Missouri Law Review

Volume 55
Issue 2 *Spring 1990*

Article 5

Spring 1990

Are Costs to Clean Up--Cleanup Costs Federal Courts Refuse to Agree on Whether Toxic Waste Cleanup Costs Are Damages under Missouri Law

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ARE COSTS TO CLEAN UP—CLEANUP COSTS? FEDERAL COURTS REFUSE TO AGREE ON WHETHER TOXIC WASTE CLEANUP COSTS ARE "DAMAGES" UNDER MISSOURI LAW

Jones Truck Lines v. Transport Insurance Co.[1]

Since the passage of the Comprehensive Environmental Response, Compensation, and Liability (SUPERFUND) Act[2] in 1980, there has been an explosion of litigation concerning the extent to which an insured is covered under his comprehensive general liability (CGL)[3] insurance

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1. No. 88-5723 (E.D. Pa. May 10, 1989) (WESTLAW, 1989 WL 49517) (memorandum on summary judgment) [hereinafter *Jones*] and (June 28, 1989) (WESTLAW, 1989 WL 71595) (memorandum of Findings of Fact and Conclusions of Law) [hereinafter *Jones Memorandum*].

2. 42 U.S.C. §§ 9601-9675 (Supp. V 1987). Section 107 of SUPERFUND establishes liability for:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release . . . .

42 U.S.C. § 9607(a)(4) (Supp. V 1987).

3. One commentator described the history of the CGL as follows:

> The standard form of comprehensive general liability (CGL) policies of insurance was first introduced in 1940 and subsequently revised in 1943, 1955, 1966, and 1973. The standard CGL insurance policies contain uniform language prepared by the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau and since 1972, the Insurance Services Office. The policy provides coverage for a policyholder's legal liability as follows:
>
> > The company 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* to which this [insurance] applies, 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

policy.[4] One of the primary issues in these cases has been whether CGL policies cover environmental cleanup costs.[5]

The policies behind SUPERFUND favor coverage.[6] One of the major purposes of SUPERFUND is to promote the speedy, cost-efficient cleanup of hazardous waste.[7] By holding that CGL policies do not cover cleanup costs, courts thwart this goal by giving an insured incentive not to immediately clean up contaminated waste. Such holdings encourage the insured to wait to clean up the contamination until actual damage has occurred or the insured has been sued.[8]

Most of the litigation on whether CGL policies cover cleanup costs has taken place in federal court. But because insurance contract interpretation is a substantive issue under the *Erie*[9] doctrine, state law must be used to decide the issue. The Missouri Supreme Court has not yet dealt with the issue.[10] This could change given the recent enactment of Missouri's certified question rule.[11] This rule allows parties litigating in federal court a state law question to which there is no controlling precedent in Missouri to refer the question to the Missouri Supreme Court for decision.[12] SUPERFUND litigants are likely to be eager to certify the question of whether under Missouri law CGL policies cover cleanup costs. Currently, however, only federal courts have dealt with the issue.

> such *bodily injury* or *property damage*, even if any of the allegations of the suit are groundless, faultless or fraudulent . . . .

Kahn, *Looking For "Bodily Injury": What Triggers Coverage Under A Standard Comprehensive General Liability Insurance Policy?*, 19 FORUM 532, 532 (1984). For a history of the CGL, see American Home Prod. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1500-03 (S.D.N.Y. 1983).

4. Hapke, *Federal Circuit Court Insurance Decisions Contaminate Superfund Policy*, 19 ENVTL. L. REP. 10393, 10395 (1989).

5. *Id.*

6. *See infra* notes 212-17 and accompanying text.

7. *See infra* note 212 and accompanying text.

8. *See infra* note 217 and accompanying text.

9. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

10. In fact the only Missouri decision to deal with this issue is an unreported Circuit Court Memorandum, Order and Partial Judgment of September 8, 1989 in Cooper Indus. v. American Mut. Liab. Ins. Co., No. 864-00284 (Cir. Ct. of the City of St. Louis September 8, 1989).

11. MO. REV. STAT. § 477.004 (Supp. 1989)

12. MO. REV. STAT. § 477.004 (Supp. 1989). Since the writing of this Note the issue in question has indeed been certified to the Missouri Supreme Court by the Third Circuit. Jones Truck Lines v. Transport Ins. Co., No. 72650 (Mo. July 13, 1990) (en banc). The court found, however, that it had no authority under the Missouri Constitution to answer such questions. *Id.*

In *Continental Insurance v. Northeastern Pharmaceutical and Chemical Co. (NEPACCO),*[13] the Eighth Circuit, applying Missouri law and predicting how the Missouri Supreme Court would rule on this issue, held that cleanup costs imposed under SUPERFUND are not covered under a standard form CGL. More recently though in *Jones Truck Lines v. Transport Insurance Co. (Jones),*[14] the United States District Court for the Eastern District of Pennsylvania, applying Missouri law, held that such costs are covered under a CGL.

I. FACTS AND HOLDING

Jones Truck Lines (Jones) brought a declaratory judgment action against its insurer, Transport Insurance Co. (Transport), in the United States District Court for the Eastern District of Pennsylvania.[15] Jones asked the court to clarify the extent to which hazardous waste cleanup costs incurred by Jones in order to avoid the initiation by the Environmental Protection Agency (EPA) of a SUPERFUND or Resource Conservation and Recovery (RCRA) Act[16] action against Jones were covered under a CGL issued to Jones by Transport.[17]

Transport provided insurance to Jones under two CGL policies from January 1, 1970 to January 1, 1973.[18] These policies provided coverage "for *damages* . . . for loss of or damage to property of others."[19] During the coverage period Jones operated three trucking terminals in Missouri.[20] During the coverage period Jones had a contractor spray one of these terminals, the Hall Street facility, with oil

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13. 842 F.2d 977 (8th Cir. 1988) (en banc).

14. *Jones*, No. 88-5723 (E.D. Pa. May 10, 1989) (WESTLAW, 1989 WL 49517).

15. *Jones Memorandum*, WESTLAW op. at 1.

16. 42 U.S.C. §§ 6901-6991i (Supp. V 1987).

17. *Jones Memorandum*, WESTLAW op. at 1.

18. An Occupational Comprehensive Liability and Comprehensive Physical Damage Policy which provided Jones with up to $15,000 of coverage and an excess Occupational Comprehensive Liability and Comprehensive Physical Damage Policy which provided Jones with up to $4,985,000 of coverage. *Jones*, WESTLAW op. at 2. The policies provided:

> (1) [For the insurer] [t]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay for damages, arising out of the occupation of the named insured, as stated in the declarations, as a result of personal injury, bodily injury, sickness, disease or death to persons and for loss of or damage to property of others.

Id. at 3-4.

19. *Id.* at 4 (emphasis added).

20. *Jones*, WESTLAW op. at 2.

to control dust on the unpaved roads around the facility.[21] In 1982, Jones learned that the Hall Street facility was on a list prepared by the EPA of sites that might be contaminated with dioxin.[22] Samples of the soil taken in 1983 confirmed the presence of dioxin in the soil at the Hall Street facility.[23]

The EPA was ready and willing to take control and clean up the site and bring an action against Jones under SUPERFUND or RCRA if Jones did not clean up this site.[24] To avoid this, Jones hired a private firm to do the cleanup and contamination control requested by the EPA.[25] Jones claimed to have incurred $320,000 for the investigation and cleanup of the Hall Street facility.[26]

Transport denied liability for the costs incurred in cleaning up the Hall Street facility and sought summary judgment in the declaratory judgment action.[27] Transport alleged that the costs incurred by Jones in connection with the Hall Street facility were not *damages* to property as contemplated by the policies.[28] As a basis for its motion, Transport relied on the Eighth Circuit's holding in *NEPACCO* that under Missouri law "damages" in a CGL does not include cleanup costs.[29]

The district court was unable to discern any basis for the *NEPACCO* decision under Missouri case law.[30] The court found that hazardous waste cleanup costs are "damages" as the term is used in comprehensive general liability insurance policies and denied Transport's motion for summary judgment.[31]

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21. *Id.* at 3.
22. *Id.*
23. *Id.*
24. *Id.* at 24.
25. *Id.*
26. *Id.*
27. *Id.* at 1.
28. *Id.* at 11 (emphasis added). Transport also sought summary judgment on two additional grounds. First, Transport argued that the costs Jones incurred in connection with the Hall Street facility were not covered by the policies because they were costs incurred by Jones to clean up its own property only. *Id.* Second, Transport argued that the costs that Jones incurred were not covered by the policies since Jones was not legally obligated to pay for such costs by any judgment or agreement. *Id.* The court denied Summary Judgment on both of these grounds also. *Id.* at 26.
29. *NEPACCO*, 842 F.2d at 979.
30. *Jones*, WESTLAW op. at 20.
31. *Id.*

II. LEGAL BACKGROUND

A. The Road to NEPACCO

Many decisions have held that cleanup costs do not constitute "damages" under a CGL.[32] Some of these decisions were rendered before the passage of SUPERFUND and involve cleanup of nontoxic substances.[33] They are important, though, because later courts dealing with toxic waste-related-cleanups relied on their reasoning on whether cleanup costs constitute "damages."[34] Two of the most important of these decisions are *Desrochers v. New York Casualty Co.*[35] and *Aetna Casualty and Surety Co. v. Hanna.*[36] In *Desrochers,* the insured, the Desrochers, regraded a marshy area on their land.[37] In doing so they obstructed a culvert bordering their property.[38] As a result, their

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32. Cincinnati Ins. Co. v. Milliken & Co., 857 F.2d 979, 981 (4th Cir. 1988) (South Carolina law); *NEPACCO,* 842 F.2d at 987; Maryland Cas. Co. v. Armco, Inc., 822 F.2d 1348, 1354 (4th Cir. 1987), *cert. denied,* 484 U.S. 1008 (1988) (Maryland law); Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1329 (4th Cir. 1986) (response costs are an economic loss under Maryland law); Aetna Cas. & Sur. Co. v. Hanna, 224 F.2d 499, 503 (5th Cir. 1955) (Florida law); Aetna Cas. v. Gulf Resources, 709 F. Supp. 958, 961 (D. Idaho 1989) (court found arguments that cleanup costs do not constitute "damages" persuasive, but denied coverage for another reason under Idaho law); Maryland Cas. Co. v. Ormond, No. 87-3038, slip op. at 12 (W.D. Ark. Jan. 6, 1989) (Arkansas law); Ft. McHenry Lumber Co. v. Pennsylvania Lumbermen's Mut. Ins. Co., No. HAR 88-825, WESTLAW op. at 6 (D. Md. Sept. 23, 1988) (1989 WL 74843) (Maryland law); Verlan, Ltd. v. John L. Armitage & Co., 695 F. Supp. 950, 955 (N.D. Ill. 1988), *reconsideration denied,* No. 87-C-5121 (N.D. Ill. Jan. 27, 1989) (WESTLAW, 1989 WL 8590) (Illinois law); Hayes v. Maryland Cas. Co., 688 F. Supp. 1513, 1515 (N.D. Fla. 1988) (Florida law); Travelers Ins. Co. v. Ross Elec., 685 F. Supp. 742, 745 (W.D. Wash. 1988) (Washington law); Garden Sanctuary, Inc. v. Insurance Co. of N. Am., 292 So. 2d 75, 77 (Fla. Dist. Ct. App. 1974); Ladd Constr. Co. v. Insurance Co. of N. Am., 391 N.E.2d 568, 570 (Ill. App. Ct. 1979); Desrochers v. New York Cas. Co., 99 N.H. 129, 106 A.2d 196, 199 (1954).

33. *Hanna,* 224 F.2d 499 (removal of boulders and fill material); *Garden Sanctuary,* 292 So. 2d 75 (restoration of burial grounds to its natural state); *Ladd,* 391 N.E.2d 568 (removal of slag pile which collapsed on neighboring railroad tracks); *Desrochers,* 99 N.H. 129, 106 A.2d 196 (removal of obstruction from drainage culvert).

34. *NEPACCO,* 842 F.2d at 985-86; *Maryland Cas.,* 822 F.2d at 1352-53; *Verlan,* 695 F. Supp. at 953-54; *Ross,* 685 F. Supp. at 745.

35. 99 N.H. 129, 106 A.2d 196 (1954).

36. 224 F.2d 499 (5th Cir. 1955).

37. *Desrochers,* 99 N.H. at 130, 106 A.2d at 197.

38. *Id.*

neighbor's land was flooded.[39] The neighbor filed a bill of equity against the Desrochers asking the court to order the Desrochers to remove the obstruction.[40] The court awarded damages to the neighbors and ordered the Desrochers to remove the obstruction.[41] The Desrochers' insurer paid the damages but denied liability for the cost of removing the obstruction.[42]

The Desrochers brought a declaratory judgment action against their insurer asking the court to determine the extent to which they were covered under their CGL policy.[43] On appeal, the Supreme Court of New Hampshire determined that the insurance agreement did not provide coverage for the costs the insured would incur in complying with the injunction.[44]

The court reasoned that if the Desrochers were to arrange for others to do work necessary for compliance with the injunction, the costs would be sums which the insured would be legally obligated to pay but would not be sums which they were obligated to pay "as damages."[45] "Damages," wrote the court, "are recompense for injuries sustained."[46] "They are remedial rather than preventative in nature."[47] The expense of restoring the Desrochers' property would not *remedy* injury to any third party.[48] It would only prevent future harm.[49] The court held

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39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 130, 106 A.2d at 196.

44. *Id.* at 131, 106 A.2d at 198.

45. *Id.* The court wrote that the insured's legal obligation to pay would arise from a contract with the repairer and that liability assumed under contract was expressly excluded from coverage under the policy. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 132, 106 A.2d at 198.

49. *Id.* at 132-33, 106 A.2d at 198-99. The court reasoned that the insurer was not liable to indemnify the Desrochers for this future harm because the Desrochers would not become legally obligated to pay for the harm until another flood occurred. Since the Desrochers's coverage had already terminated, no liability could possibly arise during the coverage period. *Id.* Missouri courts would be unlikely to rule the same way under similar circumstances. Both the majority and the dissent in *NEPACCO* agreed that Missouri "would probably adopt the 'exposure' theory of coverage." *NEPACCO*, 842 F.2d at 984. Under the exposure theory of coverage an injury occurs when "one is first exposed to that which eventually causes the injury." Hadzi-Antich, *Coverage for Environmental Liabilities Under the Comprehensive General Liability Insurance Policy; How to Walk a Bull through a China Shop*, 17 CONN. L. REV. 769, 782 (1985). Arguably the blocking of the culvert could be viewed as the first exposure to

the term "damages," does not include the cost of compliance with a mandatory injunction.[50]

In *Aetna Casualty and Surety Co. v. Hanna*, the Fifth Circuit expanded the *Desrochers* holding.[51] In *Hanna*, the insured filled in a once submerged lot with boulders, trash, and dirt.[52] Storms and high water undermined the retaining wall separating the Hannas' lot from their neighbor's lot.[53] The fill was deposited on the neighbor's lot.[54] The neighbor brought an action against the Hannas to have them remove the boulders and fill. The action also sought to restrain further trespass by requiring the Hannas to build a retaining wall.[55]

The Hannas's insurer refused to defend or to indemnify the Hannas.[56] The Hannas brought suit against the insurer seeking damages for the insurer's failure to indemnify.[57] On appeal, the Fifth Circuit concluded that the insured had no duty to indemnify the Hannas.[58]

Under the policy, the court wrote, the insurer only had an obligation to *pay*, not to remove boulders and dirt.[59] The court interpreted the policy as only requiring payment if the third party had a legal claim for "damages."[60] "Damages," the court maintained, "has an accepted technical meaning in law."[61] "Damages," wrote the court, are "pecuniary compensation or indemnity which may be recovered in the courts by any person who has suffered loss, detriment or injury."[62] "This," concluded the Fifth Circuit, "is a far cry from the cost to unsuccessful litigants of complying with an injunctive decree."[63]

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which the later injury would relate back.

50. *Desrochers*, 99 N.H. at 132-33, 106 A.2d at 199.
51. *Hanna*, 224 F.2d 499 (5th Cir. 1955).
52. *Id.* at 500.
53. *Id.*
54. *Id.*
55. *Id.* at 501.
56. *Id.*
57. *Id.* at 502.
58. *Id.* at 504.
59. *Id.* at 503 (emphasis added).
60. *Id.* at 503.
61. *Id.*
62. *Id.* (quoting BLACK'S LAW DICTIONARY 499 (3d ed. 1933)).
63. *Hanna*, 224 F.2d at 503. The court also argued that damages in an action for trespass equals the difference in value of the land before and after the trespass, not the cost of removing the rocks. *Id.* The addition of rocks, hypothesized the court, in some situations might have increased the value of the land. *Id.* Missouri, however, has accepted a definition of damages which measures damages as the cost of restoring the land to its original condition.

The first SUPERFUND case to hold that cleanup costs do not constitute damages under a CGL was *Maryland Casualty Co. v. Armco, Inc.*[64] In *Armco*, the insured, an original waste generator, stored its waste at a storage site which followed improper storage techniques which resulted in seepage of toxic chemicals into the soil and groundwater surrounding the site.[65] The federal government brought suit against the owners of the waste storage facility and the original waste generators including the insured under SUPERFUND and RCRA.[66] The government sought the defendant's compliance with a comprehensive remedial action program to prevent further seepage and to reimburse the government for its response costs.[67]

The insured brought a declaratory judgment action against its insurer to determine the extent to which it was covered under its CGL.[68] On appeal, the Fourth Circuit held that the insured was not covered for the costs of complying with the SUPERFUND order.[69] The court held that a "claim seeking compliance with the regulatory directives of a federal agency, which compliance takes the form of obedience to injunctions and reimbursement of remedial costs, does not constitute a claim for 'damages' under the insurance policy."[70] The court stated that previous judicial decisions had given a limited definition to the term "damages."[71] The term "damages," the court wrote, denotes "only payments to third persons when those persons have a legal claim for damages."[72] Reimbursement of cleanup costs pursuant to SUPERFUND is not "damages" in this legal sense.[73] It is a form of equitable remedial relief.[74]

These three cases delineate the major arguments in favor of not regarding cleanup costs as "damages." *Desrochers* and *Hanna* stand for the proposition that actions for equitable injunctive relief are not actions

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Jack L. Baker Cos. v. Pasley Mfg. & Distrib. Co., 413 S.W.2d 268, 273 (Mo. 1967) ("where damaged property can be restored to its former condition at a cost less than the diminution in value, the cost of restoration is the proper recovery").

64. 822 F.2d 1348 (4th Cir. 1987).

65. *Id.* at 1350.

66. *Id.*; United States v. Conservation Chem. Co., 653 F. Supp. 152 (W.D. Mo. 1986).

67. *Armco*, 822 F.2d at 1350-51.

68. *Id.* at 1351; Maryland Cas. Co. v. Armco, Inc., 643 F. Supp. 430 (D. Md. 1986).

69. *Armco*, 822 F.2d at 1354.

70. *Id.* at 1350.

71. *Id.* at 1352.

72. *Id.* (quoting *Hanna*, 224 F.2d at 503).

73. *Armco*, 822 F.2d at 1352.

74. *Id.*

for "damages."[75] *Armco* stands for the proposition that actions for the equitable relief of restitution or reimbursement are not actions for "damages."[76] The rule in *Desrochers* and *Hanna* precludes the insurer from being liable when the insured is ordered to clean up a site. The rule in *Armco* precludes an insurer from being liable when the insured is asked to reimburse a government agency for cleaning up a site. Many other cases have relied on the reasoning of these three cases or similar reasoning in holding that cleanup costs do not constitute damages under a CGL.[77]

B. Aviex and its Progeny

United States Aviex Co. v. Travelers Insurance Co.,[78] was the first of a line of cases rejecting the equitable/legal distinction developed in *Desrochers* and *Hanna*.[79] In *Aviex*, a fire destroyed Aviex's chemical manufacturing facility.[80] Water used in extinguishing the fire caused toxic chemicals to seep into the ground contaminating the groundwater beneath Aviex's property.[81] The Michigan Department of Natural Resources ordered Aviex to have performed a study to determine the extent of the contamination and to correct the contamination.[82] Aviex's insurer denied coverage under the CGL policy for both the costs incurred in performing the study and the costs to cleanup the contamination.[83] Aviex brought a declaratory judgment action asking the court to clarify the obligation of its insurer to pay the costs.[84] The trial court held that the insurer was liable to pay the costs and the Michigan Court of Appeals affirmed.[85]

The court of appeals found that *Aetna* and *Desrochers* had interpreted "damages" too narrowly.[86] Since the Attorney General of Michigan could have filed suit to recover full value for injuries done to natural

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75. *See supra* text accompanying notes 37-63.

76. *See supra* text accompanying note 70.

77. *See supra* note 32 and accompanying text.

78. 125 Mich. App. 579, 336 N.W.2d 838 (Mich. App. 1983).

79. Hapke, *supra* note 4, at 10396.

80. *Aviex*, 125 Mich. App. at 583, 336 N.W.2d at 840.

81. *Id.*

82. *Id.* The insured was notified that it "must conduct an investigation to determine the extent of the contamination and correct the contamination or the DNR [Michigan's Department of Natural Resources] would refer the matter for legal action." *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 584-85, 590, 336 N.W.2d at 841, 843.

86. *Id.* at 589, 336 N.W.2d at 843.

resources of the state[87] in which case the insurer's liability would have been clear, the court wrote that it was "merely fortuitous" that the Attorney General had decided not to do so but instead decided to order the insured to remedy the problem.[88] The damage to the natural resources, the cost to restore the water to its original condition, is the same in either case.[89]

Aviex is important for two reasons. First, implicit in the *Aviex* decision is the idea that if the government cleans up a toxic waste site and sues the insured for the costs it incurs in doing so, payments made by the insured are "damages." The court in *Aviex* assumed rather than decided this. A number of courts have held rather than assumed that this is so.[90]

Second, the court in *Aviex* held that the costs incurred by the insured in complying with a government order for the insured to clean up the substances are "damages."[91] *Aviex* based this holding on the similarity between such liability and the liability imposed upon an insured when the government cleans up the property and has the insured reimburse the costs.[92] A number of other courts have also reached this conclusion.[93]

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87. *Id.* at 589-90, 336 N.W.2d at 843.

88. *Id.* at 590, 336 N.W.2d at 843.

89. *Id.* This measure of damages was rejected by the courts in *Armco*, *Hanna*, and *Desrochers*. *Armco*, 822 F.2d at 1353; *Hanna*, 224 F.2d at 503; *Desrochers*, 99 N.H. at 132-33, 106 A.2d at 199.

90. National Indem. Co. v. U.S. Pollution Control, Inc., 717 F. Supp. 765, 767 (W.D. Okl. 1989); Chesapeake Utils. Corp. v. American Home Assurance Co., 704 F. Supp. 551, 565 (D. Del. 1989); U.S. Fidelity & Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139, 1168 (W.D. Mich. 1988); Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 662 F. Supp. 71, 75 (E.D. Mich. 1987); CPS Chem. Co. v. Continental Ins. Co., 222 N.J. Super. 175, ---, 536 A.2d 311, 314 (Ct. App. Div. 1988).

91. *Aviex*, 125 Mich. App. at 587-90, 336 N.W.2d at 842-43.

92. *Id.* at 589-90, 336 N.W.2d at 843.

93. Avondale Ind., Inc. v. Travelers Indem. Co., 887 F.2d 1200 (2d Cir. 1989); Port of Portland v. Water Quality Ins. Syndicate, 796 F.2d 1188, 1194 (9th Cir. 1986) (cleanup costs are recoverable under a property damage liability clause); Chesapeake Utils. Corp. v. American Home Assurance Co., 704 F. Supp. 551, 561 (D. Del. 1989); Intel Corp. v. Hartford Accident & Indem. Co., 692 F. Supp. 1171, 1192 (N.D. Cal. 1988); Centennial Ins. Co. v. Lumbermens Mut. Cas. Co., 677 F. Supp. 342, 350 (E.D. Pa. 1987); New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1365-66 (D. Del. 1987); Township of Gloucester v. Maryland Cas. Co., 668 F. Supp. 394, 400 (D. N.J. 1987); Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 662 F. Supp. 71, 75 (E.D. Mich. 1987); Upjohn Co. v. New Hampshire Ins. Co., 178 Mich. App. 706, 720, 444 N.W.2d 813, 819 (1989); Broadwell Realty Servs. v. Fidelity & Cas. Co., 218 N.J.

Representative of the cases holding that "damages" includes the cost of reimbursing the government for cleanup costs the government incurs in cleaning up a site is *U.S. Fidelity and Guaranty Co. v. Thomas Solvent Co.*[94] In this case, Thomas Solvent Company, the insured, contaminated the groundwater beneath the land it occupied with industrial solvents which it produced.[95] The groundwater flow caused residential wells located nearby to become contaminated and also carried the contamination to a nearby city.[96] The United States, acting under the authority of SUPERFUND, sought reimbursement of costs incurred in responding to the release of these hazardous substances.[97] Thomas Solvent Company's insurer refused to defend it in the action.[98] The insurer argued that claims by the EPA for remedial and response costs are not claims for "damages" under a CGL.[99]

The judge deciding the case was not convinced by the insurer's arguments. The judge especially took issue with the insurer relying on the historical distinction between law and equity to deny coverage.[100] The judge wrote that "the insured ought to be able to rely on the common sense expectation that property damage within the meaning of the policy includes a claim which results in causing him to pay sums of money because his acts or omissions affected adversely the rights of

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Super 516, ---, 528 A.2d 76, 82 (Ct. App. Div. 1987); *cf.* Chemical Applications Co. v. Home Indem. Co., 425 F. Supp. 777, 779 (D. Mass. 1977) (insured was covered under CGL where insured performed removal and cleanup work itself instead of permitting government to have it done by others and bring suit); Lansco, Inc. v. Department of Envtl. Protection, 138 N.J. Super. 275, 284, 350 A.2d 520, 525 (Ct. Ch. Div. 1975) (determines that cleanup costs are a measure of damages while deciding that an injury to the environment constitutes property damage under a CGL); Kutsher's Country Club Corp. v. Lincoln Ins., 119 Misc. 2d 889, 893, 465 N.Y.S.2d 136, 189 (Sup. Ct. 1983) ("imposing the cost of cleanup by statute . . . is clearly reflective of the state's power to establish damages"); Lehigh Elec. & Eng'g Co. v. Selected Risks Ins. Co., 30 Pa. D. & C.3d 120, 122 (1982) (sums expended in an effort to clear up a spillage in order to prevent and mitigate the occurrence of damage to property of others is covered under a CGL); Aronson Assocs., Inc. v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 14 Pa. D & C.3d 1, 7 (1977) (preventative measures such as cleanup costs can be recovered where they are required to protect against a third person's property being harmed).

94. 683 F. Supp. 1139 (W.D. Mich. 1988).
95. *Id.* at 1145.
96. *Id.*
97. *Id.* at 1168.
98. *Id.*
99. *Id.*
100. *Id.*

third parties."[101] The judge noted that claims for reimbursement of response costs might be characterized as claims seeking "equitable relief," but in fact such costs are essentially compensatory damages for injury to property.[102] The common sense expectation and contractual understanding of the insured, not the artificial and highly technical legal definition of "damages" ought to control.[103]

Representative of the cases holding that "damages" includes costs incurred by the insured in complying with a government order to clean up the site is *Centennial Insurance Co. v. Lumbermens Mutual Casualty Co.*[104] In this case, Jordan Chemical Company (Jordan) hired a disposal service which improperly disposed of Jordan's waste.[105] The United States government brought an action against Jordan under SUPERFUND alleging that Jordan had endangered health and environment at the disposal site by improperly depositing the waste.[106] Jordan presented claims to defend and indemnify to its two insurers.[107] One insurer, Lumbermens, disclaimed coverage.[108] The other insurer, Centennial, defended Jordan in the action and settled the claims.[109]

Centennial and Jordan brought a declaratory judgment action asking the court to declare that Lumbermens had been obligated to defend and indemnify Jordan against the SUPERFUND claims.[110] Lumbermens contended that its policy did not provide coverage for the SUPERFUND claims because they sought equitable relief rather than legal damages.[111] The court disagreed.[112] As did the *Aviex* court, the court in *Centennial* noted that in SUPERFUND actions the government may either seek an injunction ordering the polluter to clean up the site or clean up the site itself and sue the polluter for response costs.[113] "When such an option exists," wrote the court, "coverage should not hinge on the form of action taken or the nature of the relief sought."[114] "Coverage," wrote the court, "should be triggered when an

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101. *Id.*
102. *Id.*
103. *Id.*
104. 677 F. Supp. 342 (E.D. Pa. 1987).
105. *Id.* at 343-44.
106. *Id.* at 344.
107. *Id.* at 344-45.
108. *Id.* at 344.
109. *Id.* at 344-45.
110. *Id.* at 345.
111. *Id.* at 349.
112. *Id.* at 350.
113. *Id.* at 349-50.
114. *Id.* at 350.

actual or threatened use of the legal process coerces payment or clean up conduct by a policyholder."[115] Under this definition costs to clean up waste are damages under a CGL.[116]

Recently, the Second Circuit also held that costs incurred by an insured in cleaning up a site are "damages" under a CGL. In *Avondale Industries, Inc. v. Travelers Indemnity Co.*,[117] the insured Avondale Industries, Inc. sought a judgment declaring that its insurer was obligated to defend it in proceedings to be taken against Avondale by the Louisiana State Department of Environmental Quality. In these proceedings, the Department of Environmental Quality sought to have Avondale clean up a disposal site where Avondale had deposited hazardous substances.[118] Avondale had been insured by its insurer under a CGL at the time the substances had been deposited.[119]

Here also, the insurer argued that "damages" only includes remedies at law.[120] The court disagreed. The court noted that the term "damages" was not defined in the CGL.[121] The court wrote that without a specific exclusionary definition of "damages" in the policy to alert him, an ordinary businessman reading the policy would have believed himself covered for potential claims for cleanup costs.[122] Since it was not given a limiting definition in the policy, the term must be construed to embrace coverage.[123]

C. A Missouri View

In *Cooper Industries, Inc. v. American Mutual Liability Insurance Co.*, a recently decided Missouri circuit court case, a middle-ground approach was taken.[124] The court held that an action by the government seeking reimbursement of response costs was a claim for "damages," but an action seeking an order for an insured to clean up a hazardous waste site at the insured's expense was not an action for "damages." The court noted that the plain everyday meaning of "damages" was "compensation for loss or injury."[125] An action seeking

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115. *Id.*
116. *Id.*
117. 887 F.2d 1200 (2d. Cir. 1989).
118. *Id.* at 1202.
119. *Id.*
120. *Id.* at 1207.
121. *Id.*
122. *Id.*
123. *Id.*
124. Cooper Indus. v. American Mut. Liab. Ins., No. 864-00284, slip op. at 36 (Cir. Ct. of the City of St. Louis Sept. 8, 1989).
125. *Cooper*, slip op. at 37.

reimbursement of response costs does indeed seek compensation for loss or injury.[126] But, an action for an injunction to have the insured clean up a site seeks enforcement not compensation.[127]

D. NEPACCO—An Eighth Circuit Prediction of Missouri Law

The first case in which Missouri law was used to decide the issue of whether cleanup costs are "damages" under a CGL was *NEPACCO.* In *NEPACCO,* Northeastern Pharmaceutical and Chemical Company (NEPACCO) was insured by Continental Insurance from August 1970 to November, 1972 under three standard-form CGLs.[128] Continental agreed "to pay on behalf of [NEPACCO] all sums which [NEPACCO became] legally obligated to pay as damages because of . . . property damage."[129]

NEPACCO improperly disposed of and hired contractors who improperly disposed of waste containing dioxin.[130] The EPA cleaned up the sites contaminated by this waste and sought to recover its costs pursuant to SUPERFUND in a lawsuit against NEPACCO.[131] Also the State of Missouri sued NEPACCO for costs incurred by the state in excavating and removing dioxin contaminated soil from one of the sites.[132]

Continental filed a declaratory judgment action against NEPACCO to determine its liability in connection with the EPA and State of Missouri suits.[133] On appeal, a panel of the Eighth Circuit held that cleanup costs imposed in accordance with SUPERFUND are "damages" under a CGL policy.[134] The Eighth Circuit en banc reversed.[135]

The court wrote that these lawsuits in which the government was seeking recovery of cleanup costs under SUPERFUND were essentially equitable actions for restitution or reimbursement of costs.[136] The government was not seeking "damages."[137]

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126. *Id.*
127. *Id.*
128. *NEPACCO,* 842 F.2d at 979.
129. *Id.*
130. *Id.*
131. *Id.* at 980.
132. *Id.* at 981.
133. *Id.*
134. Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 811 F.2d 1180, 1189 (8th Cir. 1987).
135. *NEPACCO,* 842 F.2d at 987.
136. *Id.*
137. *Id.* at 985-86.

The court cited applicable Missouri rules of contract interpretation which held that

> [t]he rules of construction applicable to insurance contracts require that the language used be given its plain meaning. If the language is unambiguous the policy must be enforced according to such language. If the language is ambiguous it will be construed against the insurer. Language is ambiguous if it is reasonably open to different constructions; and language used will be viewed in light of "the meaning that would ordinarily be understood by the lay[person] who bought and paid for the policy."[138]

The court wrote that case law was sharply divided on whether "damages" covers cleanup costs and that outside the insurance context the term "damages" is ambiguous.[139] "[F]rom the viewpoint of the lay insured," the court wrote, "the term 'damages' could reasonably include all monetary claims, whether such claims are described as damages, expenses, costs, or losses."[140] But in the insurance context, the term "damages" is not ambiguous. In the insurance context "damages" refer to legal damages, not claims for equitable monetary relief.[141]

E. NEPACCO'S Dissent

A strong dissent took issue with the court's reasoning. The dissent wrote that the majority disregarded established Missouri law.[142] The dissent noted that the Supreme Court of Missouri sitting en banc had held that rules of construction in insurance contracts provide that if ambiguous language is used in an insurance contract, it "will be viewed in light of 'the meaning that would ordinarily be understood by the layman who bought and paid for the policy.'"[143] According to the dissent, the majority ignored this lay definition and substituted a technical insurance definition of "damages" without citing a single Missouri case which justified substitution.[144]

The dissent quoted the majority as writing "[f]rom the viewpoint of the lay insured, the term 'damages' could reasonably include all

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138. *Id.* at 985 (quoting Robin v. Blue Cross Hosp. Serv., Inc., 637 S.W.2d 695, 698 (Mo. 1982) (en banc) (citations omitted)).

139. *NEPACCO*, 842 F.2d at 985.

140. *Id.*

141. *Id.*

142. *NEPACCO*, 842 F.2d at 987 (Heaney, J. dissenting).

143. *Id.* at 988 (quoting Robin v. Blue Cross Hosp. Serv., Inc., 637 S.W.2d 695, 698 (Mo. 1982) (en banc) (citations omitted)).

144. *NEPACCO*, 842 F.2d at 988 (Heaney, J. dissenting).

monetary claims, whether such claims are described as damages, expenses, costs, or losses."[145] This concession, wrote the dissent, should have been dispositive in light of the Missouri Supreme Court's holding in *Robin v. Blue Cross Hospital Service, Inc.*[146] According to this case, when a word is open to different constructions, the word must be accorded the meaning ordinarily given it by the lay person who bought and paid for the policy.[147]

The dissent also argued that the technical meaning given to the term "damages" by the majority would not include the cost of restoring real property to the pre-damage condition.[148] This is contrary to the legal definition of "damages" developed in Missouri case law which includes the cost of restoring real property to its pre-damaged condition.[149] According to the dissent, prior Missouri case law on the definition of "damages" and prior Missouri case law on insurance contract construction demands that cleanup costs be considered "damages."

III. THE INSTANT DECISION

The court in *Jones* began its analysis of the "damages" issue by acknowledging that the Eighth Circuit had held the term "damages" in a CGL does not include cleanup cost.[150] The court said it would defer to the Eighth Circuit's view of Missouri law unless it found that the Eighth Circuit "ignored clear signals emanating from the state court" or "clearly misread state law."[151] After reviewing Missouri law on insurance contract interpretation, the district court decided that the Eighth Circuit had clearly misread Missouri law.[152]

The court noted that the majority's conclusion in *NEPACCO* was not based on Missouri case law or Missouri rules of insurance contract

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145. *Id.*

146. *Id.*

147. *Id.* The dissent also points out that the majority's reliance on *Armco* was misplaced. *Id.* at 989. *Armco* was decided under Maryland law noted the dissent. *Id.* The dissent argued that Maryland law and Missouri law differ as to the meaning to be given "damages." *Id.* at 989-90. Under Maryland law, wrote the dissent, "damages" must be construed according to its narrow, technical meaning. *Id.* at 989. But under Missouri law, argued the dissent, damages must be accorded "the meaning that lay persons would give it." *Id.* at 990.

148. *Id.*

149. *Id.*

150. *Jones*, WESTLAW op. at 12.

151. *Id.* at 13.

152. *Id.* at 20.

construction.[153] Rather, the court said, in adopting a technical, insurance industry definition of the term, the majority cited a Fourth Circuit case applying Maryland rather than Missouri substantive law.[154]

As both the majority and dissent did in *NEPACCO*, the court quoted *Robin v. Blue Cross Hospital Service, Inc.* and *Green v. Zurich Insurance Co.*, and concluded that in Missouri "damages" must be given the meaning that would ordinarily be understood by the layperson who bought and paid for the policy.[155] The court stated that "from the viewpoint of the 'lay insured,' the term 'damages' could reasonably include all monetary claims, whether such claims are described as damages, expenses, costs, or losses."[156] Consequently the court wrote, according to Missouri law "damages,"—as the term is used in comprehensive general liability insurance policies—must include cleanup costs.[157]

IV. ANALYSIS

A. Introduction

In *Jones Truck Lines v. Transport Insurance Co.*, the United States District Court for the Eastern District of Pennsylvania determined that the Eighth Circuit in deciding *NEPACCO* had clearly misread Missouri law.[158] The district court held that the term "damages" in a liability insurance policy encompasses environmental cleanup costs imposed on an insured by a state or federal agency.[159] The district court was correct in its analysis of Missouri law and its rejection of the definition of "damages" posited by the Eighth Circuit.[160] Under Missouri law the term "damages" in a liability insurance policy must be construed to include environmental cleanup costs.[161]

But the district court's analysis was incomplete. The district court in deciding *Jones* failed to discuss the facts of the case before it and how the determination that "damages" include cleanup costs like those imposed in *NEPACCO* was relevant in deciding the case.[162] The

153. *Id.* at 20.
154. *Id.*
155. *Id.* at 19.
156. *Id.*
157. *Id.* at 20.
158. *Id.*
159. *Id.*
160. See *infra* text accompanying notes 170-86.
161. See *infra* text accompanying notes 170-86.
162. See *infra* text accompanying notes 187-90.

situation in *NEPACCO* is on the surface different from that in *Jones*. In *NEPACCO* the EPA sought to have the insured reimburse it for cleanup costs.[163] In *Jones* the EPA in essence ordered the insured to clean up hazardous waste.[164] One action sought reimbursement of cleanup costs; the other sought to have the insured clean up contamination. Some courts have considered these two remedies as being different from one another and accordingly have treated them differently in analyzing the construction of the term "damages."[165]

Indeed, the two actions should be treated similarly.[166] Liability imposed by an action to have an insured clean up a hazardous waste site as well as liability imposed by an action to have an insured

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163. *NEPACCO*, 842 F.2d at 980.

164. *Jones*, WESTLAW op. at 24.

165. *See* Cooper Indus., Inc. v. American Mut. Liability Ins. Co., No. 864-00284 (Cir. Ct. of St. Louis Sept. 8, 1989). *But see*, Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1226-27 (2d Cir. 1989); Port of Portland v. Water Quality Ins. Syndicate, 796 F.2d 1188, 1194 (9th Cir. 1986) (cleanup costs are recoverable under a property damage liability clause); Chesapeake Utils. Corp. v. American Home Assurance Co., 704 F. Supp. 551, 561 (D. Del. 1989); Intel Corp. v. Hartford Accident & Indem. Co., 692 F. Supp. 1171, 1192 (N.D. Cal. 1988); Centennial Ins. Co. v. Lumbermens Mut. Cas. Co., 677 F. Supp. 342, 350 (E.D. Pa. 1987); New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1365-66 (D. Del. 1987); Township of Gloucester v. Maryland Cas. Co., 668 F. Supp. 394, 400 (D.N.J. 1987); Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 662 F. Supp. 71, 75 (E.D. Mich. 1987); Upjohn Co. v. New Hampshire Ins. Co., 178 Mich. App. 706, 719-20, 444 N.W.2d 813, 819 (1989); Broadwell Realty Servs. v. Fidelity & Cas. Co. of New York, 218 N.J. Super. 516, 528 A.2d 76, 82 (Ct. App. Div. 1987). *Cf.* Chemical Applications Co. v. Home Indem. Co., 425 F. Supp. 777, 779 (D. Mass. 1977) (insured was covered under CGL where insured performed removal and cleanup work itself instead of permitting government to have it done by others and bring suit); *Aviex*, 125 Mich. App. 579, 589-90, 336 N.W.2d 838, 843 (1983); Lansco, Inc. v. Department of Envtl. Protection, 138 N.J. Super. 275, 283-84, 350 A.2d 520, 525 (Ct. Ch. Div. 1975) (determines that cleanup costs are a measure of damages while deciding that an injury to the environment constitutes property damage under a CGL), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (Ct. App. Div. 1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977); Kutsher's Country Club Corp. v. Lincoln Ins. Co., 465 N.Y.S.2d 136, 139, 119 Misc. 2d 889, 893 (Sup. Ct. 1983) ("imposing the cost of cleanup by statute . . . is clearly reflective of the State's power to establish damages"); Lehigh Elec. & Eng'g Co. v. Selected Risks Ins. Co., 30 Pa. D & C.3d 120, 122 (1982) (sums expended in an effort to clear up a spillage in order to prevent and mitigate the occurrence of damage to property of others is covered under a CGL); Aronson Assocs., Inc. v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 14 Pa. D & C.3d 1, 7 (1977) (preventative measures such as cleanup costs can be recovered where they are required to protect against a third person's property being harmed).

166. See *infra* text accompanying notes 196-217.

reimburse the costs the government incurred in cleaning up the site should be considered "damages" in a liability insurance policy.[167] Further analysis, though, is required to arrive at this conclusion.[168] The court in *Jones* brushed over the distinction, failing to show how the two remedies are different yet should be treated similarly.

B. Missouri Law: Cleanup Costs are Damages

The court in *Jones* correctly interpreted Missouri rules of construction to hold that cleanup costs are damages under a CGL.[169] Missouri courts have provided that insurance policy terms should be given "the meaning which the ordinary insured of average intelligence and common understanding reasonably would give to the words or language under consideration."[170] Missouri courts have also held that if the policy language is ambiguous it will be construed against the insurer.[171] Finally, Missouri courts have held that "an insurance contract reasonably susceptible of any interpretation favorable to the insured will be so construed in order to avoid a forfeiture."[172] Taking these rules of construction into consideration it becomes clear that the court in *Jones* correctly rejected the narrow definition of "damages" posited by the Eighth Circuit in *NEPACCO*.[173]

The court in *NEPACCO* conceded that lay policyholders would most likely interpret "damages" to include "any compensatory obligation imposed upon them."[174] The Eighth Circuit also conceded that this "layperson" definition fails to distinguish legal damages from equitable damages.[175] Nevertheless, the Eighth Circuit relied on this distinction between legal and equitable damages to exclude costs of equitable relief.[176] In doing so the Eighth Circuit failed to follow the established

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167. See *infra* text accompanying notes 196-217.

168. See *infra* text accompanying notes 187-217.

169. See *infra* text accompanying notes 170-86.

170. Hammontree v. Central Mut. Ins. Co., 385 S.W.2d 661, 666-67 (Mo. Ct. App. 1965).

171. Robin v. Blue Cross Hosp. Servs., 637 S.W.2d 695, 698 (Mo. 1982) (en banc) (citing Meyer Jewelry Co. v. General Ins. Co. of America, 422 S.W.2d 617, 623 (Mo. 1968)).

172. Bellamy v. Pacific Mut. Life Ins. Co., 651 S.W.2d 490, 495-96 (1983) (citation omitted).

173. See *infra* text accompanying notes 174-87.

174. Note, *Does the Term "Damages" in the Comprehensive General Insurance Policy Include Environmental Cleanup Costs?*, 22 CREIGHTON L. REV. 1035, 1050 (1988-89).

175. *Id.*

176. *NEPACCO*, 842 F.2d at 985.

Missouri rules of insurance contract construction. The Eighth Circuit's definition of "damages" is not the layperson's definition of damages which the Missouri rules of construction demand.

"Damages" can really only be seen as distinguishing between legal and equitable relief "by a lawyer, steeped in the traditional distinction between law and equity and schooled by the federal courts to be wary of the liberality of jury trials."[177] In Missouri, though, it is not the lawyer's or insurance specialist's definition which is controlling but that of the ordinary layman.[178] As the dissent wrote in *NEPACCO*, "[I]f the insurer wished to use a technical, legal meaning for that term which differed from the accepted dictionary definition, it should have explicitly done so."[179] Under Missouri law if damages is open to different constructions it must be accorded the meaning ordinarily given it by the layperson who bought and paid for the policy.[180]

The Eighth Circuit in *NEPACCO* also rejected another Missouri definition of "damages" under which cleanup costs would be considered "damages." In *Jack L. Baker Cos. v. Pasley Manufacturing & Distributing Co.*, an action for "damages," the court wrote that "where damaged property can be restored to its former condition at a cost less than the diminution in value, the cost of restoration is the proper recovery."[181] The interpretation of "damages" as the cost of restoration of property does not restrict "damages" to its narrow technical meaning.[182] Rather it suggests that actions for cleanup costs and actions to force an insured to clean up hazardous waste, which are measures designed to restore property to its previous condition, are also actions for "damages" in Missouri.[183]

The court in *NEPACCO* had before it two definitions of damages which were favorable to the insured—the layperson definition and the *Baker* definition.[184] Given Missouri's rule of construction that "an insurance contract reasonably susceptible of any interpretation favorable to the insured will be so construed in order to avoid a

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177. *Cooper Indus.*, slip op. at 33.

178. *Hammontree* at 666-67. Missouri "courts do not necessarily accept the construction accorded to policy terms by astute insurance specialists or perspicacious counsel but rather are concerned with the meaning which the ordinary insured of average intelligence and common understanding would give the words or language under consideration." *Id.*

179. *NEPACCO*, 842 F.2d at 988 (Heaney dissenting).

180. *Robin*, 637 S.W.2d at 698.

181. *Baker*, 413 S.W.2d at 273.

182. Note, *supra* note 174, at 1051.

183. *Id.*

184. *Id.* at 1051-52.

forfeiture,"[185] the Eighth Circuit should have chosen one of these definitions and construed "damages" to include cleanup costs.[186] The court in *Jones* in rejecting the *NEPACCO* definition of "damages" defined "damages" as a Missouri court would define "damages."

C. *Cost to Clean up and Cleanup Costs Distinguished*

In focusing on the misconstruction of the term "damages" in *NEPACCO* however, the district court failed to consider that the underlying actions taken by the EPA against the insured in *NEPACCO* were different from the underlying action taken by the EPA against the insured in *Jones*.

The court in *Jones* correctly determined that under Missouri law liability imposed as a result of an action such as that in *NEPACCO* for response costs should be considered "damages."[187] The court did not show why liability imposed by an order for the insured to clean up the site should be considered "damages."[188] Indeed such liability should constitute "damages" under a liability insurance policy.[189] To understand this though, it is necessary to clarify the differences between the various types of remedies which have been imposed on the insured in cases dealing with the construction of the term "damages" in a CGL.[190] There are three types of actions which have been discussed in these cases.

Action One—The "common law action." After toxic waste has harmed the property of a third party that party may bring an action against the insured to have the insured compensate them for that harm. This is the common law action for "damages" which both camps, the insureds and the insurers, agree is covered under a CGL.

Action Two—The "response costs action." After the release of the hazardous substance, the EPA or a state may clean up the site in accordance with SUPERFUND and later bring an action against the insured for the expenses (response costs) it incurred in cleaning up the site. This was the type of action on which the insured based its claim against the insurer in *NEPACCO*. This was characterized by the majority in *NEPACCO* as an equitable action for restoration or

185. Bellamy v. Pacific Mutual Life Ins. Co., 651 S.W.2d 490, 495-96 (Mo. 1983) (citation omitted).

186. Note, *supra* note 174 at 1052.

187. *See supra* text accompanying notes 169-86.

188. *See infra* text accompanying notes 190-95.

189. *See infra* text accompanying notes 196-217.

190. *See infra* text accompanying notes 191-95.

restitution and thus not covered under a policy providing coverage for "damages."[191]

Action Three—The "clean up action." After the release of the hazardous substance, the EPA or the state may order or bring an action to have the insured clean up the site. This was the type of action and the remedy sought by the Michigan Department of Natural Resources in *Aviex*.[192]

The court in *NEPACCO* held that "damages" only included the remedy sought in the "common law action."[193] The thrust of the opinion in *Jones* was that a legal obligation to pay "damages" under Missouri law was inclusive of the remedies sought in both the "common law action" and the "response costs action."[194]

The remedy imposed upon Jones Truck Lines though is not the remedy discussed in the "response costs action" but the remedy discussed in the "clean up action." The EPA, in essence, did not bring an action against Jones for cleanup costs after it cleaned up the Hall Street facility. The EPA ordered Jones to clean up the Hall Street facility.[195] The *Jones* court should have argued that an action for "damages" was inclusive of the "clean up action" as well as the "response costs action."

D. Should "Damages" Include the Cost to Clean Up

Although the court in *Jones* did not do so, a strong argument can be made that "damages" in a liability insurance policy should include liability imposed by the "clean up action."[196]

There are three reasons why "damages" as that term is used in liability insurance policies should include the liability imposed by the "clean up action." First, to so construe "damages" comports with case law holding that the "clean up action" is equivalent to the "response costs action."[197] Second, to so construe "damages" comports with the reasonable expectation of the parties upon entering the insurance agreement.[198] Finally, to so construe "damages" comports with the policies behind SUPERFUND.[199]

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191. *See supra* text accompanying note 136.
192. *See supra* text accompanying note 82.
193. *See supra* text accompanying note 141.
194. *See supra* text accompanying note 159.
195. *See supra* text accompanying note 24.
196. *See infra* text accompanying notes 197-217.
197. *See infra* text accompanying notes 200-03.
198. *See infra* text accompanying notes 204-11.
199. *See infra* text accompanying notes 212-17.

1. *Costs to Clean Up Are Equivalent to Cleanup Costs*

In *Aviex*, the court assumed that a "response costs action" was an action for "damages" under a CGL.[200] The question before the court was whether the Michigan Department of Natural Resources (DNR) ordering Aviex to clean up (the "clean up action") was the same as the DNR cleaning up itself and bringing an action for response costs against Aviex (the response costs action).[201] The court in *Aviex* answered yes.[202] The court reasoned that when the state can either clean up and sue for response costs or order the insured to cleanup which one the court chooses is merely fortuitous because the "damages" for the property damage remains the same—the cost to restore the property to its original condition.[203]

The reasoning of *Aviex* is compelling. Since the property damage is the same and the cost to restore is the same whether the government cleans up and sues the insured for reimbursement or the government orders the insured to clean up, it is preferring form over substance to allow coverage in the former but not the latter situation.

2. *Expectations of the Parties*

Missouri courts have held that insurance contracts should be read in light of the reasonable and normal expectations of parties as to the extent of coverage.[204] California has similar case law.[205] A federal court sitting in California has found in this rule of law a straight forward reason why a "clean up action" should be considered an action for "damages" in a CGL.[206]

At the time the CGLs were negotiated, reasoned the court, neither the insured nor the insurers anticipated claims of this sort.[207] SUPERFUND was not enacted until 1980. What the parties did contemplate was that if the insured became legally obligated to pay for the property damage inflicted by the insured, the insurer would compensate the insured.[208] The fact that the obligation is not in the

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200. *See supra* text accompanying notes 86-90.

201. *See supra* text accompanying notes 82-84.

202. *See supra* text accompanying note 85.

203. *See supra* text accompanying notes 87-89.

204. State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co., 594 S.W.2d 950, 953-54 (Mo. Ct. App. 1980).

205. Intel Corp. v. Hartford Accident & Indem. Co., 692 F. Supp. 1171, 1189-90 (N.D. Cal. 1988).

206. *Id.* at 1190.

207. *Id.*; Hapke, *supra* note 4 at 10395-96.

208. *Intel*, 692 F. Supp. at 1190.

form of "legal damages" does not alter the fundamental nature of the insured's obligation.[209]

Jones Truck Lines was responsible for the contaminated land.[210] Jones contracted to have the dioxin-laden oil sprayed on the land.[211] Jones is legally obligated under SUPERFUND to pay for the damage. Jones and the insurer probably did not consider how the payments would be made if such an accident occurred. They probably did not consider the difference between reimbursing the government for doing the cleanup work and Jones paying to do the cleanup work itself. At the time of contracting they probably only considered that if Jones had to pay money for property damage, Transport would indemnify Jones. To hold that the cost an insured incurs in cleaning up toxic substances itself is "damages" would fulfill the expectations of parties such as Jones and Transport upon entering the insurance agreement.

3. SUPERFUND Policy

One of the major purposes of Superfund is to promote the speedy, cost-efficient cleanup of hazardous waste.[212] Treating liability imposed by a "response costs action" differently from liability imposed by a "clean up action" would create a disincentive for the insured to cooperate in the speedy, cost-efficient cleaning up of a site.[213]

In order to avoid the costs of litigation, federal and state governments often enter into a consent decree or settlement with an insured responsible for contamination.[214] These settlements often require the insured to clean up the site.[215] If the term "damages" is construed to include the "response costs action" but not the "clean up action," an insured, knowing that his action of cleaning up the site would not be covered by his insurer, would be disinclined to enter such a settlement.[216] The insured would doubtless refuse to enter into such a settlement and wait for the government to sue them for response costs incurred by the government in cleaning up the site.[217] This would only serve to delay the cleanup of the site, cause additional contamination, and increase the costs of dealing with hazardous waste for society as a whole.

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209. *Id.*
210. *See supra* text accompanying notes 21-23.
211. *See supra* text accompanying note 21.
212. Hapke, *supra* note 4, at 10402.
213. *Id.* at 10401-02.
214. *Id.* at 10402.
215. *Id.*
216. *Id.*
217. *Id.*

V. CONCLUSION

Jones failed to discuss the differences between a "response costs action" and a "clean up action." Nevertheless, the court in *Jones* decided the case in harmony with Missouri case law. If Missouri courts are given the opportunity to decide this issue, they should decide the issue as it was decided in *Jones*.

With the passage of the Missouri certified question rule,[218] the Supreme Court of Missouri is likely to have the opportunity to rule dispositively on whether the term "damages" in a CGL includes cleanup costs. SUPERFUND litigants in federal courts will probably be eager to certify the state law question to the Supreme Court of Missouri. In deciding the question, the court will have two recent federal decisions on the issue to turn to for guidance—*Jones* and *NEPACCO*. *NEPACCO* was rendered closer to home, but *Jones* is more consistent with Missouri case law. The court in *Jones* construed the term "damages" to include claims for response costs as a Missouri court would. The outcome of *Jones* shows the court's belief that "damages" include costs incurred by an insured in cleaning up contamination.

TIM BURNS

218. MO. REV. STAT. § 477.004 (Supp. 1989).