PRP lead) is to get the PRPs involved at an early stage in the hope that they will voluntarily work out a settlement agreement to pay the remediation costs.⁵⁰ In the

44. See 42 U.S.C. § 9604(a) (1994). The section states in relevant part: Whenever (A) any hazardous substance is released or there is a substantial threat into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to public health and welfare, the President is authorized to act . . . or take any other response measure consistent with the national contingency plan.

Id.

45. ACTON, *supra* note 8, at 13.

46. The trust fund, established under 42 U.S.C. § 9611(a) (1994), finances both the preliminary investigation costs and any emergency costs that the EPA incurs to implement the remediation process. ACTON, *supra* note 8, at 8. Congress initially authorized a total of \$1.6 billion for the fund and increased the amount in 1986 under SARA to \$8.5 million until 1991. *Id.* (referring to 42 U.S.C. § 9611(a) (Supp. 1986)). In 1991, the agency was given an additional 5.1 million to replenish the fund until 1994. *Id.* However, Congress did not replenish the fund in 1994. *Id.* The money for the fund is raised primarily through "taxes on crude oil and chemical feedstocks, cost recoveries from site operators, generators and current and past owners, interest, and general revenues." BONDERUD, *supra* note 14, at 6.

Wisconsin has an equivalent fund called the Environmental Repair Fund (ERF). WIS. STAT. § 144.442 (1984). The ERF had a balance of \$3.7 million in 1989. ENVTL. PROTECTION AGENCY, AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY 158 (1989). The ERF receives appropriations from the state (\$4.2 million in 1989) and it receives more than \$1 million annually from "cost recovery actions and interest." *Id.*

47. The studies are called "formal investigations" and "feasibility studies." ACTON, *supra* note 8, at 13. Although there are differences between the two studies, it is sufficient for purposes of this comment to describe both studies as an intensive investigation of the site and waste characteristics to determine the possible remedies and the costs of those remedies.

48. ACTON, *supra* note 8, at 13.

49. *Id.* at 13.

50. See Env'tl. Protection Agency, *supra* note 23, at 35,211 ("The goal of the government is to negotiate an agreement for 100% of response costs."); Environmental Protection Agency Superfund Program; Notice Letters, Negotiations and Information Exchange, 53 Fed. Reg. 5298, 5298 (1988) ("A fundamental goal of the CERCLA enforcement program is to facilitate voluntary settlements.").

event the parties can not settle on the proper manner to distribute the costs, the EPA is authorized to seek an injunctive order demanding that the PRPs clean the land and apportion the cost later.⁵¹

After the PRPs take the lead on the project, they are responsible for developing a design plan to commence the clean up process.⁵² Once all the proposals are in place, the EPA authorizes the most feasible plan in a document called the record of decision.⁵³ At this point the plan is put into action and the contractors start the restoration.⁵⁴ If the plan is successful, the PRPs can apply to the EPA to take the site off the NPL and conclude the entire matter.⁵⁵

C. Notifying the Potentially Responsible Parties

As mentioned, the hallmark of any cleanup program is the search for potentially responsible parties.⁵⁶ Accordingly, the identification process runs concurrently with the property's listing on the NPL to illicit the quickest possible response from the PRPs.⁵⁷ The initial, and most important, notification to the PRPs is called a general notice letter.⁵⁸ The purpose of the general notice letter is "to inform PRP's of their potential liability for future response costs,"⁵⁹ and to fulfill the EPA's goal of establishing "the process of information exchange . . . to initiate

51. See 42 U.S.C. § 9006(a) (1994). This section states in relevant part:

When the President determines that there may be an imminent and substantial danger to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from the facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

Id.

52. ACTON, *supra* note 8, at 13.

53. *Id.*

54. *Id.*

55. *Id.* at 14.

56. The EPA's *PRP Search Manual Final Report* states in relevant part: "[t]he identification of PRPs is an integral component in the resolution of a hazardous substance release. From the notification of a release through the remedial action, identification of and communication with the PRPs are essential in determining the strategy for cleanup." OSWER, *supra* note 41, at 5.

57. *Id.*

58. The EPA sends general notice letters to "all parties where there is sufficient evidence to make a preliminary determination of potential liability under section 107 of CERCLA." Env't. Protection Agency Superfund Program: Notice Letters, Negotiations and Information Exchange, 53 Fed. Reg. 5298, 5301 (1988).

59. *Id.* at 5300.

the process of informal negotiations.”⁶⁰

After the PRP receives a general notice letter, it can respond to the letter in one of four ways: 1) voluntarily negotiate with other PRPs and sign a consent decree;⁶¹ 2) directly negotiate with the EPA to settle the PRP's liability; 3) seek immediate assistance from its insurer; or 4) simply ignore the letter.⁶² If the PRP ignores the general notice letter, the EPA is forced to seek injunctive relief to compel the party to clean the site.⁶³

When identifying PRPs, the EPA does not have an obligation to name every party that could be liable for the contamination or to apportion liabilities to the parties it does name.⁶⁴ Each PRP is jointly and severally liable for the entire cost of the cleanup.⁶⁵ Therefore, the usual “result is that a party with a ‘deep pocket’ that contributed only a small amount of waste to a site to which other generators contributed, theoretically, could find itself liable for the entire cost of the cleanup.”⁶⁶

III. FRAMING THE ISSUE: INTERPRETING THE INSURER'S DUTY TO DEFEND

A. *The Insurance Company's Role*

The PRPs usually look to their insurers to help carry the immense financial burden imposed by the CERCLA statute.⁶⁷ The insurer is generally involved in the clean up process through a comprehensive general liability policy (CGL). The CGL does not specifically cover a particular injury, but “indemnifies the insured against a virtually unlimited variety of events causing bodily injury or property damage

60. *Id.* In addition to these purposes, the general notice also informs the PRPs of the special notice procedures and the time constraints for a response. *Id.*

61. The EPA always prefers that the parties settle the matter without the agency's direct involvement. Environmental Protection Agency, *supra* note 23, at 35,209. As stated in one of its formal policy guides, “the EPA will consider private party responses as the preferred approach for the majority of the Superfund Sites.” *Id.*

62. Sidney S. Liebesman, *Triggering An Obligation: Receipt of an EPA PRP Letter and An Insurer's Duty to Defend*, 5 VILL. ENVTL. L.J. 479, 489 (1994).

63. *Id.*

64. Lathrop, *supra* note 9, at 6.

65. See *supra* notes 20 and accompanying text.

66. Lathrop, *supra* note 9, at 8.

67. See Barry R. Ostrager, *Special Insurance Coverage Issues Arising out of Hazardous Waste/Environmental Clean-up Litigation*, 855 A.L.I.-A.B.A. 1005 (1993). Ostrager states that “insurers frequently receive requests from insureds for reimbursements of expenses incurred to investigate and remediate toxic waste problems.” *Id.* at 1049.

unless specifically excluded from coverage.”⁶⁸ The form and interpretation of this policy has substantially changed over the years,⁶⁹ and each change has expanded the scope of the policy to create broader environmental liability for the insurer.⁷⁰

The ordinary CGL will contain a “duty to defend” clause that defines the time and event (or events) that will trigger the insurer’s liability.⁷¹ This clause usually states that the insurer has the “duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage.”⁷² The controversy in an ordinary coverage lawsuit arises from the interpretation of the words “suit” and “damages.” Specifically, the issue is whether a general notice letter from the EPA constitutes a “suit” within the CGL and whether PRPs’ cleanup costs⁷³ constitute “damages” within the CGL.

B. Interpreting “Suit” Under the CGL

The insurer favors a narrow construction of the words, limiting the

68. Thomas A. Gordon & Roger Westendorf, *Liability Coverage For Toxic Tort, Hazardous Waste Disposal And Other Pollution Exposures*, 25 IDAHO L. REV. 567, 574-75 (1988).

69. The CGL policy used to be triggered on an “accident” basis where liability depended on a “sudden, catastrophic event.” Irene A. Sullivan & William J. Wright Jr., *Hazardous Waste, Toxic Tort, and Product Liability Insurance Problems 1987 in HAZARDOUS WASTE LITIGATION: CGL INSURANCE COVERAGE ISSUES* 301 (1987). The policies were revised in 1966 to provide coverage on an “occurrence” basis. *Id.* This change expanded the scope of liability for the insurer because an “occurrence” meant “an accident, including continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage.” *Id.*

70. See Gordon & Westendorf, *supra* note 68, at 575.

71. See KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW, AN ANALYSIS OF TOXIC AND HAZARDOUS WASTE INSURANCE COVERAGE ISSUES 43 (1991).

72. The total provision for a general comprehensive liability policy in Wisconsin states: The company [insurer] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury or . . . property damage . . . caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage.

ARNOLD P. ANDERSON, WISCONSIN INSURANCE LAW 406 (Michael S. Gilleland ed., 3d ed. 1990).

73. Not all expenses associated with a contaminated parcel of property constitute “response costs” under CERCLA. See ABRAHAM, *supra* note 71, at 11. CERCLA imposes strict liability for “the necessary costs of ‘response,’” and defines “response” as “remove, removal, remedy, and remedial action.” *Id.* (citing 42 U.S.C. § 9601(25) (1994)). Therefore, “response costs” are the expenses paid by the PRP for “the retention of environmental consultants, the formulation of remedial action plans and the implementation of those plans.” Ostrager, *supra* note 54, at 1049-50.

definitions to the literal meaning of the policy language.⁷⁴ To the insurer, the general notice letter does not constitute a "suit" under the CGL because it only informs PRPs of their potential liability for a contaminated site.⁷⁵ The insurer defines "suit" as a formal legal action in a court of law, not as an informal notification of possible liability.⁷⁶

The PRPs define the word in a broad manner to trigger the duty to defend clause in the CGL.⁷⁷ The PRPs argue that the word "suit" is ambiguous in the CGL policy and, therefore, should be construed in favor of coverage.⁷⁸ In addition, the PRPs argue that the insurer's narrow interpretation frustrates the reasonable expectations of the parties at the time the contract was formed.⁷⁹ The PRPs view the general notice letter as something more than just a notification of potential liability and argue that it actually embodies the same characteristics as a traditional lawsuit because it immediately affects the PRPs' rights.⁸⁰ In other words, a general notice letter has the effect of a lawsuit because it presents the insured with a number of choices that will significantly determine the ultimate cost of the cleanup and who will bear that cost.⁸¹

74. See Joanna L. Johnson, *Whether Insurers Must Defend PRP Notification: An Expensive Issue Complicated By Conflicting Court Decisions*, N.ILL. U.L. REV., 579, 592 (1990).

75. *Id.* at 593. See *supra* note 60 and accompanying text.

76. Johnson, *supra* note 74, at 593. See also *Patrons Oxford Mut. Ins. v. Marois*, 573 A.2d 16, 16 (Me. 1990) ("[T]he duty to defend the insured party against 'any suit . . . seeking damages' does not include an administrative proceeding that can award no damages.").

77. Johnson, *supra* note 74, at 593.

78. *Id.*

79. Paul V. Majkowski, *Triggering the Liability Insurer's Duty to Defend in Environmental Proceedings: Does A Potentially Responsible Party Notification Constitute a "Suit"?*, 67 ST. JOHN'S L. REV. 383, 386 (1993). Mr. Majkowski states "pro-insured results are often obtained through . . . the reasonable expectations doctrine." *Id.* He goes on to say that "[t]he reasonable expectations tests 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." *Id.*

80. *Id.*; see also *Aetna Cas. & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1516-17 (9th Cir. 1991) (concluding that the general notice letter is "unlike the garden variety demand letter"). In a federal CERCLA action, PRPs are required to sign a consent decree when they voluntarily agree to settle the matter. Arthur J. Harrington & Thomas N. Harrington, *Harrington v. Harrington: Two Advocates Square Off on the Edgerton Decision*, ENVTL. L. SECTION M.B.A. 2 (1994). The decree is accompanied by the filing of a Summons and Complaint and is not effective until it is published in the Federal Register. *Id.* PRPs argue these formal requirements justify the position that a reasonable person would construe a general notice letter as an agency action that constitutes a "suit." See *supra* note 79.

81. See Liebesman, *supra* note 49, at 489. See also *Fireman's Fund Ins. Co. v. Cello-O Corp.*, 662 F. Supp. 71, 74 (E.D. Mich. 1987) ("The insurers construe their policies too

C. Interpretation of Damages

The insurers have a similarly narrow interpretation of the word "damages" that relies on a highly technical distinction between the classification of legal and equitable damages.⁸² The argument starts with the premise that response costs are classified as equitable remedies designed to "restore the status quo ante or prevent threatened future injury."⁸³ The insurer argues that the CGL policies only contemplate legal remedies which are designed to compensate for past injuries.⁸⁴ They believe that the two remedies must remain separate or the phrase "pay as damages" will lose all practical value in limiting the insurer's exposure.⁸⁵

The PRPs, however, interpret the term in a different manner. The PRPs consider the term in the CGL to be ambiguous because it could mean legal or equitable damages.⁸⁶ The PRPs rely on the common law contract rule that the court must interpret any ambiguous terms in the contract under their plain meaning.⁸⁷ The insureds argue that reasonable people understand the plain meaning of the term "damages" to encompass any costs incurred as a result of an environmental contamination.⁸⁸ Therefore, in the eyes of the PRPs, a broad definition not only encompasses the plain meaning of the word, it also enforces the original expectations of the parties when the policy was created.

IV. CITY OF EDGERTON V. GENERAL CASUALTY CO.⁸⁹

The Wisconsin Supreme Court has recently silenced the debate on

narrowly: coverage does not hinge on the form of the action taken or the nature of relief sought, but on an actual or threatened use of legal process to coerce payment or conduct by a policyholder."); *Avondale Indus., Inc. v. Commercial Union Co.*, 697 F. Supp. 1314, 1322 (S.D.N.Y. 1988) ("It should be clear that it is misleading to characterize a demand letter . . . as seeking 'voluntary participation in remedial measures.'").

82. Kristen A. Kolesar, Note, *Insurance Coverage for CERCLA Claims Under Comprehensive General Liability Policies: Cleaning Up Hazardous Waste in the Legal Environment*, NOTRE DAME L. REV. 549, 553 n.19 (1993).

83. Johnson, *supra* note 74, at 593 n.88 (citing BARRY OSTRAGER & T. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 8.03 (2d ed. 1989)).

84. Bruce W. Roznowski, *The Insurance Industry Perspective: Unique Coverage Issues*, in ENVIRONMENTAL AND TOXIC TORT CLAIMS: INSURANCE COVERAGE IN 1989 AND BEYOND 8 (1989).

85. *Id.*

86. See Johnson, *supra* note 74, at 596-97.

87. Kolesar, *supra* note 82, at 554.

88. *Id.* at 553 n.18.

89. 184 Wis. 2d 750, 517 N.W.2d 463 (1994), *cert. denied*, 115 S. Ct. 2615 (1995).

the proper interpretation of these terms in *City of Edgerton v. General Casualty Co.*⁹⁰ In one swift blow, the court reversed a pro-insured legal trend in Wisconsin and created an immensely popular forum for insurance companies trying to avoid environmental liability under the duty to defend clauses.⁹¹

A. Overview of the Case

The case involved a landfill in Rock County that was owned and operated by Edgerton Sand & Gravel, Inc. ("ES&G").⁹² The site was primarily used as a place for dumping and burning waste.⁹³ ES&G operated the property as a municipal landfill under a lease with the City of Edgerton (the "City").⁹⁴ In 1978, the EPA suspected groundwater contamination at the site and recommended that the site be closed and capped.⁹⁵ ES&G closed the landfill, but the water contamination problem persisted.⁹⁶ Consequently, the Wisconsin Department of Natural Resources (the "DNR")⁹⁷ recommended that the site be placed

90. *Id.*, 517 N.W.2d at 463.

91. Robert Mullins, *Pushing the Edgerton Envelope: Insurers Edgy After Ruling*, BUS. J.—MILWAUKEE, July 23, 1994, at 2 (quoting Timothy Jablonski, branch manager of insurance broker Johnson & Higgins, as saying Wisconsin went from "being the worst state to be an insurance company in, as far as environmental issues, to being the best state."). Prior to the *City of Edgerton* decision, Wisconsin was a preferable forum for insured parties because it allowed the parties to avoid pollution exclusion clauses in CGL policies. See *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 456 N.W.2d 570 (1990). Pollution exclusion clauses exempt the insurer from covering all occurrences that are not "sudden and accidental" releases of pollution on the property. *Id.* at 741, 456 N.W.2d at 572. In *Just v. Land Reclamation, Ltd.*, the court interpreted the "sudden and accidental" language very broadly and allowed gradual polluters to recover from the insurance companies under the CGL policies. *Id.* at 760, 456 N.W.2d at 578.

92. *City of Edgerton*, 184 Wis. 2d at 758-59, 517 N.W.2d at 468.

93. *Id.*, 517 N.W.2d at 468.

94. *Id.*, 517 N.W.2d at 468.

95. Capping was a process where the EPA places a layer of clay under the topsoil of the contaminated property to contain the hazardous wastes. *Id.* at 759 n.6, 517 N.W.2d at 468 n.6.

96. *Id.* at 759, 517 N.W.2d at 468.

97. Although CERCLA is a federal statute, waste cleanups are actually regulated under both federal and state law. See generally WIS. STAT. §§ 144.442, 144.76 (1987). The Wisconsin statutes mirror the liability system developed under CERCLA by creating a ranking system and a fund for emergency situations. ENVIRONMENTAL PROTECTION AGENCY, AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50 STATE STUDY, 1990 UPDATE 170 (1990). The DNR is the primary enforcement agency in Wisconsin and is "responsible for implementation of the state's direct response hazardous substances cleanup programs and is authorized to take action to take actions to implement the federal programs in cooperation with the Environmental Protection Agency (EPA)." BONDERUD, *supra* note 14, at 1.

on the EPA's list of contaminated sites for priority cleanup.⁹⁸

On June 22, 1989, the DNR notified ES&G and the City that it was investigating the circumstances surrounding the presence of hazardous waste on the property.⁹⁹ Each party immediately informed its insurer, General Casualty Company, and requested payment for any expenses resulting from the investigation.¹⁰⁰ General Casualty Company did not respond to the request.¹⁰¹ In February of 1990, the DNR sent a special notification letter giving each party the option to voluntarily agree to a remediation arrangement or have the EPA place the site on the National Priorities List.¹⁰² Again, the parties notified their insurers of the impending liability and General Casualty Company failed to respond on the basis that the EPA did not constitute a "suit for damages."¹⁰³

The City and ES&G commenced a declaratory action to define the obligations of the insurance company under the CGL policy.¹⁰⁴ The plaintiffs alleged that General Casualty was obligated to defend the parties in the administrative process and indemnify the parties for any losses sustained as a result of the contamination.¹⁰⁵ The trial court agreed with the plaintiffs on the basis that the general liability letter constituted a "suit" under the CGL.¹⁰⁶

The Wisconsin Court of Appeals reversed and ruled that the initial general notice letter did not trigger the insurer's duty to defend.¹⁰⁷ However, the court of appeals ruled that General Casualty was still obligated to defend the action because the subsequent special notice letters triggered the duty to defend.¹⁰⁸ The court of appeals held that the special notice letters created a certain level of "adversariness" between the parties because the letter gave the insured parties an

98. *City of Edgerton*, 184 Wis. 2d at 760-61, 517 N.W.2d at 469. The list for priority clean up is not the same list as the National Priorities List. The list for priority clean up is the initial notification that the DNR is beginning an analysis of the property, which could eventually lead to a place on the NPL.

99. *Id.* at 759-60, 517 N.W.2d at 468.

100. *Id.* at 760, 517 N.W.2d at 468-69.

101. *Id.*, 517 N.W.2d at 468-69.

102. *See supra* note 39 and accompanying text.

103. *City of Edgerton*, 184 Wis. 2d at 758-62, 517 N.W.2d at 468-69.

104. *Id.*, 517 N.W.2d at 468-69.

105. *Id.*, 517 N.W.2d at 468-69.

106. *City of Edgerton v. General Cas. Co.*, 172 Wis. 2d 518, 528, 493 N.W.2d 768, 772 (Wis. Ct. App. 1992).

107. *Id.* at 534, 493 N.W.2d at 775.

108. *Id.*, 493 N.W.2d at 775 ("We conclude that the duty to defend arises when a federal or state environmental agency identifies a PRP which it unequivocally requires to pay the cost of, or participate in paying the cost of, landfill remediation and cleanup.").

ultimatum: voluntarily settle on a remediation agreement or the EPA will force you to settle by putting the property on the NPL.¹⁰⁹

In addition, the Wisconsin Court of Appeals ruled that remediation costs are included as "damages" under the CGL policy.¹¹⁰ The court of appeals was not convinced by the technical distinctions between legal and equitable damages and concluded that the response costs contemplate both past and future injuries.¹¹¹ The court of appeals held that the "insured ought to be able to rely on the common sense expectations that the property damages within the meaning of the policy includes a claim . . . causing him to pay sums of money because of his acts or omissions."¹¹²

B. The City of Edgerton Result—Creating a Friendlier Forum for Insurance Companies

The Wisconsin Supreme Court precluded coverage on both counts by adopting a narrow definition of the terms "suit" and "damages." In defining the word "suit," the court agreed with the court of appeals that the general notice letter did not trigger the duty to defend the insured PRP.¹¹³ However, the court went one step further and ruled that the special notice letter was not encompassed within the definition either.¹¹⁴

The court defined a "suit" as an action requiring an "actual court proceeding, initiated by the filing of a complaint."¹¹⁵ The court determined that neither the general nor special notice letters had any functional importance beyond making the parties aware of their potential liabilities.¹¹⁶ The letters were not confrontational tools that forced the parties to engage in some remedial action on the site, but only served to

109. The appellate court relied on the case *Ryan v. Royal Ins. Co. of Am.*, which listed certain factors that determined whether a notice letter constituted a "suit." *Ryan v. Royal Ins. Co. of Am.*, 916 F.2d 731, 741 (1st Cir. 1990). These factors are the "coerciveness, adversariness, [and] the seriousness of the effort with which the government hounds an insured, and the gravity of the imminent consequences." *Id.* The Wisconsin Court of Appeals concluded that the DNR had taken a sufficient "adversarial posture" to make the special purpose letter a "suit" under this analysis. *City of Edgerton*, 172 Wis. 2d at 539, 493 N.W.2d at 776.

110. *City of Edgerton*, 172 Wis. 2d at 543, 493 N.W.2d at 778.

111. *Id.*, 493 N.W.2d at 778.

112. *Id.*, 493 N.W.2d at 778 (quoting *Upjohn Co. v. Aetna Cas. & Sur. Co.*, 768 F. Supp. 1186, 1199-1200 (W.D. Mich. 1990)).

113. *City of Edgerton v. General Cas. Co.*, 184 Wis. 2d 750, 758, 517 N.W.2d 463, 468 (1994), *cert. denied*, 115 S. Ct. 2615 (1995).

114. *Id.*, 517 N.W.2d at 468.

115. *Id.* at 774, 517 N.W.2d at 474.

116. *Id.*, 517 N.W.2d at 474.

“gather information regarding hazardous substances at the site, as well as to call for voluntary action by the City and ES&G in the process of cleanup.”¹¹⁷

The court relied on *Detrex Chemical Industries v. Employers Insurance of Wausau*¹¹⁸ to support its narrow definition.¹¹⁹ In *Detrex Chemical Industries*, the Detrex Corporation (“Detrex”) brought an action for declaratory judgment against the insurer, Employers Insurance of Wausau, to establish the rights of the respective parties.¹²⁰ Detrex was liable for six different properties throughout the country that were listed on the NPL and it sought coverage under its standard CGL policy.¹²¹

The court concluded that the environmental action did not rise to the level of a “suit” in the CGL policy.¹²² Initially, it looked to the four corners of the policy and discovered that the word “suit” was listed separately from the word “claim” in the contract.¹²³ The court then looked to the plain meaning of the word and determined that it required some action beyond the mere assertion of a claim against the insured PRP.¹²⁴

The *City of Edgerton* court picked up on this distinction and ruled that “neither letter has the attributes of a suit.”¹²⁵ The court also focused on the inherent unfairness of holding the insurance companies to a broad interpretation of the word “suit.” Under Wisconsin law, one of the primary goals in interpreting insurance policies is to enforce the true intentions of the parties.¹²⁶ The court determined that the insurance company had never intended to bind itself to environmental liabilities and, therefore, a broad construction would create an obligation

117. *Id.*, 517 N.W.2d at 474.

118. 681 F. Supp. 438 (N.D. Ohio 1987).

119. *See City of Edgerton*, 184 Wis. 2d at 774, 517 N.W.2d at 474.

120. *Detrex Chemical Industries*, 681 F. Supp. at 441.

121. *Id.* at 442. The policy contained the usual language that the insurer is obligated to “defend any suit against the insured seeking damages on account of such bodily injury or property damage.” *Id.*

122. *Id.* at 443.

123. *Id.*

124. *Id.* (“[A] claim for damages made against Detrex that might result in its legal liability is not synonymous with a ‘suit’ and therefore the making of the claim is not enough to trigger the duty to defend.”).

125. *City of Edgerton*, 184 Wis. 2d at 774, 517 N.W.2d at 474.

126. *See Kremers-Urban Co. v. American Employers Ins.*, 119 Wis. 2d 722, 351 N.W.2d 156 (Wis. 1984).

the parties never intended.¹²⁷

The court also rejected the plaintiffs' definition of "damages" under the CGL.¹²⁸ The court determined that the remediation costs to clean a contaminated site were equitable damages that fell outside the scope of legal damages contemplated by the CGL policy.¹²⁹

The court adopted the narrow definition promulgated in *Shorewood School District v. Wausau Insurance Companies*.¹³⁰ In that case, the Shorewood School District was sued by some schoolchildren and the Board of the School District of the City of Milwaukee for engaging in illegal racial discrimination that resulted in an "inequality of educational opportunity."¹³¹ The complaint sought declaratory and injunctive relief to force the school districts to organize programs and procedures that would reduce the occurrence of racial discrimination in the future.¹³²

The Shorewood School District immediately attempted to get its insurance carrier, Wausau Insurance Companies, to defend the suit under its CGL policy. The policy contained the language that the insurer would "defend any suit against the insured seeking damages on account of such [personal injury]."¹³³ The school district argued that, although the complaint did not assert a direct claim for damages, the expenses incurred in conforming to the court order constituted "damages" under the CGL policy.¹³⁴

The court disagreed with the school district and drew a sharp distinction between legal and restitutionary damages. The court held that insurance policies only included legal damages compensating parties for "past wrongs or injuries" and not equitable remedies to prevent future injuries.¹³⁵ Once the court defined damages in this restrictive manner, the rest of the decision progressed logically. Because the

127. *City of Edgerton*, 184 Wis. 2d at 781, 517 N.W.2d at 477. ("[T]he insurer would be put in the position of anticipating a coverage expectation for which it did not contract or receive payment.").

128. *Id.* at 782, 517 N.W.2d at 477.

129. *Id.*, 517 N.W.2d at 477.

130. 170 Wis. 2d 347, 488 N.W.2d 82 (Wis. 1992).

131. *Shorewood School District*, 170 Wis. 2d at 348, 488 N.W.2d at 85.

132. *Id.*, 488 N.W.2d at 85.

133. *Id.*, 488 N.W.2d at 85 (brackets in original).

134. *Id.* at 365-66, 488 N.W.2d at 88.

135. The *Shorewood* court stated, "[d]amages' as used in these insurance policies unambiguously means legal damages. It is legal compensation for past wrongs or injuries and is generally pecuniary in nature. The term 'damages' does not encompass the cost of complying with an injunctive decree." *Id.* at 368, 488 N.W.2d at 89.

plaintiffs only demanded equitable damages to prevent future discrimination and the school district's insurance policy only included the obligation to defend legal damages, the insurer was not obligated to defend the action.¹³⁶

The *Edgerton* court applied this same reasoning in determining that response costs were not included within the term "damages" in the CGL policy. The court determined that the response costs were actually a monetary form of compliance with the EPA's administrative injunction to clean the land.¹³⁷ The City and ES&G demanded response costs, however the court held that the costs were not included as "damages" under the CGL policy.¹³⁸

The court listed two additional reasons why response costs were not included in the word damages. The first reason was that the phrase "as damages" would lose all value if the term were interpreted broadly because any expense would be encompassed by the definition.¹³⁹ The second reason focused on Congressional intent and the structure of the CERCLA statute. In the liability section of CERCLA, Congress holds a potentially responsible party liable for "all costs of removal or remedial action incurred by the United States Government or a State" or "damages for injury to, destruction of, or loss of natural resources."¹⁴⁰ The court inferred that the separate classification of response costs and natural resource damages meant that Congress intended the response costs as equitable relief and the natural resource losses as compensatory damages.¹⁴¹

The court attempted to bolster its minority position¹⁴² by citing two

136. *Id.* at 374-75, 488 N.W.2d at 92.

137. *City of Edgerton v. General Cas. Co.*, 184 Wis. 2d 750, 785, 517 N.W.2d 463, 478 (1994), *cert. denied*, 115 S. Ct. 2615 (1995).

138. *Id.*, 517 N.W.2d at 478.

139. *Id.* at 784, 517 N.W.2d at 478 ("[T]his court has concluded that if the term 'damages' is given a broader or more expansive interpretation, the phrase 'as damages' would be rendered mere surplusage, since any expenses prior to litigation would be covered by the policies.").

140. 42 U.S.C. § 9607(a)(4)(A), (a)(4)(C) (1994).

141. *City of Edgerton*, 184 Wis. 2d 784, 517 N.W.2d at 478 ("Response costs . . . are, by definition, considered to be equitable relief and reflect a congressional intent to differentiate between cleanup or response costs under 42 U.S.C. sec. 9607(a)(4)(A) and damages for injury, destruction, or loss of natural resources under 42 U.S.C. sec. 9607(a)(4)(C).").

142. *Krueger & Smith*, *supra* note 2, at 4. (providing a survey of how other jurisdictions have decided the "damages" issue). Of the twelve state supreme courts that have decided the issue, only one jurisdiction agrees with the *City of Edgerton* interpretation. *Id.* That case is *Patrons Oxford Mutual Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990). In addition, eleven state appellate courts and six circuit courts of appeal have decided that response costs are damages.

federal cases that ruled similarly on the "damages" issue. The first was *Maryland Casualty Co. v. Armco, Inc.*,¹⁴³ a fourth circuit case in which the defendant, Armco, was included on the list of potentially liable parties for the contamination of a waste storage facility.¹⁴⁴ The EPA brought a suit against the parties seeking injunctive relief to force a settlement between the listed PRPs.¹⁴⁵ Armco immediately contacted its insurer, Maryland Casualty, and demanded to be compensated for any expenses arising from the government action under its CGL policy.¹⁴⁶

The primary issue in the case was whether the EPA's action seeking injunctive relief constituted a claim for "damages" under the CGL. In construing the term, the court determined that it should apply a "legal, technical meaning" differentiating between legal and equitable damages.¹⁴⁷ The court analyzed the relief demanded by the EPA and concluded that the EPA was only seeking to "prevent or mitigate the occurrences or reoccurrences of hazardous contamination"—or, in essence, the EPA was seeking equitable damages.¹⁴⁸ The court held that the CGL policy only covered legal damages.¹⁴⁹ Therefore, the court held that the EPA's action seeking injunctive relief did not constitute a claim for "damages" under the CGL policy.¹⁵⁰

The second case relied on in the *City of Edgerton* decision was *Continental Insurance v. Northeastern Pharmaceutical & Chemical Company, Inc.*¹⁵¹ In that case, Northeastern Pharmaceutical & Chemical Company ("NEPACCO") was involved in the manufacturing industry which produced hazardous waste as a byproduct of its business.¹⁵² The company disposed of the waste by placing it in storage drums and

Krueger & Smith, *supra* note 2, at 2.

143. 822 F.2d 1348 (4th Cir. 1987).

144. *Id.* at 1350.

145. *Id.*

146. The CGL obligated Maryland Casualty:

[T]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by an occurrence; [and] [To] defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false, or fraudulent

Id. at 1350.

147. *Id.* at 1351-52.

148. *Id.* at 1354.

149. *Id.*

150. *Id.*

151. 842 F.2d 977 (8th Cir. 1988).

152. *Id.* at 979.

burying the waste underground.¹⁵³ The drums subsequently leaked and the company was faced with environmental liability under CERCLA.¹⁵⁴ The EPA filed a lawsuit against the PRPs demanding that the parties pay for the response costs.¹⁵⁵ The EPA won the lawsuit and commenced a garnishment action against Continental Insurance Company as NEPACCO's insurer.¹⁵⁶ Continental responded by filing an action for declaratory judgment to define the respective rights of the parties.¹⁵⁷

As in the *Armco* case, the primary issue was whether the government action demanded relief in a form consistent with the definition of damages under the CGL policy. The court held that the plain meaning of the term "damages" only encompassed legal damages, not equitable damages.¹⁵⁸ The court followed the *Armco* decision and ruled that the government claim constituted a claim for equitable damages which were not covered under NEPACCO's CGL policy because the policy only covered legal damages.¹⁵⁹

V. CRITIQUE OF THE CITY OF EDGERTON DECISION

The *City of Edgerton* decision created a wave of fear for many of the municipalities and local business communities facing high liability costs.¹⁶⁰ What caused the most fear was the court's narrow interpretation of the word "damages." The decision unequivocally stated that response costs were not "damages" under the CGL policy and, therefore, the insurer will never have to pay those expenses even when the EPA files a formal lawsuit.¹⁶¹

As of September 30, 1994, Wisconsin had forty sites listed on the NPL and another fifteen sites nominated for the list.¹⁶² At that time,

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 981.

157. *Id.*

158. *Id.* at 985-87.

159. *Id.* at 985.

160. A list of over 60 businesses and industries petitioned the Wisconsin Supreme Court to reconsider its decision. Mullins, *supra* note 91. The article stated, "Some businesses and municipalities now worry that their liability insurance policies are virtually worthless for this type of liability, and fear they'll go bankrupt cleaning up environmental contamination on their own." *Id.*

161. *City of Edgerton v. General Cas. Co.*, 184 Wis. 2d 750, 782, 517 N.W.2d 463, 477 (1994), *cert. denied*, 115 S. Ct. 2615 (1995) ("The CGL policies in this case do not provide coverage for Superfund response costs, since such costs do not constitute damages.").

162. BONDERUD, *supra* note 14, at 3.

the EPA was in the process of evaluating an additional 300 sites in the state that could potentially become Superfund projects in the future.¹⁶³ Of the forty sites listed on the NPL, twenty-nine projects were financed by the PRPs.¹⁶⁴ The cost of the current environmental projects in Wisconsin was estimated at \$215,000,000, of which local municipalities, like the City of Edgerton, were responsible for approximately \$92,760,000.¹⁶⁵ The court's interpretation of the CGL policy assures that all PRPs will not receive insurance coverage for their portion of the \$215,000,000 liability attributed to response costs.

This severe result raises the question of whether the court interpreted the language in the duty to defend clause correctly. The decision is susceptible to three major criticisms. The first criticism stems from the court's interpretation of the word "suit." In defining the word in such a narrow manner as an "actual court proceeding[], initiated by the filing of a complaint,"¹⁶⁶ the court is motivating parties to prolong the settlement process.¹⁶⁷ If the court requires a formal judicial proceeding to trigger the duty to defend clause, the PRPs will not begin the remediation process until that action is filed to avoid the risk that their insurer will deny coverage under *City of Edgerton*. The net result is that the PRPs will be motivated to ignore general notice letters, prolong settlement negotiations, and wait for a formal judicial filing.¹⁶⁸

163. *Id.*

164. *Id.*

165. See Tom Cioni, *Landfill Cleanup Ruling Could Have Costly Implications for Cedarburg*, MILWAUKEE J., June 28, 1994, at 1. The article cites an informal survey conducted by the League of Wisconsin Municipalities in which the League faxed questionnaires to 158 Wisconsin cities (the state has total of 189 cities). Memorandum from League of Wisconsin Municipalities (June 28, 1994) (on file with author). The questionnaires asked the cities if any of them were currently under orders from a government agency to investigate or cleanup any landfill sites. *Id.* In addition, the questionnaire asked what the city's share of the total cost was for inspection and remediation. *Id.* Of the 106 cities that responded to the questionnaires, 38 of those cities were either third parties in an environmental action or under orders from a government agency to engage in a cleanup program. *Id.* The total cost of these cleanup measures was \$215,202,924. *Id.*

Another interesting aspect of the survey was a follow-up question that asked whether the city believed it had insurance to cover these costs. *Id.* Twenty of the 38 cities believed they had insurance coverage, 10 cities were not sure if they had insurance coverage, and 7 cities believed they did not have insurance. *Id.*

166. *City of Edgerton v. General Cas. Co.*, 184 Wis. 2d 750, 775, 517 N.W.2d 463, 474 (1994), *cert. denied*, 115 S. Ct. 2615 (1995).

167. Harrington, *supra* note 80, at 2; Richard W. Fields & Priscilla Anne Whitehead, *Wisconsin's Summer Surprise: Life After Edgerton*, 7 ENVTL. CLAIMS J. 117 (Winter 1994/95).

168. Some commentators respond to this argument by stating that the PRPs will not wait for the formal filing because it would compromise the client's other rights. See Heidi L. Vogt, *City of Edgerton v. General Casualty of Wisconsin: A Landmark Decision in Wisconsin*

The second major criticism is that the court's interpretation diverges from precedent in Wisconsin and other jurisdictions that have decided the issue. Under Wisconsin law, courts give unambiguous terms in insurance policies a "plain and ordinary meaning."¹⁶⁹ Most jurisdictions that have decided the issue have determined that the plain and ordinary meaning of "damages" does not include the hyper-technical distinction between legal and equitable relief.¹⁷⁰ There is a strong argument that most people would not construe the word damages in such a technical sense and would believe that the response costs would be encompassed within the definition. Therefore, the majority of jurisdictions interpreting damages, unlike the court in *City of Edgerton*, seem to enforce the meaning that the parties intended when they formed the insurance policy. In addition, there is evidence to suggest that the insurance industry itself attributed a broad, inclusive meaning to the term damages within the standard CGL policy.¹⁷¹

The third criticism of the decision is that the cases used to support the court's interpretation of "damages" have been gutted of all substantive value. In *Bausch & Lomb Inc. v. Utica Mutual Insurance Co.*,¹⁷² the Maryland Court of Appeals rejected the Fourth Circuit's analysis in *Armco* and ruled that response costs were not distinct from legal damages.¹⁷³ Similarly, in *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*,¹⁷⁴ the District Court of Columbia rejected

Insurance Coverage Law, 68 WIS. LAW. May 1995 at 10, 12. Although this assertion is true, the fact remains that if the PRP wants to recover a portion of the remediation costs (i.e., natural resources damages), the PRP will have to wait for a formal filing to fall within the parameters of the duty to defend clause.

169. *Frank v. Wisconsin Mut. Life Ins.*, 543 N.W.2d 535, 536 (Wis. Ct. App. 1995).

170. Fields and Whitehead note that *City of Edgerton* stands contrary to "the great majority of U.S. Courts of Appeals, Wisconsin federal district courts, and the unanimous panel of Wisconsin Court of Appeals in the [Edgerton] decision." Fields & Whitehead, *supra* note 167, at 118. See also Ostrager *supra* note 67 (providing a synopsis of state cases interpreting the definition of damages and suit).

171. See Jordan S. Stanzler & Charles A. Yuen, *Coverage for Environmental Cleanup Costs: History of the Word "Damages" in the Standard Form Comprehensive General Liability Policy*, 3 COLUM. BUS. L. REV. 449, 479, 457-487 (1990). Stanzler and Yuen state "the insurance industry would have been surprised to hear the industry's current 'damages' arguments By the 1940s, the insurance industry was well aware that any substantive distinction between 'damages' and 'injunctive relief' in actions to remedy the [environmental contamination] had become insignificant." *Id.* at 479.

172. 625 A.2d 1021 (Md. 1993).

173. *Id.* at 1033 ("We do not think that the construction of the phrase 'pay as damages' based on the ordinary meaning of the words improperly reduces the concept of damages to mere surplusage.").

174. 944 F.2d 940 (D.C. Cir. 1991).

the *Northeastern Pharmaceutical* decision stating "[w]e also reject the insurers' argument, adopted in NEPACCO . . . that the language of CERCLA is against construing the word 'damages' to encompass liability for the governments' cleanup costs."¹⁷⁵

These criticisms have, in part, lead to a movement in the Wisconsin appellate courts to restrict the application of the decision to the facts of the case. The court has not extended *City of Edgerton* to claims for response costs by owners of property against insured parties that contributed to the contamination.¹⁷⁶ Neither has the court extended *City of Edgerton* to other clauses within the CGL policy¹⁷⁷ (i.e., umbrella policies). Thus, *City of Edgerton* stands only "for the proposition that letters from an environmental agency do not constitute a suit and that the agency's order to an owner or occupier of land to remediate the land is nothing more than an order for injunctive relief [which does not constitute damages]."¹⁷⁸

VI. CONCLUSION

It has been three years since the Wisconsin Supreme Court decided *City of Edgerton*. Although the case seemed to dramatically change environmental law in Wisconsin, the true effect of the case seems rather minimal. Many of the fears and apprehensions of business communities and municipalities toward the court's narrow interpretation of "suit" and "damages" have not been realized as a result of the court's willingness to limit the application of the case. The Wisconsin Supreme Court should limit the decision to the facts of the case because it prolongs the settlement process, misconstrues the plain and ordinary interpretation of

175. *Id.* at 946-47.

176. See, e.g., *General Cas. Co. of Wisconsin v. Hills*, 201 Wis. 2d 1, 548 N.W.2d 100 (Wis. Ct. App. 1996); *Wisconsin Pub. Serv. Corp. v. Heritage Mut. Ins. Co.*, 200 Wis. 2d 821, 548 N.W.2d 544 (Wis. Ct. App. 1996); *Spic & Span, Inc. v. Continental Cas. Co.*, 203 Wis. 2d 118, 522 N.W.2d 435 (Wis. Ct. App. 1996); *Sauk County v. Employers Ins. of Wausau*, 202 Wis. 2d 434, 550 N.W.2d 439 (Wis. Ct. App. 1996).

For example, in *General Casualty Co. of Wisconsin v. Hills*, the owner of a contaminated waste disposal site sued one of the contributors as a third party defendant for response costs. *Hills*, 201 Wis. 2d at 3-4, 548 N.W.2d at 101. The contributor filed a claim with its insurer and the insurer denied coverage on the basis that response costs were not damages under the CGL. *Id.*, 548 N.W.2d at 101. The court held that the *City of Edgerton* did not apply to these facts because the contributor did not own the property and the landowner's claim was seeking monetary compensation, not injunctive relief. *Id.* at 13, 548 N.W.2d at 104.

177. *General Cas. Co. of Wisconsin v. Getzen Co.*, 205 Wis. 2d 111, 555 N.W.2d 409 (Wis. Ct. App. 1996).

178. *Hills*, 201 Wis. 2d at 10, 548 N.W.2d at 103.

the terms, and relies upon substantively questionable precedent. The time has come to accept *City of Edgerton* for what it really is: a poorly construed case subject to valid criticisms that should limit the decision to the facts of the case.

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