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COMPREHENSIVE GENERAL LIABILITY POLICIES UNDER MAINE'S GROUND WATER PROTECTION ACT: THE LAW COURT'S EXTRAORDINARY DEFINITION OF ORDINARY INTELLIGENCE

I. INTRODUCTION

In *Patrons Oxford Mutual Insurance Co. v. Marois*,¹ the Supreme Judicial Court of Maine, sitting as the Law Court, joined the current debate in the state and federal judiciaries as to whether comprehensive general liability (CGL) insurance policies² obligate the insurer to indemnify the insured for cleanup costs³ incurred pursuant to governmentally mandated cleanup of hazardous substances. In that decision, the court held that cleanup costs incurred pursuant to court order authorized by the Maine Underground Oil Storage Facilities and Ground Water Protection Act⁴ are not covered by such policies. The explicit basis of the court's decision was that the average Maine insured understands that state-mandated cleanup of hazardous spills is a form of equitable relief for which CGL policies provide no coverage. The decision leaves many Maine businesses and individuals uninsured against the risk of liability for cleanup costs, with a resulting negative effect on the manner and speed in which hazardous spills are cleaned up.⁵ The *Patrons Oxford* decision is there-

1. 573 A.2d 16 (Me. 1990).

2. The Marois' Special Multi-Peril Policy provided coverage for "all sums which the insured shall become legally obligated to pay as damages because of . . . property damage." Appendix on Appeal at 30, *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990) (No. KEN-89-284) [hereinafter Appendix on Appeal]. This language is identical to that found in standard, industry-wide CGL policies. For a good discussion of the historical development of CGL policies, see Stephen Mountainspring, *Insurance Coverage of CERCLA Response Costs: The Limits of "Damages" in Comprehensive General Liability Policies*, 16 *ECOLOGY L.Q.* 755, 759 (1989).

3. "Cleanup costs" are not defined by the Maine Underground Oil Storage Facilities and Ground Water Protection Act, ME. REV. STAT. ANN. tit. 38, §§ 561 to 570-H (West 1989 & Supp. 1990-1991). The term refers generically to any sums a polluter spends, or is compelled to spend, in complying with a government directive ordering the polluter to clean up a hazardous discharge.

4. P.L. 1985, ch. 496, § A (effective June 28, 1985) (codified as ME. REV. STAT. ANN. tit. 38, §§ 561 to 570-H (West 1989 & Supp. 1990-1991)). The Maine Act essentially follows its federal counterpart, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1989).

5. In his *amicus curiae* brief filed in support of the Marois, the Attorney General of Maine stated:

The interest of the Attorney General as *amicus* stems from the fact that this appeal presents a significant issue of concern to the people of Maine The resolution of this issue under Maine law may affect dramatically the manner in which the numerous spills of petroleum products occurring

fore at odds with a law intended to ensure prompt cleanup of hazardous spills.⁶

While this coverage question is supercharged by the growing awareness and concern over environmental policy, the policy debates are ancillary to the question at hand. As the Law Court correctly noted, resolution of this question reduces to a contractual equation and the calculus is quite simple: the court need only apply governing state contract law to the insurance policy at issue.⁷ Nevertheless, this Comment will take up the contract issue in its broader national context for two reasons: first, Maine's prevailing principles of insurance contract interpretation are substantially similar to those of every state that has considered this coverage question;⁸ second, the language of the special multi-peril liability policy issued to the insureds in the *Patrons Oxford* case is substantially similar to the language found in standardized, industry-wide CGL policies.⁹

Generally, whether cleanup costs are covered by CGL policies is determined by the reasonable expectations of the average layperson unschooled in the law or the insurance field.¹⁰ Therefore, each court must ultimately decide whether the average layperson would understand that the term "damages," as found in the scope and exclusions clauses of the CGL policies, refers to "legal" as opposed to "equitable" relief. In part, the debate is inspired by the fact that the term "damages" is not defined in these insurance policies.¹¹ It is impor-

throughout this state are cleaned up.

Amicus Curiae Brief in Support of Appellants Norman and Julia Marois, d/b/a S & M Market at 2, *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990) (No. KEN-89-284) (submitted by James E. Tierney, Attorney General of Maine) [hereinafter *Amicus Curiae* Brief].

6. "The Legislature intends by the enactment of this subchapter . . . to require the prompt containment and removal of pollution . . ." ME. REV. STAT. ANN. tit. 38, § 561 (West 1989 & Supp. 1990-1991).

7. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d at 17.

8. Compare, e.g., *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990) with *Hazen Paper Co. v. U.S. Fidelity & Guar. Co.*, 555 N.E.2d 576 (Mass. 1990). In general, the controlling legal principles of insurance contract interpretation provide that clear terms of a contract are to be strictly construed, but that ambiguous terms are to be liberally construed in favor of the insured. Whether a term is ambiguous depends upon the reasonable expectations of the average layperson unschooled in the law or insurance field. See *infra* notes 95, 96 and accompanying text. Although each state has put its own individual gloss on these principles, there does not appear to be any substantial variance that would explain the schism between the two competing answers to the coverage question at issue in this Comment.

9. See *supra* note 2.

10. The standard by which insurance policies are interpreted is a question of state law. This Comment will refer to Maine's particular phraseology, as articulated in *Union Mut. Fire Ins. v. Commercial Union Ins.*, 521 A.2d 308, 310 (Me. 1987). See *infra* note 94 and accompanying text.

11. Although the 1966 version of the industry-wide CGL policy defined "damages" as including "damages for loss of use of property resulting from property damage," that definition was not helpful and was ultimately stricken. See *Mountainspr-*

tant to understand from the outset that the courts denying indemnification for cleanup costs do so on the basis that the legal, technical meaning of the term "damages" excludes equitable relief. The courts that provide indemnification do so on the basis that, notwithstanding the legal definition of "damages," the average layperson reasonably expects coverage for cleanup costs. This Comment will discuss the distinction between legal and equitable relief only to the extent that a full discussion of the coverage question demands consideration of that distinction.

The coverage question as a whole is quite complex, inasmuch as the CGL policies are rife with exclusions, and the relevant environmental statutes are multifaceted. For the purposes of this Comment, it will be assumed that (1) property damage has occurred,¹² (2) the insured is a responsible party, (3) the insured may be compelled to clean up the discharge, and (4) the only issue for determination is whether or not the insured is covered against cleanup costs.

In section II of this Comment, the history of the dispute underlying the *Patrons Oxford* decision will be examined because those facts illustrate the interplay between the three significant parties to such disputes: the governing agency, the responsible party, and the insurer. In section III, the arguments presented by both state and federal courts in support of their determinations of the coverage question will be discussed. In section IV, the *Patrons Oxford* case will be evaluated in the context of the conclusions drawn in section III. Finally, the implications of the *Patrons Oxford* decision will be discussed with respect to Maine businesses and individuals.

II. THE OIL SPILL AT THE S & M MARKET

A. *Some Alternative Statutory Remedies Under the Maine Underground Oil Storage Facilities and Ground Water Protection Act*

The *Patrons Oxford* dispute arises under the Maine Underground Oil Storage Facilities and Ground Water Protection Act (Act).¹³ As reflected by the Act's statement of purpose, the discharge of oil and similar products into Maine's underground water supplies is a mat-

ing, *supra* note 2, at 759. For one court's discussion of the unhelpful nature of that definition, see *AIU Ins. Co. v. FMC Corp.*, 799 P.2d 1253, 1259 n.3 (Cal. 1990) (finding the definition not all-inclusive, and therefore ambiguous).

12. While the question whether contamination of a public water source constitutes "property damage" has spawned a debate of its own, it is beyond the scope of this Comment. See generally *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188 (9th Cir. 1986); *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171 (N.D. Cal. 1988); *Lansco, Inc. v. Department of Env'tl. Protection*, 350 A.2d 520 (N.J. 1975); *Kutsher's Country Club Corp. v. Lincoln Ins.*, 119 Misc. 2d 889, 465 N.Y.S.2d 136 (1983).

13. ME. REV. STAT. ANN. tit. 38, §§ 561 to 570-H (West 1989 & Supp. 1990-1991).

ter of increasing concern.¹⁴ The Act was implemented in order to facilitate the speedy and effective cleanup of discharged hazardous substances.¹⁵ To this end, the Maine Department of Environmental Protection (DEP) was endowed by statute with broad powers with which to effectuate hazardous discharge cleanup.¹⁶ These powers include the discretionary authority to issue a cleanup order requiring the responsible party to "cease the discharge immediately or to take action to prevent further discharge and to mitigate or terminate the threat" to public health or environment.¹⁷ Alternatively the DEP may:

undertake [on its own] the removal of that discharge and retain agents and contractors for that purpose who shall operate under the commissioner's direction. . . . Any expenses involved in the removal of discharges . . . by the commissioner . . . may be paid in the first instance from the Ground Water Oil Clean-up Fund and reimbursements due that fund must be collected in accordance with section 569.¹⁸

This Comment is chiefly concerned with cleanup orders and their resulting effect on a polluter's insurance coverage. Cleanup orders under section 568 are injunctive in nature, and therefore are properly deemed a form of equitable relief.

B. Patrons Oxford: *The Underlying Dispute*¹⁹

Norman and Julia Marois, in partnership with George Starkey,²⁰ owned and operated the S & M Market, a small grocery store located in South China, Maine, that sold gasoline on a retail basis as

14. ME. REV. STAT. ANN. tit. 38, § 561 (West 1989 & Supp. 1990-1991) states in relevant part:

The Legislature finds that significant quantities of oil [the Act's definition of oil, found at § 562-A(15), includes gasoline] are being stored in underground storage facilities; that leaks and unlicensed discharges from these facilities pose a significant threat to the quality of the waters of the State, including the ground water resources; [and] that protection of the quality of these waters is of the highest importance.

15. See *supra* note 6. See also ME. REV. STAT. ANN. tit. 38, § 570 (West 1989 & Supp. 1990-1991), which states that, "it is the intent of this [Act] to provide the means for rapid and effective cleanup and to minimize direct damages as well as indirect damages and the proliferation of 3rd-party claims."

16. See generally ME. REV. STAT. ANN. tit. 38, § 568 (West 1989 & Supp. 1990-1991).

17. ME. REV. STAT. ANN. tit. 38, § 568(3) (West Supp. 1990-1991).

18. ME. REV. STAT. ANN. tit. 38, § 568(1) (West Supp. 1990-1991).

19. The facts set forth below are drawn from the Stipulation of the parties, found in the Appendix on Appeal, *supra* note 2, at 7-8, the DEP's Clean Up Order, found in the Appendix on Appeal at 33-43, and the Board of Environmental Protection's Clean Up Order, found in the Appendix on Appeal at 44-50.

20. George Starkey died in 1987. Brief for Appellant at 1 n.2, Patrons Oxford Mut. Ins. Co. v. Marois, 573 A.2d 16 (Me. 1990) (No. KEN-89-284).

part of its business. Lathe Fuel Company (Lathe), of Augusta, Maine, installed, owned, and operated three gasoline pumps at the S & M Market. In September, 1985, the Department of Human Services' Public Health Laboratory notified the DEP that a water sample taken from the private drinking well supplying the S & M Market and the Starkey residence, located within twenty feet of the underground gasoline tanks at the market, was contaminated with what appeared to be gasoline. In January, 1986, the DEP received a complaint from Edward Poulin that his water supply, located within 700 feet of the S & M Market, was contaminated with gasoline. Based on the contamination of these two wells, the DEP sampled the water supplies of other nearby residences, and found that two other wells within 800 feet of the S & M Market were also contaminated with gasoline. When remedial measures taken by the DEP failed to adequately remedy the contamination, the DEP requested that Lathe prepare and submit to the DEP a remedial action plan.²¹ In response, Lathe notified the DEP that it would do no more than remove contaminated soil and pave the former tank and pump area.

Due to Lathe's refusal to voluntarily clean up the discharge, in July, 1988, the DEP issued a cleanup order,²² finding both Lathe and the Maroises to be "responsible parties."²³ In that order, the

21. The DEP's request for the submission of a remedial action plan was authorized by ME. REV. STAT. ANN. tit. 38, § 568(3) (West Supp. 1990-1991). The remedial action plan was to address the following issues: (1) determine the existence of gasoline-contaminated soil in the area of the tanks and pumps at the market and develop a method to prevent continued introduction of gasoline into groundwater; (2) determine the effectiveness of the aeration system in preventing migration of gasoline contaminated groundwater; and (3) restore or replace the four water supplies that became contaminated due to the discharge of gasoline at the S & M Market. Appendix on Appeal, *supra* note 2, at 40-41.

Although the DEP's request was directed solely to Lathe, Mr. Marois indicated in a letter to the DEP that he believed that Lathe was wholly responsible, and that he would not voluntarily accept responsibility for remedial work.

22. The Clean Up Order was issued pursuant to ME. REV. STAT. ANN. tit. 38, § 568(3) (West Supp. 1990-1991), which states in relevant part:

If the commissioner finds, after investigation, that a discharge of oil has occurred and may create a threat to public health or the environment . . . the commissioner may order the responsible party to cease the discharge immediately or to take action to prevent further discharge and to mitigate or terminate the threat. The commissioner may order that the responsible party take temporary and permanent remedial actions at locations threatened or affected by the discharge of oil, including a requirement that the responsible party restore or replace water supplies contaminated with oil . . .

23. ME. REV. STAT. ANN. tit. 38, § 562-A(17) (West Supp. 1990-1991) defines a responsible party as follows:

"Responsible party" means any one or more of the following persons:

- A. The owner or operator of the underground oil storage facility where a prohibited discharge has occurred;
- B. The person to whom the underground oil storage facility is

DEP determined that the site of the underground tanks at the S & M Market was the source of the gasoline contamination of the groundwater in the surrounding area, and ordered both parties to develop and implement a remedial action plan that would restore and replace the water supply in the area around the market.²⁴ Shortly thereafter, both Lathe and the Maroises appealed the DEP's cleanup order to the Board of Environmental Protection (Board).²⁵ Prior to the hearing before the Board, Lathe entered into a voluntary consent order with the DEP and withdrew its request for a hearing. This consent order superseded the DEP's cleanup order with respect to Lathe only. The Maroises proceeded with their appeal. Following the hearing before the Board, the Board issued a cleanup order requiring the Maroises to permit Lathe access to the premises to perform its obligations under the voluntary consent order and further requiring that if Lathe's activities failed to restore groundwater quality, the Maroises could be ordered to prepare and implement a remedial action plan.²⁶

registered where a prohibited discharge has occurred;

C. Any person other than those identified in paragraph A or B who caused the prohibited discharge of oil or who had custody or control of the oil at the time of the prohibited discharge; or

D. Any person who owned or operated the underground oil storage facility from the time any oil arrived at that facility.

This section is substantially similar to its predecessor, ME. REV. STAT. ANN. tit. 38, § 562(10) (West 1989) *repealed by* P.L. 1989 ch. 865, § 1 (effective April 1990).

24. Appendix on Appeal, *supra* note 2, at 33, 39-40 (DEP Clean Up Order (July 21, 1988)).

25. The appeal procedure under the Act is set forth at ME. REV. STAT. ANN. tit. 38, § 568(3)(B) (West Supp. 1990-1991).

26. Pursuant to ME. REV. STAT. ANN. tit. 38, § 568(3)(B) (West Supp. 1990-1991), on October 12, 1988, the Board ordered the Maroises to:

1. Permit Lathe Fuel Company, the Department of Environmental Protection and all agents, employees or independent contractors of either Lathe Fuel Company or the Department of Environmental Protection, free and complete access to the premises of S & M Market and all surrounding property owned by the Marois [sic] and to use utilities at the S & M Market on the Marois residence as necessary to permit Lathe Fuel Company to carry out its responsibilities under the Consent Order.

2. If in the sole discretion of DEP, the activities of Lathe Fuel Company under the Consent Order do not prevent migration of gasoline contaminated ground water in the vicinity of S & M Market and restore the ground water quality in this area then, within forty-five (45) days of receipt of written notice by the DEP, submit to the Department for its review and approval, a remedial action plan (including an implementation schedule), based upon the studies conducted by Lathe Fuel Company pursuant to the Consent Order and all other available information. This plan shall, at a minimum:

(a) Propose methodology to prevent migration of gasoline contaminated ground water in the vicinity of S & M Market and restore ground water quality to levels protective of public health and the environment; and

Upon learning of the Board's order naming the Maroises responsible parties, potentially liable for the cleanup costs associated with restoring and replacing the water supply to four separate residences, the Maroises' insurer, Patrons Oxford Mutual Insurance Company (Patrons Oxford), filed a Complaint for Declaratory Judgment in the Kennebec County Superior Court in October, 1988.²⁷ In that complaint, Patrons Oxford set the stage for the Law Court to enter the national debate, stating that the remedial measures contemplated by the Board's order were of an equitable nature, did not comprise legal damages, and were therefore not covered by the Maroises' policy.

III. LEGAL BACKGROUND: THE NATIONAL DEBATE

The DEP's decision to issue a cleanup order to the Maroises illustrates the nature of the dispute as to whether cleanup costs incurred pursuant to governmental mandate are covered by standard CGL policies. In this section the arguments most often raised in support of a court's determination of the coverage question will be presented and discussed. A fair assessment of these arguments is that the crux of the debate is about the meaning of the term "damages" as that term is used in the scope clause of the CGL policies which provide coverage for "all sums which the insured shall become legally obligated to pay as damages because of property damage."²⁸ As noted in the Introduction, there are many issues related to this coverage question. Nevertheless, the sole issue with which this Comment is concerned is the meaning of the term "damages" in CGL policies.

It will be demonstrated that the determinative factor as to whether cleanup costs are covered as "damages" is the reasonable expectations of the average layperson. The courts that deny coverage, representing a clear minority, do so on the basis that the term "damages," as a matter of state law, has a precise technical meaning

(b) Provide for the restoration or replacement of water supplies determined by the Department to have been contaminated by a discharge of gasoline at S & M Market.

3. Within fifteen (15) days of the Department's approval of the remedial action plan and implementation schedule required in paragraph 2 above, implement the plan as modified and approved by the Department in accordance with the time schedule approved by the Department.

Appendix on Appeal for Appellants at 48-49, *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990) (order after Appeal from DEP Clean Up Order (Oct. 12, 1988)).

27. Patrons Oxford's Complaint was filed pursuant to the Declaratory Judgment Act, ME. REV. STAT. ANN. tit. 14, §§ 5951-5163 (West 1980 & Supp. 1990-1991). The Complaint can be found at Appendix on Appeal at 4-5, *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990).

28. See *Mountainspring*, *supra* note 2, at 759. See also Appendix on Appeal, *supra* note 2, at 30 ¶ 1.

that is understood by the insured.²⁹ Courts that require coverage for response costs, representing a clear majority, do so on one of two bases: most courts have found that strictly construing "damages" in consonance with its technical legal meaning is contrary to controlling state law principles governing contract interpretation;³⁰ other courts have held that the substantive similarities between damages and cleanup costs require that cleanup costs be covered.³¹

A. *The Minority View: The Technical, Legal Definition of "Damages" Controls*

While different courts have formulated various arguments to support their own particular views, it is generally the case that, if third-party property damage is assumed and other policy exclusions have no effect, there is essentially one argument advanced by courts finding that response costs are not covered under the damages clause of CGL policies.³² The argument basically states that the policy language clearly and unambiguously includes coverage only for legal damages, as opposed to equitable relief.

1. *Historical Background: Aetna Casualty and Surety Co. v. Hanna and Desrochers v. New York Casualty Co.*

The argument that "damages" in this context has a precise technical meaning in law can be traced to the Fifth Circuit's decision in *Aetna Casualty & Surety Co. v. Hanna*,³³ and the New Hampshire Supreme Court's decision in *Desrochers v. New York Casualty Co.*³⁴ The argument proceeds as follows:

- (1) The term "damages" is clear and unambiguous.

29. See *infra* note 32.

30. See *infra* note 65.

31. See *infra* note 66.

32. See, e.g., *Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979 (4th Cir. 1988) (applying South Carolina law); *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir.) (en banc) (applying Missouri law), *cert. denied*, 488 U.S. 821 (1988); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987) (applying Maryland law), *cert. denied*, 484 U.S. 1008 (1988); *Aetna Casualty & Sur. Co. v. Gulf Resources & Chem. Corp.*, 709 F. Supp. 958 (D. Idaho 1989) (applying Idaho law); *Verlan, Ltd. v. John L. Armitage & Co.*, 695 F. Supp. 950 (N.D. Ill. 1988) (applying Illinois law); *Travelers Ins. Co. v. Ross Electric of Washington, Inc.*, 685 F. Supp. 742 (W.D. Wash. 1988) (applying Washington law); *Ladd Constr. Co. v. Insurance Co. of North America*, 391 N.E.2d 568 (Ill. App. Ct. 1979); *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990); *Braswell v. Faircloth*, 387 S.E.2d 707 (S.C. Ct. App. 1989).

Some courts have also argued that response costs are not covered because they are available without a requisite showing of "property damage" and are therefore beyond the scope of the CGL policies. See, e.g., *Aetna Casualty & Sur. Co. v. Gulf Resources & Chem. Corp.*, 709 F. Supp. 958 (D. Idaho 1989).

33. 224 F.2d 499 (5th Cir. 1955).

34. 106 A.2d 196 (N.H. 1954).

- (2) "Damages" has an accepted technical meaning in law—it relates only to legal relief.
- (3) Injunctive orders are equitable relief.
- (4) Therefore, costs of compliance with injunctive orders are not covered "damages" as the term "damages" is used in CGL policies.

Both *Hanna* and *Desrochers* hold that although injunctive relief requires the responsible party to spend money to comply with the injunction, such sums are not "damages" because they do not directly compensate the damaged party. Rather, those courts find legally significant the fact that compliance costs are not directly attributable to a cleanup order, but are only incidental to an order.³⁵ The *Hanna* court stated:

Insofar as coverage is concerned, the obligation is solely "to pay," not to remove fill dirt, rocks and boulders, under Court order or otherwise. . . .

Clearly, the policy covers only payments to third persons when those persons have a legal claim for damages against the Insured on account of injury to or destruction of property.³⁶

Similarly, the *Desrochers* court stated, "[t]he cost of compliance with the mandatory injunction is not reasonably to be regarded as a sum payable 'as damages.' Damages are recompense for injuries sustained."³⁷

All of the courts which have adopted this reasoning in the context of hazardous-discharge cleanup share the basic premise that cleanup costs by definition are not damages, and therefore as a matter of law are not covered by CGL policies.³⁸ A fair interpretation of this view is that the substance of the underlying claim, however meritorious, may be defeated by the form of relief sought by the damaged party. Significantly, these courts ignore the practical reality that, in all probability, the polluter will not actually physically conduct the

35. The short-sightedness of this view was recognized by the United States Supreme Court in *Ohio v. Kovacs*, 469 U.S. 274 (1985). The issue presented was whether a polluter's obligation pursuant to a cleanup order is dischargeable under the Bankruptcy Code. The Court found that the polluter could not personally clean up the discharge, and therefore could not comply with the cleanup order other than by paying money. Since the State had appointed a receiver to fulfill the polluter's obligation, the Court concluded that the State sought nothing more than payment of money so that the receiver could complete the polluter's obligations. Thus, the view that compliance costs are merely incidental to cleanup orders is belied by the fact that in most cases a polluter will be unable personally to conduct a cleanup.

36. *Aetna Casualty & Sur. Co. v. Hanna*, 224 F.2d at 503.

37. *Desrochers v. New York Casualty Co.*, 106 A.2d at 198.

38. See *supra* note 32. It must be noted that the validity of a given court's reliance on the argument outlined above depends wholly upon the terms of the insurance policy and the forum state's principles governing the interpretation of insurance contracts. Thus, each court's decision must be evaluated solely on the basis of governing state law—no court can properly adopt another court's decision without first considering whether or not governing law is substantially similar.

cleanup. Rather, a contractor will likely be hired and paid to do the work. Thus, if the damaged party hires a contractor to conduct the cleanup, and subsequently sues the polluter for compensatory damages, the damages will be covered by the CGL policies. If, on the other hand, the State compels the polluter to conduct the cleanup, and the polluter hires the same contractor, at the same price, to undertake the same cleanup, the costs under this rationale are not covered by the CGL policies.

2. *The Modern View: Hanna and Desrochers Revisited*

The two leading decisions supporting the minority view were rendered by the Fourth Circuit in *Maryland Casualty Co. v. Armco, Inc.*³⁹ and by the Eighth Circuit in *Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*.⁴⁰ These courts both viewed the coverage question as a contractual matter, and simply attempted to apply forum state law to the insurance policies at issue. Both decisions are substantially relied upon by other similarly minded courts, and can also be found at the bottom of the *Patrons Oxford* decision. In this section, the analyses of these two courts will be presented and evaluated.

a. *Maryland Casualty Co. v. Armco, Inc.*

The Fourth Circuit, purporting to apply Maryland law, adopted the narrow, technical definition of "damages" as expressed in *Hanna* and *Desrochers*. The court stated:

Judicial decisions, although not rejecting the rule of construction that terms of an insurance contract are to be given their ordinary meaning, have nevertheless limited the breadth of the definition of "damages" somewhat more narrowly than the [insured] suggests. "Damages," as distinguished from claims for injunctive or restitutionary relief, includes "only payments to third persons when those persons have a legal claim for damages. . . ." Thus "damages" is to be construed in consonance with its "accepted technical meaning in law." Maryland law, which governs the construction of this agreement, has similarly adopted the somewhat narrow, technical definition of damages.⁴¹

The court's argument stands for the proposition that since "damages" has an unambiguous meaning, the court need not investigate any further into the understanding of the insured.⁴² The *Armco*

39. 822 F.2d 1348 (4th Cir. 1987) (applying Maryland law), *cert. denied*, 484 U.S. 1008 (1988).

40. 842 F.2d 977 (8th Cir.) (en banc) (applying Missouri law), *cert. denied*, 488 U.S. 821 (1988).

41. *Maryland Casualty Co. v. Armco*, 822 F.2d at 1352 (citations omitted).

42. As will be shown below, *infra* notes 50-52 and accompanying text, the court misperceived Maryland law.

court set forth two theories in justification of its decision. First, the court argued that the context of the damages clause as a whole demanded adoption of the technical, legal definition of "damages":

If the term "damages" is given the broad, boundless connotations sought by the [insured], then the term "damages" in the contract between Maryland Casualty and Armco would become mere surplusage, because any obligation to pay would be covered. The limitation implied by employment of the phrase "to pay as damages" would be obliterated.⁴³

As a general principle of insurance contract interpretation, provisions of insurance contracts are to be interpreted in context so as to give meaning to all terms of the agreement. The *Armco* court's point was that if "damages" were held to refer to costs associated with compliance with injunctive remedies—therefore encompassing both legal and equitable relief—"damages" would lose its restrictive meaning in the phrase "all sums the insured becomes legally obligated to pay as damages because of property damage," because there would then be no sums which the contract would not cover.

The *Armco* court correctly noted, consistent with general principles of contract construction, that each term in a CGL policy should be given meaning. If the only limitation to the sums covered under the contract, as suggested by some insureds, is the limitation imposed by the term "property damage," then "damages" truly is rendered mere surplusage. Despite the best efforts of some courts to argue against this proposition,⁴⁴ the reasoning is valid. This argument, however, proves too little. Even though the term "damages" should in the first instance, as a matter of technical contract interpretation, be considered limiting, the argument does not cure the ambiguity of the term. Even assuming that the average layperson

43. *Maryland Casualty Co. v. Armco*, 822 F.2d at 1352.

44. See *Aerojet-General Corp. v. Superior Court*, 257 Cal. Rptr. 621, 626-29 (Cal. Ct. App. 1989), *reh'g denied per curiam*, 258 Cal. Rptr. 684 (Cal. Ct. App. 1989). In response to the Fourth Circuit's argument in *Armco* that a broad construction of "damages" would render the term mere "surplusage," *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d at 1352, the *Aerojet* court stated that "a construction of 'damages' which includes sums connected with equitable relief is not a boundless universe—such 'damages' still must be 'because of' property damage." *Aerojet-General Corp. v. Superior Court*, 257 Cal. Rptr. at 632. Essentially, the *Aerojet* court held that the term "damages" should be excised from the contract, but that policy concerns justified this result. The court's argument is both unjustified and misguided. First, a court should have a good reason to overlook the plain meaning of an insurance contract, and a desire to implement environmental policy is not a good reason. Second, the argument is misguided because instead of asserting that policy reasons favor excising contract language, the court should adhere to its main point, a correct one, that the term "damages" is ambiguous, and therefore should be interpreted in accordance with principles governing the interpretation of ambiguous terms in an insurance contract—principles which have previously been shown to favor a broad definition.

would understand "damages" to be a limitation on the scope of the CGL policy, the strict construction argument begs the question as to what types of damages are covered. Since this question is not answered by the plain language of the CGL policies, the court should have referred to Maryland law, which required that ambiguities be resolved in favor of the insured.⁴⁵ This is not to say that an ambiguity as to the meaning of a single term invites a court to rewrite the entire contract. But it is important to note that if the key word in the scope clause of the policy is ambiguous, a court should, as a matter of law, look to the reasonable expectations of the average layperson.

The *Armco* court's second justification for denying the insured coverage for cleanup costs is that the form of relief sought by the injured party defines, and thus limits, the scope of the insured's coverage.⁴⁶ The court stated:

In defining "damages," and distinguishing "damages" from equitable remedies, we focus not on the *nature* of the underlying action, but rather on the form of *relief* sought. . . . [W]hether a particular cause of action has historically been considered a "legal" or "equitable" proceeding, with the differing procedural and substantive rights thereto appertaining, is irrelevant. The insurance contract . . . is written in terms of the relief sought, and not in terms of the form of the cause of action. The contract describes "damages" to be paid, and not liabilities arising out of "legal," rather than "equitable" proceedings.⁴⁷

The first response to this statement is that there exists a third option in addition to the two listed by the court above. While it may well be true that the policies are written in terms of relief sought, the phrase "relief sought" may reasonably be held to refer to the substantive nature of the injury underlying the damaged party's claim. This would comport with the insured's probable intention to obtain insurance against all liabilities arising out of certain types of property damage, as opposed to an intention to obtain coverage against the risk of all types of property damage for only certain kinds of lawsuits. Intuitively, from the standpoint of the insured, it is more reasonable to expect coverage to depend upon the nature of the accident, over which the insured has some control, as opposed to the nature of the relief sought by the damaged party, over which the insured has no control.

Moreover, the fact that the insurance contracts at issue are writ-

45. To date, the Maryland Court of Appeals has not been presented with this coverage question. While the *Armco* court determined that Maryland would adopt a narrow, technical definition of "damages," other courts have disagreed. *See, e.g., infra* notes 50-52 and accompanying text.

46. *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d at 1352.

47. *Id.* at 1352-53.

ten in terms of damages to be paid does not lend credence to the view that the average layperson should be able to infer from this fact the nature of the relief sought, and therefore know that cleanup costs are beyond the scope of the CGL policy. If anything, this argument proves too much—it demonstrates that the insurance contract does provide coverage for *some* damages. This in turn raises the question of what kinds of damages *are* covered. Since the policies generally do not enumerate the types of covered damages, the principles of contract construction dictate that the court look to the reasonable expectations of the average layperson. Thus, the fact that the policies are written in terms of the relief sought, instead of the damages covered, does not serve to dispel the ambiguity of the term “damages,” but rather serves to highlight that ambiguity. Even assuming that only “money damages” are covered, a question remains concerning which kinds of “money damages.” In Maine, punitive damages, although technically considered money damages, are not covered by identical policy language.⁴⁸

In fairness to the *Armco* court, the above rationale was offered by the court in response to an argument proffered by the insureds to the effect that the action brought against the insureds was an action in quasi-contract, and that therefore the action was one at law, and not in equity. This argument, as the court noted,⁴⁹ proved nothing because it did not follow from the fact that when an action is framed in terms of the historical distinction between law and equity the relief awarded will be legal and not equitable. Instead, the court’s argument is simply that the historical distinction between legal and equitable *relief*, as opposed to the distinction between legal and equitable *actions*, is dispositive of the coverage issue.

While the foregoing discussion illuminates the primary arguments relied upon by courts finding no coverage for response costs, it is important to note that any argument, however interesting, must comport with controlling state law. The *Armco* court failed to adhere to Maryland law, and for that reason alone any persuasive authority gleaned from its arguments should be justified in light of the forum state’s law, and not on the basis of the *Armco* decision itself. A cogent criticism of this aspect of the *Armco* court’s decision can be found in *Chesapeake Utilities Corp. v. American Home Assurance Co.*,⁵⁰ in which the United States District Court for the District of Delaware was faced with the identical coverage question at issue in *Armco*, also under Maryland law. That court rejected the *Armco* decision, citing numerous Maryland cases defining the principles governing insurance contract interpretation. The court concluded

48. See *infra* note 124 and accompanying text.

49. *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d at 1352.

50. *Chesapeake Util. Corp. v. American Home Assurance Co.*, 704 F. Supp. 551 (D. Del. 1989) (applying Maryland and Delaware law).

simply that "*Armco* misstates Maryland law."⁵¹ The *Chesapeake* court stated:

Under Maryland law (as announced by the Maryland Court of Appeals—which the Fourth Circuit, as well as this Court, must follow), words in insurance contracts are given their customary and normal meaning. Obviously if language in an insurance contract is unambiguous, it will be enforced according to its single plain meaning. If, on the other hand, the language is ambiguous, it is resolved against the insurance company which prepared the contract. Language is deemed ambiguous if, to a *reasonably prudent lay[person]*, it is susceptible to multiple meanings. . . . Any definition of "damages" which is grounded upon the ancient division between law and equity . . . would hardly be an "ordinary and accepted meaning" in the eyes of a "reasonably prudent layperson."⁵²

Further support for the argument that "damages" is ambiguous can be found in the Eighth Circuit's decision in *NEPACCO*.⁵³ Although that court ultimately held that response costs are not covered by CGL policies, the court nevertheless recognized 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."⁵⁴

On the basis of the foregoing, it should be clear that the *Armco* court failed to follow Maryland law with respect to the interpretation of insurance policies. Notwithstanding the validity and import

51. *Id.* at 558.

52. *Id.* at 559-60 (footnote omitted) (citation omitted). See also *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1187 (N.D. Cal. 1988) (arguing that the *Armco* court misconstrued Maryland law).

53. *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (5th Cir.) (en banc) (applying Missouri law), *cert. denied*, 488 U.S. 829 (1988).

54. *Id.* at 985. The *NEPACCO* court majority has been soundly criticized for holding the average insured to knowledge of the technical, legal meaning of damages. See *infra* note 58 and accompanying text. Presumably the *NEPACCO* court's contention was that an insurance contract should be considered in the context of the insurance field alone, and that in the insurance field the term "damages" has a clear meaning, even if the term is ambiguous outside of the insurance field. In answer to this argument, it need only be stated that the validity of that rebuttal relies entirely upon the principles of the governing state law.

This argument is substantially similar to the one found in *Chesapeake Util. Corp. v. American Home Assurance*, discussed *supra* notes 50-52 and accompanying text. More recently, in *Independent Petrochemical Corp. v. Aetna Casualty and Sur. Co.*, Nos. 89-5367, 89-5368, 1991 U.S. App. LEXIS 21337 (D.C. Cir. Sept. 13, 1991), the District of Columbia Circuit was presented with the identical issue arising from the same factual circumstances underlying the *NEPACCO* case. After duly noting the deference generally afforded decisions of a "home" circuit court of appeal on questions of state law, the District of Columbia Circuit rejected the reasoning of the *NEPACCO* court, stating that "[d]eference is one thing; blind adherence quite another. . . . [W]e will not follow another circuit's decision if that court 'ignored clear signals emanating from the state courts' or 'clearly misread state law.'" *Id.* at *12-*13.

of its argument concerning giving full effect to all terms in insurance contracts, the *Armco* decision should not generally be relied upon as support for the proposition that response costs are not covered by CGL policies.

b. *Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Company, Inc.*

The second case generally cited in support of the proposition that cleanup costs are not covered under CGL policies is the Eighth Circuit's sharply divided *NEPACCO* decision.⁵⁵ The *NEPACCO* court, like the *Armco* court, recognized that state law (in this case Missouri law) governs the interpretation of insurance contracts. Following the *Armco* model, the court noted that Missouri law provided for viewing insurance language in light of "the meaning that would ordinarily be understood by the lay[person] who bought and paid for the policy."⁵⁶ Although recognizing 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,"⁵⁷ the court nevertheless held that in the insurance context the average layperson understood the narrow, technical definition of "damages" to exclude equitable relief.⁵⁸ Although the *NEPACCO* majority wrote a lengthy opinion, the only portion of the court's reasoning that differs substantially from the *Armco* decision is the assertion that the narrow definition of "damages" is supported by the language of the federal statute at issue in that case, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁵⁹

The *NEPACCO* court stated that "[t]he limited construction of the term 'damages' is also consistent with the statutory scheme of CERCLA . . . which differentiates between cleanup costs and damages."⁶⁰ Because CERCLA provides a mechanism for obtaining both

55. 842 F.2d 977 (8th Cir.) (en banc) (applying Missouri law), *cert. denied*, 488 U.S. 821 (1988). The court was split 5-3.

56. *Id.* at 985.

57. *Id.*

58. The dissenting judges in *NEPACCO* sharply criticized the majority for strictly construing the term "damages," arguing that Missouri law did not permit such a strict construction. *See id.* at 987-90.

59. The *NEPACCO* court's argument is based upon the language of 42 U.S.C. § 9607(a)(4) (1988), which is the federal counterpart to ME REV STAT ANN tit. 38, §§ 568-570 (West 1989 & Supp. 1990-1991).

60. *NEPACCO*, 842 F.2d at 986. 42 U.S.C. § 9607(a)(4) (1988) states in relevant part:

any person who accepts or accepted any hazardous substances for 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, shall be liable for—

cleanup orders and third-party damage awards, the court reasoned that the distinction between legal and equitable remedies, at least with respect to actions arising under CERCLA and similar state counterparts, persists.⁶¹

As weight for this position, the court stated that the remedy sought by the injured party, whether cleanup costs or damages, can result in a great disparity in cost.⁶² Traditionally, legal damages, whether measured by the diminution in value of the property or by the cost of restoration of the property to its pre-discharge condition, will not exceed the full value of the property. Thus, depending on the policy limit, if the insurer is liable to indemnify the insured, the insurer will not be liable to pay more than the value of the property, and possibly considerably less than the policy limit. On the other hand, cleanup costs have been known to exceed by many times the pre-discharge value of the damaged property.⁶³ In such cases, the insurer liable for cleanup costs would be fully liable up to its policy limit, and in many cases the policy limit would be exceeded. Thus, the *NEPACCO* court argued, the remedy sought is significant and should be considered dispositive.

When the *NEPACCO* court argued that the limited construction of "damages" is consistent with the statutory scheme of CERCLA, the court echoed and expanded upon an idea first raised in the *Armco* decision.⁶⁴ Presumably, the *NEPACCO* court's major point is that there is a potentially great difference in the amount of money for which the insured will ultimately be held liable, and that therefore it is reasonable to focus on the remedy sought while ignoring the fact that both legal and equitable remedies are concurrently available upon a showing of the same factual predicate. The argu-

(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.

As the statute makes clear, subsections A and B address cleanup costs, and subsection C addresses damages.

61. *NEPACCO*, 842 F.2d at 986.

62. *Id.* 842 F.2d at 986-87.

63. See generally Tybe Ann Brett, *Insuring Against the Innovative Liabilities and Remedies Created by Superfund*, 6 *UCLA J. ENVTL. L. & POL'Y* 1, 53 (1986) (describing the problems faced by insurers when insuring against liability for hazardous discharges). See also Mountainspring, *supra* note 2, at 756-58 (describing the costs of hazardous waste cleanup).

64. See *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d at 1352, where the court asserts the distinction between CERCLA remedies in order to bolster its argument that the proper focus of the debate is the form of relief sought, and not the underlying action.

ment is unpersuasive for at least two reasons.

First, the argument erroneously presupposes that the insured relied on the provisions of CERCLA to define the coverage of the insurance policy when in fact there is no connection between the two. In the absence of contradictory evidence, there is simply no reason to believe that an insured either reads or knows about the environmental statutes prior to procuring a CGL policy. It is manifest that a CGL policy provides coverage for liabilities much broader than those arising under CERCLA. Furthermore, as a contractual issue, it is improper to hold the insured to language not included in the contract. Finally, in many cases the CGL policies will pre-date the statutes at issue, rendering absurd any attempt by a court to interpret the policies in light of the statutes.

Second, CERCLA's provisions are not incorporated into CGL policies, and therefore should have no bearing on the definition of the term "damages" as found in the policies. While it may be true that an administrative agency's choice of remedy may ultimately have a significant impact on the insured's coverage under its insurance policy, that agency's choice should in the first instance have no bearing on the contractual relationship between insured and insurer.

B. The Majority View: Cleanup Costs are "Damages" for Purposes of CGL Coverage

There are essentially two different arguments advanced in favor of providing coverage for cleanup costs under CGL policies. The first is premised on the belief that the plain, ordinary meaning of the term "damages" does not distinguish between legal and equitable relief, and so cleanup costs are therefore covered by CGL policies.⁶⁵ The second argument focuses on the similarities between the various remedies concurrently available under prevailing environmental statutes, and concludes that cleanup costs are covered in order to protect the reasonable expectations of the insured.⁶⁶

65. See, e.g., *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989) (applying New York law), *cert. denied* — U.S. —, 110 S.Ct. 2588 (1990); *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188 (9th Cir. 1986) (applying Oregon law); *National Indem. Co. v. U.S. Pollution Control, Inc.*, 717 F. Supp. 765 (W.D. Okla. 1989) (applying Oklahoma law); *Chesapeake Utils. Corp. v. American Home Assurance Co.*, 704 F. Supp. 551 (D. Del. 1989) (applying Maryland and Delaware law); *New Castle County v. Hartford Accident and Indem. Co.*, 673 F. Supp. 1359 (D. Del. 1987) (applying Delaware law); *Aerojet-General Corp. v. Superior Ct.*, 257 Cal. Rptr. 621 (Cal. Ct. App. 1989); *U.S. Fidelity & Guar. Co. v. Specialty Coatings*, 535 N.E.2d 1071 (Ill. Ct. App. 1989); *Hazen Paper v. U.S. Fidelity & Guar.*, 555 N.E.2d 576 (Mass. 1990); *Minnesota Mining & Mfg. v. Travelers Indem.*, 457 N.W.2d 175 (Minn. 1990); *C.D. Spangler Constr. v. Indus. Crankshaft & Eng'g Co.*, 388 S.E.2d 557 (N.C. 1990); *Boeing Co. v. Aetna Casualty & Sur. Co.*, 784 P.2d 507 (Wash. 1990).

66. See, e.g., *Intel Corp. v. Hartford Accident and Indem. Co.*, 692 F. Supp. 1171 (N.D. Cal. 1988) (applying California law); *U.S. Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich. 1988) (applying Michigan law); *AIU Ins. Co.*

1. *The Plain, Ordinary Meaning of "Damages" Does Not Distinguish Between Legal and Equitable Remedies*

Many courts that have found cleanup costs to be covered as "damages" have done so on the basis that the plain, ordinary meaning of "damages" is ambiguous. These courts look to ordinary dictionary definitions as a reflection of the average layperson's understanding of "damages" and conclude that the average layperson unschooled in either law or insurance would reasonably expect cleanup costs to be covered. These courts generally ignore the debate over the distinction between legal and equitable remedies, holding simply that the average layperson would not understand, and indeed should not, as a matter of law, be held to understand the esoteric vagaries of such a distinction. The argument can be distilled as follows:

(1) The interpretation of CGL policies is to be governed by the mutual intention of the parties, so far as that intention is ascertainable from the terms of the contract.

(2) Any ambiguous terms in the contract are to be construed in favor of coverage.

(3) Whether a certain term is ambiguous is determined by the reasonable understanding of the average layperson.

(4) If ambiguous, a term will be given its plain, ordinary meaning as understood by the average layperson.

(5) "Damages," as found in CGL policies, is undefined.

(6) The plain, ordinary meaning of the term "damages" does not distinguish between sums which are awarded as legal as opposed to equitable relief.

(7) The plain ordinary meaning of the term "damages" as found in CGL policies reasonably includes cleanup costs.

(8) Therefore, cleanup costs are covered by the terms of CGL policies.⁶⁷

The courts relying on this argument rebut the legal, technical definition of "damages" adopted by the *Armco* and *NEPACCO* courts by recognizing that because the distinction between legal and equitable remedies is not self-evident to the average layperson, the insurance companies, as drafters of the policies, should bear the burden of covering such expenses. It is clear to these courts that (1) the insurance companies understand the law better, and are therefore in a better position to decide which claims to cover; (2) the insurance companies have a stronger bargaining position than the insured, and

v. FMC Corp., 799 P.2d 1253 (Cal. 1990); *Upjohn Co. v. New Hampshire Ins. Co.*, 444 N.W.2d 813 (Mich. Ct. App. 1989); *Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co. of New York*, 528 A.2d 76 (N.J. Super. Ct. App. Div. 1987); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 323 S.E.2d 726 (N.C. Ct. App. 1984), *rev'd on other grounds*, 340 S.E.2d 374 (N.C. 1986); *Compass Ins. Co. v. Cravens, Dargan & Co.*, 748 P.2d 724 (Wyo. 1988).

67. See, e.g., cases cited *supra* note 65.

therefore can effectively and unambiguously exclude equitable relief from coverage; and (3) the insurance companies write the policies themselves—it is unlikely that the parties bargain over the coverage provisions beyond the insured deciding what coverage is desired, and the insurer quoting a price. The essence of this position is captured well by the Washington Supreme Court in *Boeing Co. v. Aetna Casualty & Surety Co.*,⁶⁸ wherein it was stated:

The reported decisions across the country, the lay dictionary, the insurance dictionary, the failure of the insurance industry to write down what it meant, each of these facts lays waste to insurers' argument. For us to read the words "as damages" to exclude coverage for cleanup costs, would require this court to rewrite the principles of insurance contract analysis in Washington, and then to retroactively apply these rewritten principles to the policyholders that bought their policies decades ago. . . . [T]he industry knows how to protect itself and it knows how to write exclusions and conditions. The words "as damages" do not stand exclusionary guard for the industry and represent a vast exclusion from coverage. The term "damages" is to be given its plain, ordinary meaning and not the technical meaning advocated by insurers.⁶⁹

The courts that have taken a contrary view have done so quietly. Essentially, as demonstrated above,⁷⁰ courts falling on the other side of the issue have simply concluded that controlling forum state law requires the adoption of a narrow legal definition of damages such as the one espoused by the *Hanna* and *Desrochers* courts. Interestingly, of the courts to have adopted the narrow definition of "damages," the majority are federal courts. The validity of the leading federal decisions representing that view, *Armco* and *NEPACCO*, has been cast into serious doubt by subsequent courts on the basis that *Armco* and *NEPACCO* misperceived controlling state law.⁷¹ Furthermore, at least two state courts, those of Illinois⁷² and Washington,⁷³ have declined to follow the prior decision of a federal district court applying their respective state's law on the ground that the federal court misperceived controlling state law.⁷⁴ Moreover, of the three state decisions to have adopted the narrow legal definition of

68. 784 P.2d 507 (Wash. 1990).

69. *Id.* at 516.

70. *See, e.g., supra* note 32 and accompanying text.

71. *See, e.g., supra* notes 50-52, 58 and accompanying text.

72. *See United States Fidelity & Guar. Co. v. Specialty Coatings Co.*, 535 N.E.2d 1071 (Ill. App. Ct. 1989).

73. *See Boeing Co. v. Aetna Casualty & Sur. Co.*, 784 P.2d 507 (Wash. 1990).

74. *Compare Verlan Ltd. v. John L. Armitage & Co.*, 695 F. Supp. 950, 955 (N.D. Ill. 1988) (no coverage) *with United States Fidelity & Guar. Co. v. Specialty Coatings Co.*, 535 N.E.2d 1071, 1080 (Ill. App. Ct. 1989) (coverage); *compare also Travelers Ins. Co. v. Ross Electric of Washington, Inc.*, 685 F. Supp. 742, 745 (W.D. Wash. 1988) (no coverage) *with Boeing Co. v. Aetna Casualty & Sur. Co.*, 784 P.2d 507, 515 (Wash. 1990) (coverage).

"damages," Illinois,⁷⁵ Maine,⁷⁶ and South Carolina,⁷⁷ all three are subject to serious dispute primarily due to their heavy reliance on the flawed federal court decisions. Insofar as a state court justifies adoption of a legal definition of "damages" on the basis of the *Armco* or *NEPACCO* decisions alone, however, without recourse to its own state law, the decision is subject to serious doubt.

2. *Response Costs, Although Equitable in Nature, Are Covered by CGL Policies*

The second argument advanced by courts favoring coverage of response costs states that it would "exalt form over substance" to decide the coverage issue on the basis of the remedy sought by the governing administrative agency. In *AIU Insurance Co. v. FMC Corp.*,⁷⁸ the California Supreme Court articulated this argument as follows:

The costs of injunctive relief, whether incurred for prophylactic, mitigative, or remedial purposes, do not readily satisfy the statutory⁷⁹ or dictionary definitions of "damages." Because such costs are paid to employees or independent contractors rather than aggrieved parties, they do not directly "compensate" aggrieved persons for "loss" or "detriment." To be sure, in economic terms it may make little difference whether cleanup is performed and paid for directly by the insured pursuant to injunction or undertaken by the agencies (who then seek reimbursement). Nonetheless, it is difficult to construe the two methods of payment as equally covered by the ordinary definition of the word "damages" . . .

It is unlikely, however, that the parties to CGL policies intended to cover reimbursement of response [cleanup] costs but not the costs of injunctive relief, at least where the latter costs are incurred—generally at a lower total cost—for exactly the same purposes addressed through governmental expenditure of response costs. . . .

For these reasons, it would exalt form over substance to interpret CGL policies to cover one remedy but not the other. Given the practical similarity of remedies available under the environmental statutes at issue here, we believe a reasonable insured would expect both remedies to fall within coverage as "damages." Insofar as injunctive relief is an equivalent substitute for the goal of government remedial action, the distinction relied on by *Hanna* is inapposite in the CERCLA context.

. . .

75. *Ladd Constr. Co. v. Insurance Co. of North America*, 391 N.E.2d 568 (Ill. App. Ct. 1979).

76. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990).

77. *Braswell v. Faircloth*, 387 S.E.2d 707 (S.C. Ct. App. 1989).

78. 799 P.2d 1253 (Cal. 1990).

79. California has legislated the "ordinary" definition of "damages." *Id.* at 1267.

. . . Under CERCLA and similar statutes, injunctive relief and reimbursement of response costs serve substantially the same purpose. For this reason, we find CGL policy language is ambiguous as applied to remedial and mitigative costs incurred pursuant to injunction under CERCLA and similar statutes, and therefore must be construed in favor of coverage to satisfy the reasonable expectations of the insured.⁸⁰

The *AIU* court effectively acknowledged that the common law practice of distinguishing injunctive relief from "damages" is inapposite to cases arising under CERCLA and its state counterparts.⁸¹ The

80. *Id.* at 1276-78 (citations omitted).

81. The California court is not alone in its reasoning. In *Lansco, Inc. v. Department of Env'tl. Protection*, 350 A.2d 520 (N.J. Super. Ct. Ch. Div. 1975), a New Jersey court held that the insured was covered under his CGL policy for the costs of cleaning up an oil spill because "the State . . . has fixed as the measure of damages the cost of eliminating the harmful substance from the waters of the State. Hence, the cost of the clean-up determines the amount Lansco became legally obligated to pay and the amount for which it is entitled to indemnification." *Id.* at 525.

Later, in *U.S. Aviex Co. v. Travelers Ins. Co.*, 336 N.W.2d 838 (Mich. Ct. App. 1983), the Michigan Court of Appeals made a virtually identical argument:

[The Insurer] agrees that the contamination of subterranean and percolating water . . . is "physical injury to tangible property" within the terms of the insurance policy. If the state were to sue in court to recover in traditional "damages," including the state's costs incurred in cleaning up the contamination, for the injury to the groundwater, [the insurer's] obligation . . . to pay damages would be clear. It is merely fortuitous from the standpoint of either [insured] or [insurer] that the state has chosen to have [insured] remedy the contamination problem, rather than choosing to incur the costs of clean-up itself and then suing [insured] to recover those costs. The damage to the natural resources is simply measured in the cost to restore the water to its original state.

Id. at 843 (citing *Chemical Applications Co. v. Home Indem. Co.*, 425 F. Supp. 777, 778 (D. Mass. 1977)); *Lansco, Inc. v. Department of Env'tl. Protection*, 350 A.2d 520, 525 (N.J. Super. Ct. Ch. Div. 1975)).

In 1984, the North Carolina Court of Appeals held in *Waste Management of Carolinas v. Peerless Ins. Co.*, 323 S.E.2d 726 (N.C. Ct. App. 1984), that "the [insured] seek[s] to pass on those costs of remedying the present harm. Although called "equitable relief," these cleanup costs are essentially compensatory damages for injury to common property, the . . . groundwater. They are thus covered by the general liability policies." *Id.* at 735.

In 1988, in *Compass Ins. Co. v. Cravens, Dargan & Co.*, 748 P.2d 724 (Wyo. 1988), the Wyoming court held that "[w]e . . . agree with . . . the court in *Lansco, Inc. v. Department of Env'tl. Protection* that the proper measure of property damage is the cost of cleaning up the oil when there is no residual damage to the property." *Id.* at 729-30.

In 1989, in *Upjohn Co. v. New Hampshire Ins. Co.*, 444 N.W.2d 813 (Mich. Ct. App. 1989), the Michigan Court of Appeals stated:

[W]e agree with the trial court that governmental agencies could have ordered Upjohn to act and, had they done so, Upjohn would have been legally obligated to pay the costs of cleanup. . . . We believe that it makes no difference that Upjohn took the remedial action it did before being ordered to do so and, in fact, we believe that such swift remedial action should be

courts sharing this view have noted that there is no compelling reason to adhere to the distinction between the forms of relief available because that distinction does not comport with the reasonable expectations of the insured. In the words of the United States District Court for the Western District of Michigan:⁸²

[T]he argument concerning the historical separation of damages and equity is not convincing and it seems to me 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 third parties. While such claims might be characterized as seeking "equitable relief," the cleanup costs are essentially compensatory damages for injury to common property. . . . [F]rom the standpoint of the insured damages are being sought for injury to property. It is that contractual understanding rather than some artificial and highly technical meaning of damages which ought to control.⁸³

The immediate response to this argument is that if the average layperson does, in fact, understand the difference between legal and equitable relief,⁸⁴ that understanding should properly permit the court to limit coverage to only "legal" relief. This would be consistent with the *Armco* court's concern with giving full effect to all terms of the insurance contract.⁸⁵ This argument must fail, however, because it does not follow that the average layperson reasonably expected coverage to depend upon the discretionary authority of the governing agency, even if the insured did in fact understand the difference between legal and equitable relief. Governing principles of insurance interpretation require that effect be given to the mutual intention of the parties. A considered reading of a CGL policy leads the average layperson to expect coverage to depend upon the substantive nature of the accident or occurrence, and not upon the discretionary actions of the DEP commissioner.

encouraged rather than discouraged.

Id. at 819.

82. *U.S. Fidelity and Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich. 1988) (applying Michigan law).

83. *Id.* at 1168.

84. In the words of one court, "[the] words and phrases such as 'in law,' 'in equity,' 'legally,' and 'damages' are [not] so confusing and ultra-technical as to defy understanding and interpretation by those who have need for policies of insurance . . ." *Ladd Constr. Co. v. Insurance Co. of North America*, 391 N.E.2d 568, 573-74 (Ill. App. Ct. 1979).

85. *See supra* notes 43-45 and accompanying text.

IV. RESOLUTION OF THE COVERAGE QUESTION UNDER MAINE LAW:
Patrons Oxford Mutual Insurance Co. v. Marois

A. Introduction

It is against this backdrop that the Law Court decided *Patrons Oxford Mutual Insurance Co. v. Marois*.⁸⁶ The Law Court essentially held that as a matter of law the average layperson unschooled in either the law or the insurance field would not believe that cleanup costs are covered damages. The Law Court stated two reasons in support of this view: (1) the average layperson as defined by settled principles of Maine law would not expect cleanup costs to be covered by CGL policies,⁸⁷ and (2) previous judicial interpretations make clear the meaning of the policy language.⁸⁸ In so holding, the Law Court adopted the minority view. More importantly, the Law Court's decision does not withstand close analysis of the issue—its arguments are unconvincing, and its reliance on cited authority is unjustified.

B. The Superior Court Decision

The Superior Court in *Patrons Oxford* had found that “[t]he term damages, in the instant case, necessarily extends to payments which must be made to protect, restore and/or replace the water supplies of the . . . third party property owners whose water supplies have been adversely affected by [gasoline] leakage from the [S & M Market].”⁸⁹ The lower court reasoned that the purpose of “damages” is to make injured parties “whole” again, and “to the extent that can be accomplished through monetary payments or repair or restoration that can be accomplished through payment of money” such costs are covered by the language of the subject policy.⁹⁰

C. The Law Court's Decision

Following the Superior Court's ruling that *Patrons Oxford* was obligated to indemnify the *Maroises* for amounts incurred in restoring

86. 573 A.2d 16 (Me. 1990).

87. *Id.* at 18.

88. *Id.* at 19.

89. *Patrons Oxford Mut. Ins. Co. v. Marois*, No. CV-88-368, slip op. at 6, (Me. Super. Ct., Ken. Cty, May 16, 1989) (found in Appendix on Appeal, *supra* note 2, at 56).

90. *Id.* Purporting to follow exclusionary language contained in the insurance contract, the court refused to extend coverage to costs associated with cleanup operations on the *Maroises'* own property, despite arguments to the contrary that all costs associated with the mitigation of damages potentially chargeable to the insurance carrier should be covered. The court noted that despite the incidental benefit conferred upon the insurance carrier through such on-property cleanup operations, the policy covered only damages for “liability,” and not for “preventive maintenance or repair.” *Id.*, slip op. at 9 (also in Appendix on Appeal, *supra* note 2, at 59).

or replacing third parties' water systems to the extent the amounts are spent on work undertaken on the third party's property,⁹¹ the Maroises appealed to the Law Court. Patrons Oxford did not cross-appeal. "On reasoning somewhat different from that of the Superior Court" the Law Court affirmed the judgment.⁹² Apparently well aware of the potentially great environmental impact of its forthcoming decision, the Law Court noted at the outset that it was concerned solely with the interpretation of a contract, and not with fostering or impeding environmental goals.⁹³ To that end, the court limited itself to a discussion of principles governing insurance contract interpretation, focusing on the context of the coverage question at issue. The court noted in general terms that the question whether governmentally mandated environmental cleanup costs are covered by CGL policies as "damages," while a case of first impression in Maine, has sparked great debate in both federal and state courts throughout the country. Without expressly adopting the reasoning of any particular court, the Law Court employed two rationales for joining the minority of courts holding that "response costs" are not "damages."

1. *The Law Court's Assertion that "Damages" is Unambiguous*

Because the Law Court viewed the coverage question as a simple contract action, the court applied controlling state law principles of insurance policy interpretation, relying on its 1987 decision in *Union Mutual Fire Insurance Co. v. Commercial Union Insurance Co.*,⁹⁴ wherein it was stated:

It has long been the rule in Maine that insurance policies are to be liberally construed in favor of the insured and strictly construed against the insurer that drafted the policy. Any ambiguity in the contract is resolved against the insurer. In applying these rules of construction to the instant case, the contract language is to be viewed from the perspective of an average person untrained in ei-

91. This distinction was presumably founded on the Superior Court's understanding of the on-property exclusion typically found in CGL policies. The Maroises' policy excluded coverage for damage to property owned by the insured. See Special Multi-Peril Policy Liability Insurance, in Appendix on Appeal, *supra* note 2, at 30, ¶ (k)(1).

92. Patrons Oxford Mut. Ins. Co. v. Marois, 573 A.2d at 17. The Law Court stated:

We conclude that in the current posture of this case, the Maroises are not confronted with any liability for damages. We therefore reject their appeal seeking greater coverage than the Superior Court found. Our analysis might result in somewhat different coverage than the Superior Court found with its on-premises/off-premises distinction, but we do not address that issue. Because the insurance company has not cross-appealed, it is bound by the Superior Court's judgment as to its responsibilities vis-a-vis the Maroises.

Id. at 19-20.

93. *Id.* at 17.

94. 521 A.2d 308 (Me. 1987).

ther the law or the insurance field "in light of what a more than casual reading of the policy would reveal to an ordinarily intelligent insured."⁹⁵

The *Patrons Oxford* court neatly resolved the question whether the term "damages" is ambiguous by concluding as a matter of law that the average layperson untrained in either law or insurance, "engaged in a more than casual reading of the policy," would find the term "damages" to be clear and unambiguous.⁹⁶ The court therefore strongly suggested that had *Patrons Oxford* cross-appealed, it would not have been obligated to indemnify the insureds for *any* cleanup costs.⁹⁷

Upon a close study of the dispute at issue and the extant case law on the subject, it is clear that the court decided the question on the basis of the historical difference between legal and equitable relief, following the decisions in *Hanna*, *Desrochers*, *Armco*, and *NEPACCO*. The court essentially held that reimbursement for the costs of "pollution control," as opposed to reimbursement for the costs of "property damage," is equitable relief—and therefore not covered by a CGL policy that provides coverage only for "damages because of property damage."⁹⁸

In what purports to be an explanation for its optimistic view of the innate understanding of the average layperson regarding esoteric legal doctrine, the Law Court argued that the Act's provision for separate treatment of pollution control and damages supports its view that the policy language unambiguously excludes coverage for cleanup costs.⁹⁹ This argument, like the argument found in *NEPACCO*,¹⁰⁰ presumably asserts that distinctions drawn in the body of an environmental statute can properly impute to the average layperson signing an insurance contract knowledge that such distinctions will control interpretation of the contract. The court

95. *Id.* at 310 (citations omitted).

96. The Law Court stated:

[W]e do not believe the "ordinarily intelligent insured," engaged in a "more than casual reading of the policy," would consider [cleanup costs] to be "sums which the insured [is] legally obligated to pay as damages." Instead, [cleanup costs] are the expenses the [insured] may be required to incur to halt continuing pollution and property damage.

Patrons Oxford Mut. Ins. Co. v. Marois, 573 A.2d at 18 (quoting *Union Mut. Fire Ins. Co. v. Commercial Union Ins. Co.*, 521 A.2d 308, 310 (Me. 1987)).

The phrase, "engaged in a more than casual reading," seems to be nothing more than a requirement that the average layperson's understanding of the policy language be "reasonable." There is no reason to believe that this language, absent more, renders Maine's law substantively different from that of other states to have considered this coverage question.

97. See *supra* note 119 and accompanying text.

98. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d at 18 n.2.

99. *Id.* at 18 n.3.

100. See *supra* notes 62-64 and accompanying text.

stated:

If the Maroises fail to act, the DEP may undertake clean-up action under [ME. REV. STAT. ANN. tit. 38, § 568 (West 1989 & Supp. 1990-1991)]. If it does so, its expenses are initially charged against the Ground Water Oil Clean-up Fund, then recovered from a responsible party like the Maroises. [ME. REV. STAT. ANN. tit. 38, § 569(6), 570 (West 1989 & Supp. 1990-1991)]. Such sums expended by the DEP, however, are for pollution control, not for property damage. The statute explicitly recognizes a separate treatment for property damage. If third parties suffer property damage, they may seek damages from the Fund, [ME. REV. STAT. ANN. tit. 38, § 569(2-A) (West 1989 & Supp. 1990-1991)], amounts for which the Maroises would ultimately be responsible, [ME. REV. STAT. ANN. tit. 38, § 569(6) (West 1989 & Supp. 1990-1991)], and which would presumably be covered under the policy. The stipulated facts make no reference to even a threat of such a property damage claim.¹⁰¹

Essentially, the Law Court has stated that the average layperson would understand that her CGL policy does not cover costs associated with cleanup orders because the issuance of such orders is authorized by provisions of the Act that are properly characterized as providing for pollution cleanup, as distinguished from compensation for third-party property damage.

Apparently, the court holds the view that DEP action to temporarily restore water supplies is not action taken to repair "property damage," but rather is "pollution control."¹⁰² As support, the court noted that the Act provides separate recourse for third parties seeking compensation for property damage suffered as a result of a discharge of oil to groundwater.¹⁰³ The court stated that actions taken to clean up pollution are different in kind from actions taken to repair or restore damaged property. Moreover, the court stated that contamination of water supplies does not constitute "property damage."¹⁰⁴ It is difficult to imagine how the court could come to that conclusion, yet no explanation is provided.

It is true that an owner of damaged property can seek monies from the Groundwater Clean-up Fund (Fund) to reimburse costs already incurred in cleaning up contaminated groundwater, or to pay

101. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d at 18 n.3. The DEP Clean Up Order, which may be found in the Appendix on Appeal, *supra* note 2, at 36, discloses the fact that the DEP undertook temporary remedial action at all four contaminated residences. It is therefore difficult to understand the court's point. It may be supposed that the third parties did not threaten legal action because the DEP responded, and remedied, their injury.

102. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d at 18-19. Temporary remedial measures may be undertaken by the DEP pursuant to ME. REV. STAT. ANN. tit. 38, § 568(2) (West Supp. 1990-1991).

103. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d at 18 n.3. See ME. REV. STAT. ANN. tit. 38, § 569(2-A) (West 1989 & Supp. 1990-1991).

104. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d at 18-19.

someone else to clean up contaminated groundwater.¹⁰⁵ Disbursement of monies from the Fund for this purpose is clearly authorized by the Act.¹⁰⁶ It is also true, however, that a responsible party can use Fund monies to clean up discharges in the first instance; so too can the State.¹⁰⁷ Certainly, it is fair to characterize such expenditures as pollution control, but that does not by itself justify the distinction drawn by the court.

The statutory section relied upon by the court to justify its distinction between pollution control and property damage¹⁰⁸ is more fairly characterized as a statutory vehicle whereby a nonresponsible party that expends money cleaning up a discharge is assured of a procedural device to facilitate reimbursement of those expenditures. This section is not an attempt by the Legislature to distinguish pollution control from other types of property damage. The Act primarily provides for the restoration of water supplies, not for the rebuilding of physical structures near contaminated water supplies that become damaged due to the discharge. This interpretation is consistent with the stated purpose of the Act to provide for summary cleanup of hazardous discharges: "The Legislature intends by the enactment of this [Act] . . . to require the prompt containment and removal of [hazardous discharges]."¹⁰⁹

Insofar as the court justifies its denial of coverage on the basis of the distinctions drawn in the Act between property damage as covered damages under CGL policies, and response costs as not recoverable, two things can be said. First, it is improper for the court to define policy coverage in light of statutory language that is not contained in the policy itself. Second, one of the purposes of the Act is to hold responsible parties financially accountable for cleanup costs, whether initially incurred by the responsible party, the State, or the damaged party;¹¹⁰ therefore, it would be inconsistent to permit re-

105. See ME. REV. STAT. ANN. tit. 38, § 569 (West 1989 & Supp. 1990-1991).

106. This conclusion is based on the interplay between ME. REV. STAT. ANN. tit. 38, §§ 568 and 569 (West 1989 & Supp. 1990-1991).

107. See ME. REV. STAT. ANN. tit. 38, § 568(1) (West Supp. 1990-1991).

108. ME. REV. STAT. ANN. tit. 38, § 569(2-A) (West 1989 & Supp. 1990-1991).

109. ME. REV. STAT. ANN. tit. 38, § 561 (West 1989 & Supp. 1990-1991).

110. See ME. REV. STAT. ANN. tit. 38, § 570 (West 1989 & Supp. 1990-1991). It is sometimes argued that denial of coverage for response costs best comports with the statutory purpose of holding responsible parties responsible. Presumably, denying coverage will act as a deterrent against future pollution. See generally Brett, *supra* note 63, at 52. An alternative approach is to first make certain that the pollution is cleaned up, and then to rely on the criminal law to deter future hazardous discharges. It can fairly be argued that if an insurance company is willing to risk incurring costs for cleaning up hazardous spills in return for collecting premiums, there is no good reason to deny them that business opportunity—especially in light of the fact that it provides insurance against a polluter's inability to clean up his own discharge. Of course, choosing between these two approaches is a policy matter dependent upon a legislature's priorities.

sponsible parties to recover the costs of cleanup.

The Law Court's argument seems to have been borrowed from the Eighth Circuit's decision in *NEPACCO*, although that decision is not specifically cited.¹¹¹ The *NEPACCO* court found its limited construction of "damages" consistent with the statutory scheme of the environmental statutes at issue in that action, which, like the Maine statute, differentiated between cleanup costs and damages. As discussed above, in the context of the *NEPACCO* decision,¹¹² the gist of the Law Court's argument is that, depending upon the relief sought by the DEP, there is a potentially great difference in the amount of money for which the insured will ultimately be held liable. Therefore, the court argues, it is reasonable to focus on the remedy sought while ignoring the fact that both remedies are concurrently available upon a showing of the same predicate—i.e., groundwater pollution.

The argument is unpersuasive because it is necessarily predicated on the proposition that CGL insurance coverage depends upon the provisions of applicable environmental statutes. Nowhere in the policies is it stated that the policies are to be read in light of prevailing statutes. In the absence of such a contractual provision, it is improper for a court to limit coverage on that basis. While the rights of the parties are of course governed by applicable laws, such laws serve to mark the boundaries of the parties' freedom of contract. They do not positively define the parties' expectations at the time of execution. Furthermore, the Law Court's argument erroneously presupposes that the Maroises relied on the provisions of the environmental statutes to define the coverage of the insurance policy—when in fact there is no reason to believe that the Maroises either read or knew about the environmental statutes prior to procuring their CGL policy. To interpret a contract in light of a statute not incorporated into the contract is to unreasonably defeat the reasonable expectations of the insured. Insofar as Maine law requires insurance contracts to be construed in consonance with the understanding of the average layperson,¹¹³ the argument set forth by the court is clearly contrary to Maine law. Furthermore, the court's approach undermines an insured's ability to rely upon the plain words of a contract. Thus, it is improper to impute to the Maroises knowledge of the Act's provisions, let alone to hold that as a matter of law the Maroises understood what those provisions meant.

111. Compare *NEPACCO*, 842 F.2d at 986 ("The cost of cleaning up a hazardous waste site often exceeds its original value") with *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d at 18-19 ("There may be a substantial difference between these remedial costs and the amount of damages the Maroises would have to pay to property owners for damages to their property").

112. See *supra* notes 62-64 and accompanying text.

113. See *supra* note 95 and accompanying text.

The Law Court's argument that the language of the Act supports its view that cleanup costs are not covered by the policy is unconvincing because there is simply no need for the Act to provide a procedural device whereby a responsible party can recover costs for damages to his own property. Although the Act does provide that under certain circumstances a responsible party can borrow from the Fund in the first instance to clean up a discharge, the DEP is ultimately required to seek reimbursement. For obvious reasons, the Act is simply not designed to reimburse responsible parties for their expenditures.

Thus, the Law Court's reliance on the Act's distinction between remedies avails nothing. The Act does provide the DEP with the flexibility to seek various types of remedies in order to effectuate summary cleanup of hazardous discharges, but there is no reason to believe that the Legislature intended those distinctions to be anything other than procedural devices to facilitate the proper administration of the Act. The relief that may be sought by the DEP in any given case depends solely upon the DEP's discretionary judgment as to the Act's proper administration. This discretion should not be held to define an insured's rights under a contract to which the DEP is not a party.

2. *The Law Court's Assertion That Previous Judicial Interpretations Clearly Define "Damages"*

Perhaps recognizing that the average layperson does not have an intuitive grasp of the distinction between legal and equitable relief, the Law Court held that even if the average layperson does not actually possess an intuitive grasp of the legal/equitable distinction, she will be imputed with knowledge of "previous judicial interpretations" of the term "damages" as used in similar contracts. The court stated, "Previous judicial interpretations made clear the meaning of the words 'pay as damages' when used in an insurance contract."¹¹⁴ The previous judicial interpretations to which the Law Court referred are *Hanna*¹¹⁵ and *Desrochers*.¹¹⁶ As support for this position, the court stated:

There are many words, phrases or paragraphs in a standard insurance contract that a first time reader does not understand. That circumstance does not justify excising such provisions from the contract. . . . Ambiguity (as opposed to outright lack of understanding) is created only by converting an insured's hope or assumption that every out-of-pocket payment is covered into a part of the contract language.¹¹⁷

114. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d at 19.

115. *Id.*

116. 106 A.2d 196 (N.H. 1954).

117. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d at 19.

Since the insured is "given the benefit of the doubt" only when provisions of a contract are "ambiguous," the court argued, the Maroises were not entitled to the benefit of the doubt because those prior judicial interpretations had rendered the meaning of "damages" clear.

It is settled in Maine that ambiguities in insurance policies are to be interpreted in favor of the insured, and that the contract language is to be viewed from the perspective of the average person untrained in either the law or the insurance field.¹¹⁸ By holding the average layperson to knowledge of previous judicial interpretations, the Law Court has put a gloss on the settled principle governing insurance policy interpretation: the average layperson untrained in the law or the insurance field is now held as a matter of law to be abreast of current judicial interpretations of insurance policy language. Apparently, this knowledge includes the decisions of every state and federal court to have considered the issue.

One of the reasons that *Patrons Oxford* is objectionable is that prior to *Patrons Oxford* an insured in Maine would not have known that keeping abreast of previous judicial interpretations was required, or even expected. Moreover, even if the ordinarily intelligent insured were abreast of principles governing the interpretation of contracts in Maine, that insured would properly look to Maine cases to determine the meaning of "damages" in the context of CGL policies. The *Patrons Oxford* court, however, incorporated the decisions of *Hanna* and *Desrochers*, decisions of the Fifth Circuit and of the New Hampshire Supreme Court. By holding the average layperson to knowledge of previous judicial interpretations, the court is not only requiring the insured to know what those interpretations are, but also requiring the insured to be able to predict which decisions the Law Court will find persuasive. It is unreasonable to expect the ordinarily intelligent insured to gauge which of the decisions of the fifty states and all of the federal courts the Law Court will find persuasive.

3. *The Law Court's Parting Message*

Under the Superior Court's decision, *Patrons Oxford* was required to indemnify the Maroises for any costs incurred in cleaning up damaged property owned by third parties. In a parting note, the Law Court clearly hinted that had *Patrons Oxford* cross-appealed, the Law Court would not have upheld the Superior Court's decision ordering *Patrons Oxford* to indemnify the Maroises for expenses associated with the removal and restoration of contaminated groundwater from damaged properties owned by third parties. The Law

118. See *Union Mut. Fire Ins. Co. v. Commercial Union Ins. Co.*, 521 A.2d 308, 310 (Me. 1987).

Court stated:

Our analysis might result in somewhat different coverage than the Superior Court found with its on-premises/off-premises distinction, but we do not address that issue. Because the insurance company has not cross-appealed, it is bound by the Superior Court's judgment as to its responsibilities vis-a-vis the Maroises.¹¹⁹

While this follows logically from the Law Court's conclusion that the average layperson would find the policy language unambiguous, this dictum is of potentially great significance because it suggests that in the future indemnification for cleanup costs will depend not on the substance of the underlying claim, but on the nature of the relief sought by the governmental agency—a decision which usually proves to be highly discretionary and all too fortuitous.¹²⁰

V. CONCLUSION

A. Coverage Best Comports with Existing Law and with the Reasonable Expectations of the Insured

From the foregoing, it should be clear that the better view for Maine and states sharing similar principles of law is that cleanup costs are covered by CGL policies. This conclusion best comports with Maine contract law and the reasonable expectations of the insured. From a technical, legal standpoint, the argument that cleanup costs are a form of equitable relief, and therefore not covered under CGL policies providing coverage only for legal relief, has a superficial appeal. The difficulty with this argument, and the reason it must ultimately fail, is that the law governing the construction of insurance contracts provides that undefined terms must be given their plain, ordinary meaning with ambiguities construed against the insurer. Nowhere in this law is there a provision requiring that the understanding of the average layperson must comport with previous judicial interpretations, traditional insurance law, or with traditional distinctions between law and equity. Furthermore, there is no principled reason to believe that the average layperson understands the distinction that the Law Court seized upon in *Patrons Oxford*. The Law Court is correct in its assertion that the coverage question is contractual in nature. Accordingly, the court should have given effect to the reasonable expectations of the insured.

Undoubtedly, it is very difficult, if not impossible, to gauge the

119. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d at 20.

120. Moreover, this statement of the Law Court strongly suggests that the Law Court does not believe that the State has the ability to recover damages on the basis of contamination of Maine's groundwater. While this question is beyond the scope of this Comment, it is important to note that in the next case, the Law Court could assert that the state lacks the proprietary interest to maintain a traditional suit for "legal damages."

understanding of the average layperson. The chief method used by courts that have attempted to gauge that understanding is to refer to a standard dictionary definition of "damages."¹²¹ Significantly, no definition used by any of the courts draws an express distinction between legal and equitable relief. Even though the definitions relied upon by some courts purport to be limited to traditional "legal" relief, these definitions do not unambiguously exclude equitable relief.¹²² Moreover, CGL policies themselves, which generally contain a definitions section, do not contain a definition of damages.¹²³

It is fair, as the *Armco* court noted, to impute to the average layperson knowledge that coverage is limited by the term "damages," but it is not at all clear from the language of the CGL policies what that term excludes. Even if the insureds had scrutinized their policies, all they could have known is that under certain circumstances their policy will provide coverage for "damages." Furthermore, even if the insureds somehow knew that "damages" primarily covers only "monetary amounts," the scope of that coverage remains ambiguous because the policies do not discriminate between different types of legal damages. This ambiguity, at least in Maine, is highlighted by *Bralely v. Berkshire Mutual Insurance Co.*,¹²⁴ where the Law Court held that punitive damages are not covered under similar policy language, despite the fact that punitive damages are "damages." Thus, even if the Maroises knew, or thought they knew, that only compensatory money awards were properly considered

121. See *supra* note 65.

122. One dictionary definition of damages refers to "money paid or ordered to be paid as compensation for injury or loss." MORRIS, *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE*, NEW COLLEGE EDITION 333. The language "money ordered to be paid" may reasonably include cleanup costs, because at bottom cleanup costs require the expenditure of money. It cannot be seriously suggested that a polluter is able to comply with a cleanup order without spending money.

123. See *supra* note 11.

124. *Bralely v. Berkshire Mut. Ins. Co.*, 440 A.2d 359, 361 (Me. 1982). Ironically, in *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d at 19 n.8, the Law Court noted that its decision was consistent with *Bralely*, in which the court had, it said, "construed 'damages . . . for bodily injury' in an uninsured motorist policy not to provide coverage for punitive damages." The chief consistency between the two cases is the Law Court's tendency to excuse poor contract draftsmanship while holding the average layperson to a very high standard. It is one thing to expect the average layperson to understand that the term "damages" refers only to legal relief, but it is quite another to expect the average layperson to understand that "damages" denotes only *certain kinds* of legal relief.

Moreover, in the context of a Seventh Amendment jury trial question, the United States Supreme Court recently reiterated its view that not all monetary awards constitute legal relief. See *Chauffeurs, Teamsters and Helpers, Local 391 v. Terry*, 494 U.S. 588, 110 S.Ct. 1339, 1347-48 (1990), where the Court stated, "Generally, an action for money damages was 'the traditional form of relief offered in the court of law.' *Curtis v. Loether*, 415 U.S. 189, 196 (1974). This Court has not, however, held that 'any award of monetary relief must necessarily be 'legal' relief.' *Ibid.*"

“damages,” they would technically have been mistaken if they believed that it also encompassed punitive money awards. Unless the average layperson is to be imputed with knowledge of all the subtle vagaries distinguishing the forms of action and forms of relief that persist despite the merging of law and equity, CGL policies should be held to cover cleanup costs.

In sum, unless the average layperson has occasion to grasp the Law Court’s subtle distinction between “damages” and “cleanup costs” prior to signing an insurance contract, she has no reason to know—and in fact no way to know, either from dictionaries or from the insurance policy itself—that “damages” does not include cleanup costs. The argument that the average insured should be charged with knowledge of previous judicial interpretations can be dismissed because Maine law provides that the average insured need not be schooled in law or insurance.¹²⁵ Knowledge of previous judicial interpretations is clearly too onerous a burden to place on an individual without such schooling, especially when those interpretations are borrowed from other jurisdictions. For that reason, it is both improper and unfair for a court to deny an insured coverage for response costs.¹²⁶ It is a fair generalization that in most cases the insurance companies will have a more precise understanding of what “damages” means in any particular jurisdiction. Under the circumstances, the insurance companies should bear the burden of making the meaning clear.

By the same token, any argument that plain logic and careful reading will make it clear that response costs are not covered must similarly fail. Cleanup orders are only one step removed from direct monetary damages, are predicated upon the same underlying issue, and are awarded for the same reason—to expedite containment of groundwater pollution and, not incidentally, to remedy the injured party. While in some states legal damages are limited to property value, and therefore cannot rise to the costs of some cleanup orders, the reason for the award is essentially compensatory—to make the damaged party whole. The notion that average laypersons have an intuitive grasp of this “legal damages”/property-value ceiling distinction is simply unconvincing. The fact that courts themselves cannot agree only strengthens the argument in favor of coverage.

Furthermore, cleanup costs should be covered under CGL policies because coverage best comports with the reasonable expectations of

125. See *Union Mut. Fire Ins. Co. v. Commercial Union Ins. Co.*, 521 A.2d at 310.

126. See *Hazen Paper Co. v. United States Fidelity and Guar. Co.*, 555 N.E.2d 576 (Mass. 1990) wherein the court stated: “We explicitly reject the reasoning of some courts that incorporates ‘[p]revious judicial interpretations’ into the insurance contract to narrow the scope of the word ‘damages’ and thus purport to eliminate any ambiguity. Lay people should not reasonably be expected to know such limitations.” *Id.* at 583 (citations omitted).

the insured. It is fair to assume that when an insured obtains a CGL policy, the insured does so in order to protect herself against unforeseen accidents for which she will be held liable. These expectations are best characterized as depending on the nature of the underlying substantive claim, and not on the form of the relief sought. In this case, as far as the Maroises were concerned, there was no substantive difference between directly paying the neighbors a sum of money to clean up the contaminated water, and hiring a contractor for the same amount of money to do the same thing. In either case, the cost of cleanup would have been the same. Essentially, this is a matter of determining the proper measure of damages, which is wholly different from determining whether or not the costs are, technically speaking, "damages."

B. Unanswered Question: Whether the Patrons Oxford Decision Will Frustrate the Purpose of the Act

The extent to which the *Patrons Oxford* decision frustrates the purpose of the Act remains to be seen. However, the potential for serious interference with administrative enforcement of the Act is great. The Legislature envisioned the Act as a vehicle to ensure *prompt* cleanup of hazardous discharges. The reason for this is simple—the deleterious effects of hazardous discharges increase with time. The pollutants do not tend to dissipate, but rather to migrate. From both a public health and economic perspective, it is a simple fact that the faster the discharges are cleaned up, the better. The Attorney General, as *amicus curiae*, argued that the Act's vitality depends upon voluntary cleanups.¹²⁷ The Fund is a limited resource, and must be reimbursed for most expenditures. For every discharge that is not voluntarily cleaned up, there is an increase in costs that must be borne at least initially, and potentially permanently, by the State—including costs of cleanup, and costs of litigation for enforcement of the Act and reimbursement of the Fund.

It is unclear what effect the *Patrons Oxford* decision will have on voluntary cleanups. For those polluters who can afford a typically expensive cleanup, perhaps knowledge that those costs are not covered by CGL policies will encourage and enhance the likelihood of a voluntary cleanup.¹²⁸ But in the case where a polluter refuses to voluntarily clean up a discharge, the results are disastrous for everybody. It is conceivable that a polluter who cannot afford a voluntary cleanup will come forward as soon as the discharge is discovered,

127. See *Amicus Curiae* Brief, *supra* note 5, at 16-19.

128. It can be surmised that insurers, by contrast, will not voluntarily undertake responsibility to clean up hazardous discharges. Additionally, given the fact that the DEP will usually implement remedial measures in the first instance, third-party property owners are likely to rely on the DEP to first clean up a hazardous discharge and then seek restitution.

borrow money from the Fund, conduct the cleanup, and reimburse the Fund as soon as possible. In this scenario, the State bears neither the expense for cleanup nor for litigating liability. Certainly this is an optimistic view.

If, however, the polluter does not voluntarily clean up the discharge, the State, and ultimately the taxpayer, is left to bear the costs. The question for the court is therefore whether, if the DEP conducts the cleanup because the polluter cannot afford to, and the DEP thereafter sues the polluter for reimbursement, the DEP can recover damages within the limits of a CGL policy. Although these costs result from the same events that would lead to damages liability if a third party sued the polluter for harm to property, the historical distinction between law and equity would treat the costs differently, and thus CGL coverage in Maine now apparently depends on who cleans up the discharge. When the DEP seeks reimbursement for costs incurred to remedy a harm done to a third party, the DEP is subrogated to the rights of the polluter under the polluter's CGL policy. Since subrogation is an equitable doctrine, historically relief would have been available only from courts of equity, and therefore no "legal" damages would be recoverable. Furthermore, since an action seeking "reimbursement" is properly characterized as seeking "equitable restitution," those costs presumably are not covered by CGL policies under the Law Court's reasoning.¹²⁹

The end result is that if a polluter refuses to voluntarily clean up the discharge, the State is left with the option of cleaning up the discharge with money from the Fund, and pursuing a decree for equitable restitution against the polluter. Since the United States Supreme Court has found that a polluter's obligations under a cleanup order are dischargeable under the Bankruptcy Code when the polluter is unable to comply with the order other than by paying money,¹³⁰ if the polluter is uninsured against the risk of a hazardous

129. In the present appeal, the Law Court noted that "the DEP cannot recover damages in the administrative proceeding it has brought, but can only compel a clean-up." *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d at 20 (citing *ME. REV. STAT. ANN.* tit. 38, § 568 (West 1989)). It is unclear whether this statement is based on the court's understanding of proper procedural administration of the Act, on the court's view that the DEP has no "legal" standing to seek damages, or both.

A remaining possibility is for the State to sue the polluter for damages to State-owned water. In this scenario, if the State can establish an interest in its groundwater sufficient to (1) support legal standing, and (2) to establish "property damage," the State could presumably recover damages within the purview of a CGL policy. In *Patrons Oxford*, although the court noted that the insured would presumably be covered against liability for property damage, the court distinguished "property damage" from expenses incurred by the DEP in undertaking a cleanup action. The court deemed those costs to be attributable to "pollution control." *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d at 18 n.3. It is unclear whether such costs would be recoverable as damages.

130. *Ohio v. Kovacs*, 469 U.S. 274, 283 (1985).

discharge, as is the case here, and the polluter subsequently goes into bankruptcy, the taxpayer will be the party left to clean up the discharge.

As noted at the outset of this Comment, there are many policy arguments hovering around this issue, and certainly the Legislature has the ability to remedy whatever defects it finds in the wording of the Act. The purpose of this Comment, however, is merely to point out that the Law Court has frustrated the purposes of the Act without any clear justification for doing so. This is not a policy argument—it is simply a matter of contract interpretation.

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