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TRIGGERING AN OBLIGATION: RECEIPT OF AN EPA PRP LETTER AND AN INSURER'S DUTY TO DEFEND

I. INTRODUCTION

In response to the "tragic consequences" of improper hazardous waste disposal practices, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). Congress's objectives in creating CERCLA were:

[T]o encourage maximum care and responsibility in the handling of hazardous waste; to provide for rapid response to environmental emergencies; to encourage voluntary clean-up of hazardous waste spills; . . . and to ensure that parties responsible for release of hazardous substances bear the costs of response and costs of damage to natural resources.

CERCLA authorizes the United States Environmental Protection Agency ("EPA") to identify sites requiring cleanup and any

1. H.R. Rep. No. 1016, 96th Cong., 2d Sess., pt. 1, at 17, reprinted in 1980 U.S.C.C.A.N. 6119, 6120 [hereinafter H.R. Rep. No. 1016]. Prior to enactment of CERCLA, Congress determined that the existing law was "clearly inadequate to deal with this massive problem." Id. at 18. Then-Senator Albert Gore, Jr., stated that: The "public is already bearing more than its fair share of the cost of the recklessness in the form of threats to the public health and damage to the public's environment. What the public demands and what this bill ought to provide is a fair and reasonable division of the cost of cleaning up the mess." Id.


parties potentially liable for any remedial action\textsuperscript{5} necessary to repair the environmental damage.\textsuperscript{6} Upon obtaining sufficient evidence of a party's potential CERCLA liability, EPA sends a letter advising the party of its classification as a "potentially responsible party" ("PRP").\textsuperscript{7} Courts are split as to whether an insured's receipt of a PRP letter triggers an insurer's duty to defend the insured recipient under an applicable insurance policy. The dispute focuses on whether a PRP letter is the functional equivalent to the filing of a lawsuit. Insurance companies' use of the standard comprehensive general liability ("CGL") insurance policy further complicates the issue and frequently leads to litigation because of ambiguities in various CGL terms.\textsuperscript{8}

\begin{flushleft}
\textsuperscript{5} Section 101(24) defines "remedy" or "remedial action" as: those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. CERCLA § 101(24), 42 U.S.C. § 9601(24).

\textsuperscript{6} To help finance investigations and cleanups at uncontrolled or abandoned hazardous waste sites, Congress established a special tax that goes into the Hazardous Substance Response Trust Fund ("Superfund"). In 1986, CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered sections of 42 U.S.C. §§ 9601-9675), which significantly amended various sections of CERCLA, including increasing the size of the Superfund from $1.6 billion to $8.5 billion. SARA § 207(d), 42 U.S.C. § 9611. Generally, the fund is to be used for the "[p]ayment of governmental response costs incurred pursuant to section 9064..." Id. § 111(a)(1), § 9611(a)(1). President Reagan also delegated primary authority under SARA to EPA. See Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).

\textsuperscript{7} See generally Interim Guidance on Notice Letters, Negotiations and Information Exchange, 53 Fed. Reg. 5298 (1988). State environmental agencies enforcing hazardous waste cleanups have similar notices that are commonly sent to PRPs. For further discussion of PRP letters, see infra notes 58-64 and accompanying text.

This Comment focuses solely on the “duty to defend any suit” clause present in many CGL policies. The analysis herein addresses whether the term “suit,” as used in the policy, includes actions or investigations initiated as a result of receipt of a PRP letter. After extensive background discussion, this Comment illustrates potential problems caused by a lack of consistency in judicial analysis of this issue and suggests combining administrative, legislative, and judicial efforts to promote and mandate joint insurer and PRP involvement in CERCLA liability negotiations. This approach would allow those companies involved to assist in cleaning up hazardous waste sites, rather than delaying cleanup efforts through preliminary litigation.

II. BACKGROUND

A. The CERCLA Enforcement Scheme

Under CERCLA, hazardous waste site cleanups can take any one of three forms. First, a PRP, or group of PRPs, may voluntarily elect to clean up a site and thereby avoid administrative enforcement altogether. Second, EPA may choose to clean the site itself, using federal funds from Superfund, and seek reimbursement from liable parties. Finally, if “an imminent and substantial endangerment to the public health or welfare or the environment” exists, under CERCLA section 106, EPA may seek injunctive relief.


9. For purposes of this Comment, it is assumed that the insurer’s duty to defend an insured would otherwise exist, expressly or impliedly, but for an exclusion based on the definition of “suit.”


11. CERCLA § 104(a) states in part:

Whenever ... any hazardous substance is released or there is a substantial threat of such a release into the environment, ... the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time ... or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

CERCLA § 104(a), 42 U.S.C. § 9604(a).

12. CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A). “[A]ny person who accepts or accepted any hazardous substances for transport to [a site] ... from which there is a release ... caus[ing] the incurrence of response costs ... shall be liable for ... all costs of removal or remedial action incurred by the United States Government ... .” Id. For further discussion of potential liability under CERCLA, see infra notes 39-48 and accompanying text.
by issuing an administrative order requiring PRPs to undertake the cleanup themselves.\textsuperscript{13}  

Since 1989, EPA has increased its use of section 106 administrative orders.\textsuperscript{14} Penalties for groundless noncompliance with administrative orders include fines of up to $25,000 per day\textsuperscript{15} and/or treble damages based on the cost incurred by the use of Superfund monies.\textsuperscript{16} In order to avoid these penalties, PRPs must demonstrate a reasonable belief that there was sufficient cause to justify a refusal to comply with an order.\textsuperscript{17}

\textsuperscript{13} CERCLA § 106(a), 42 U.S.C. § 9606(a). CERCLA § 106(a) states in relevant part:  
\"[W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.\"  

Id.  
There are two types of CERCLA § 106 administrative orders: consent orders, which formalize removal and Remedial Investigation/Feasibility Study (\textquoteleft RI/FS\textquoteright) settlements, and unilateral orders, which obligate PRPs to perform certain removal actions. \textit{See Guidance on CERCLA § 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions}, 20 \textit{Envtl. L. Rep.} (Envtl. L. Inst.) 35253, 35253 (Jan. 31, 1990). Accordingly, EPA regional offices are to issue orders to those PRPs only when evidence exists indicating they are in fact liable. However, individual EPA offices can determine the degree of fact specificity necessary to show liability. \textit{Id.} at 35256. Regional offices are directed to consider the financial position of PRPs prior to issuing a § 106 administrative order because a \textquoteleft reasonable belief\textquoteright{} that the PRPs are financially capable of conducting remedial action is required. \textit{Id.} Exceptions to this requirement are made for those PRPs \textquoteleft lack[ing]\textquoteright{} any substantial resources when remedial actions \textquoteleft do not involve expenditures of money.\textquoteright{} \textit{Id.}  

\textsuperscript{14} \textit{See infra} notes 54-55 and accompanying text.  

\textsuperscript{15} CERCLA § 106(b) (1), 42 U.S.C. § 9606(b) (1). A court recently assessed fines for a PRP's failure to comply with a § 104 information request in the amount of $100,000 in penalties and an additional $590,000 for reimbursement to EPA for past costs. \textit{Pesticide & Toxic Chem. News} (June 16, 1993). The largest penalty assessed for a CERCLA § 104 violation was a $12.4 million penalty charged against a Texas businessman in December 1992. \textit{Toxic Materials News} (Jan. 20, 1993). That penalty represented the maximum $25,000 per day fine for the 499-day period that the defendant failed to respond to the information request. \textit{Id.}  

\textsuperscript{16} CERCLA § 107(c) (3), 42 U.S.C. § 9607(c) (3). The monies recovered under this section are deposited into the Superfund. \textit{Id.} Aside from the economic gain and punitive effect associated with being awarded treble damages, EPA views treble damages as an additional deterrence to potential violators. \textit{See Superfund Enforcement Strategy and Implementation Plan}, 20 \textit{Envtl. L. Rep.} (Envtl. L. Inst.) 35,207, 35,208 (Sept. 26, 1989) [hereinafter \textit{Superfund Enforcement Strategy}].  

\textsuperscript{17} CERCLA § 106(b) (1), 42 U.S.C. § 9606(b) (1). \textquoteleft{T}reble damages may not be assessed if the party opposing such damages had an objectively reasonable basis for believing that the EPA's order was either invalid or inapplicable to it.\textquoteright{} \textit{Solid State Circuits, Inc. v. EPA}, 812 F.2d 383, 391 (8th Cir. 1987).
Section 107 of CERCLA lists four classes of persons considered potentially responsible parties: (1) current owners and operators of a vessel or facility; (2) owners and operators of facilities at the time of hazardous substances disposal; (3) persons who arranged for disposal, treatment, or transport of hazardous substances; and (4) persons who transported hazardous substances to a site where there was a release or threatened release.

Corrective response actions can be in the form of short-term removal actions or long-term remedial actions. Removal actions are more limited, usually costing less than two million dollars or

18. "Person" is broadly defined as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." CERCLA § 101(21), 42 U.S.C. § 9601(21).


The term “owner or operator” means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand.

Id.

20. Id. § 101(9), 42 U.S.C. § 9601(9). The term “facility” includes “any building, structure, installation, equipment, ... landfill, storage container ....” Id.


23. Id.

24. Id. § 101(26), 42 U.S.C. § 9601(26).

25. Id. § 107(a), 42 U.S.C. § 9607(a).


27. Id. § 101(23), 42 U.S.C. § 9601(23). Removal actions include “security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals ....” Id.

28. Id. § 101(24), 42 U.S.C. § 9601(24). Remedial actions include: “storage, confinement, perimeter protection, ... neutralization, cleanup of released hazardous substances ... diversion, destruction, ... repair or replacement ... and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.” Id.
lasting less than twelve months. Remedial actions may be taken instead of, or in addition to, removal actions.

Remedial actions begin with a Remedial Investigation/Feasibility Study ("RI/FS"), which assesses site conditions and determines the type and extent of cleanup necessary at a site. The study can be conducted either by EPA or by PRPs if EPA determines that a PRP-controlled RI/FS can be completed properly. EPA oversees all PRP remedial studies to ensure compliance with EPA standards, National Oil and Hazardous Substances Pollution Contingency Plan ("NCP") requirements, administrative orders, and consent decrees. The remedial investigation phase may take years to complete and typically includes site characterization, field investigations, treatability studies, and risk assessments. The feasibility study evaluates alternative response actions proposed in the remedial investigation phase. Identifying the economically and environmentally appropriate action is of paramount importance given the already high and ever-increasing costs of CERCLA cleanup.

After completion of the RI/FS, actual cleanup begins. Under CERCLA, any party, including EPA, that incurs response costs may

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29. Id. § 104(c)(1), 42 U.S.C. § 9604(c)(1). There are several exceptions to these limitations, including the need to continue the response to alleviate an immediate risk. Id.


31. See 40 C.F.R. pt. 300.430(a)(2) (1992). "Developing and conducting an RI/FS generally includes the following activities: project scoping, data collection, risk assessment, treatability studies, and analysis of alternatives." Id.

32. CERCLA § 122(a), 42 U.S.C. § 9622(a). When a PRP enters into an agreement to perform remedial actions under CERCLA § 106, the agreement must be "entered in the appropriate United States district court as a consent decree." Id. § 122(d)(1)(A), 42 U.S.C. § 9622(d)(1)(A). Section 122(d)(1)(A) also stipulates that entering a consent decree is not equal to an admission of liability and can not be admitted in a judicial or administrative proceeding. Id.


34. EPA, Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies - Final Volume I 1-2 to 1-3 (July 1991). "Overall, EPA is ultimately responsible for ensuring that the response actions taken at a site protect human health and the environment and meet statutory requirements for response actions." Id. at 1-3.

35. 40 C.F.R. pt. 300.430(d).

36. Id. pt. 300.430(e).

seek reimbursement from other PRPs.\textsuperscript{38} PRPs may be liable for the costs incurred in any of the removal or remedial actions taken,\textsuperscript{39} other “necessary costs . . . consistent with the [NCP],”\textsuperscript{40} damages for the injury to or loss of natural resources,\textsuperscript{41} and the costs of any necessary health studies.\textsuperscript{42} While CERCLA does provide limitations on liability, these limits are extremely high and therefore are of little practical value to most CERCLA defendants.\textsuperscript{43}

Avoiding CERCLA liability is difficult for three reasons. First, Congress incorporated into CERCLA only very limited affirmative defenses.\textsuperscript{44} Second, courts construe CERCLA as imposing strict lia-

\begin{itemize}
  \item \textsuperscript{38} CERCLA § 107(a), 42 U.S.C. § 9607(a).
  \item Id. § 9607(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A).
  \item Id. § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).
  \item Id. § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C).
  \item CERCLA § 107(a)(4)(D), 42 U.S.C. § 9607(a)(4)(D).
  \item See id. § 107(c), 42 U.S.C. § 9607(c). CERCLA damage limitations depend on the nature of the “vessel” or “facility” carrying or holding the released hazardous substance. Id. § 107(c)(1), 42 U.S.C. § 9607(c)(1). For example, the “limitation” applicable to most facilities (excluding sea-going vessels and motor vehicles) allows a recovery ceiling of “the total of all costs of response plus $50,000,000 for any damages under this subchapter.” Id. In any event, the limitations are inapplicable to owners or operators who have engaged in willful misconduct, willful negligence, violation of standards or regulations, or failure or refusal to cooperate with government officials. Id. § 107(c)(2), 42 U.S.C. § 9607(c)(2).

  Under CERCLA, the federal government can obtain a lien on property to satisfy liability for costs or judgment against a PRP. Id. § 107(l)(1), 42 U.S.C. § 9607(l)(1). The property attached must belong to the PRP and must be subject to or affected by a removal or remedial action. Id.

  \item PRPs have an affirmative defense to CERCLA liability if they can show the release was caused by:
    \begin{enumerate}
      \item an act of God;
      \item an act of war;
      \item an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned . . . and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . .
    \end{enumerate}

CERCLA § 107(b), 42 U.S.C. § 9607(b).


bility on PRPs. Consequently, courts will hold a PRP liable if: (1) there is evidence of the presence of a hazardous substance at a site, and (2) the PRP deposited the same type of substance at that site anytime prior to the investigation. Third, without express statutory authorization, courts impose joint and several liability on PRPs when the damage is not divisible. Joint and several liability creates the possibility that a PRP may be solely or primarily liable for an enormously expensive cleanup, even if the evidence clearly indicates that the PRP was only marginally responsible for the hazardous condition.

With few exceptions, CERCLA limits federal court jurisdiction to hear challenges by PRPs to EPA response actions or administrative orders. A PRP is virtually unable to seek judicial review of

45. United States v. Monsanto Co., 858 F.2d 160, 161 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) ("Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise."); J.V. Peters & Co., Inc. v. Administrator, EPA, 767 F.2d 263, 266 (6th Cir. 1985) (holding that CERCLA § 107 imposes form of strict liability); Stewman v. Mid-South Wood Prods. of Mena, Inc., 784 F. Supp. 611, 615 (W.D. Ark. 1992) (stating that liability under CERCLA is generally strict).

46. See, e.g., United States v. Wade, 577 F. Supp. 1326, 1333 (E.D. Pa. 1983). "The only required nexus between the defendant and the site is that the defendant have dumped his waste there and that the hazardous substances found in the defendant's waste are also found at the site." Id.; see also City of New York v. Exxon Corp., 744 F. Supp. 474, 480 n.10 (S.D.N.Y. 1990) (stating that "fingerprinting" of waste not required).

47. O'Neil v. Picillo, 883 F.2d 176, 178-79 (1st Cir. 1989) (observing that Congress intended that federal courts develop uniform approach governing joint and several liability), cert. denied sub nom. American Cyanamid Co. v. O'Neil, 495 U.S. 1071 (1990); United States v. Monsanto Co., 858 F.2d at 171-73; United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983) (comparing Restatement (Second) of Torts § 433A, which states that tortfeasors may only be liable for their contribution when the harm is divisible, to § 875, which provides for joint and several liability); see also United States v. A&F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984) (imposing joint and several liability, although it would be "extremely harsh and unfair if imposed on a defendant who contributed only a small amount of waste to a site.").


49. CERCLA § 113(h), 42 U.S.C. § 9613(h). Courts generally hold that § 113(h) removes from their jurisdiction those challenges of EPA actions not explicitly made available for pre-enforcement review. E.g., Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1388 (5th Cir. 1989); Barmet Aluminum Corp. v. Thomas, 730 F. Supp. 771, 773-74 (W.D. Ky. 1990), aff'd, 927 F.2d 289 (6th Cir. 1991).
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EPA actions until EPA institutes an enforcement action.\textsuperscript{50} Courts normally uphold EPA response action decisions unless the administrative record alone\textsuperscript{51} shows the EPA action to be "arbitrary and capricious or otherwise not in accordance with law."\textsuperscript{52}

B. EPA CERCLA Enforcement Policies

EPA has attempted to reach its goal of negotiated settlements of all CERCLA-covered waste sites through settlements, administrative orders, and litigation.\textsuperscript{53} In 1989, EPA announced a policy providing for more aggressive CERCLA enforcement.\textsuperscript{54} The new policy, coined "enforcement first," sought to substantially increase the use of administrative orders against PRPs, aggressively obtain information about hazardous waste sites and persons that may be categorized as PRPs, and improve cost recovery policies.\textsuperscript{55} The ob-

\textsuperscript{50} The legislative history behind CERCLA § 113 illustrates Congressional intent to prevent pre-enforcement review. See H.R. Rep. No. 253(I), 99th Cong., 2d Sess., at 81 reprinted in 1986 U.S.C.C.A.N. 2863, 2930 ("[S]ection [113] is intended to codify the current position of the Administrator and the Department of Justice with respect to pre-enforcement review: there is no right of judicial review of the Administrator's selection and implementation of response actions until after the response action [sic] have been completed . . . ."); see also Dickerson v. Administrator, EPA, 834 F.2d 974, 977-78 (11th Cir. 1987). The purpose of precluding judicial review is to prevent "piecemeal review and excessive delay of cleanup." Chemical Waste Mgmt., Inc. v. EPA, 673 F. Supp. 1043, 1055 (D. Kan. 1987).

\textsuperscript{51} CERCLA § 113(j)(1), 42 U.S.C. § 9613(j)(1). The lead agency controlling a cleanup establishes an administrative record which contains the documents forming the basis for the selection of a response action. 40 C.F.R. pt. 300.800(a). The contents of that record include the data and analysis used to select a response action, documents used to prepare the RI/FS, public comments, administrative orders and consent decrees, and other documents that form a basis for the selection. Id. pt. 300.810(a).


\textsuperscript{53} Superfund Enforcement Strategy, supra note 16, at 35,207.

\textsuperscript{54} This policy evolved from an internal EPA management review report on the Superfund program conducted in 1989. See E.P.A., A Management Review of the Superfund Program, (June 1989) [hereinafter Management Review]. The internal review was performed as a result of then-EPA Administrator Reilly's admitted lack of knowledge of Superfund's management and progress at his Senate confirmation hearings. Id. at Administrator's Preface.

\textsuperscript{55} Id. at 1-15. In a Senate subcommittee hearing following the completion of the internal management review, then-EPA Administrator Reilly told the subcommittee: Superfund is being redirected to be an "enforcement first" program. Our objective is to get responsible parties to do the majority of the cleanups. This means that EPA will aggressively use the coercive enforcement tools at its disposal, while at the same time expanding its use of the settlement tools that are also available in the law. We will move to quickly get enforceable cleanup agreements with the responsible parties or failing such cooperation, immediately order them to conduct work. At the same time, we will continue to conduct removals and to maintain a vigorous
Objective of the new policy was twofold. First, it sought to have PRPs undertake cleanups of hazardous waste sites thereby reducing use of Superfund monies. Second, the policy encouraged issuance of section 106(a) administrative orders to PRPs who fail to voluntarily undertake cleanup action prior to EPA action.\textsuperscript{56} Although aware of EPA's ability to compel PRP compliance through litigation, EPA planners preferred to avoid judicial remedies due to the possibility of lengthy delays and the risk of adverse judicial outcomes.\textsuperscript{57}

C. Procedural and Substantive Considerations in PRP Notification

Identifying and locating PRPs is an integral part of enforcing CERCLA. Notices of potential liability are sent to PRPs when sufficient preliminary evidence exists demonstrating potential CERCLA section 107 liability.\textsuperscript{58} If there is insufficient evidence to establish potential liability, EPA may send a PRP a questionnaire requesting specific information pursuant to CERCLA section 104(e).\textsuperscript{59} These questionnaires pose difficult problems for PRPs; questionnaire responses may divulge incriminating evidence either against the recipient or other companies named therein.\textsuperscript{60} However, the responding PRP may incur penalties for failing to respond fully and accurately.\textsuperscript{61}
Pursuant to CERCLA section 122(e), EPA may send a PRP one of two types of notice letters, either general or special, to advise them of their status as a PRP. Although provided with general substantive and procedural guidelines, individual EPA regional offices have discretion in determining which type of notice to send. In addition, regional offices may elect to send a section 104(e) information request prior to, or accompanied by, a section 122(e) notice letter. The almost autonomous nature of the various EPA regional offices results in PRP letters which are not uniformly drafted; individual regions have approached investigations and negotiations differently.

Depending on the size and nature of the required cleanup, recipients of PRP letters have several options. They may initiate a cleanup on their own, negotiate with EPA on possible response actions, or seek assistance from their insurers. Another more drastic option is to ignore the EPA notice letter and force the government to use Superfund monies to clean the site and later sue to recover those costs.

EPA could encounter serious obstacles if multiple PRPs involved in a single CERCLA cleanup each choose different responses to the EPA notice. EPA may, however, encourage united PRP action by forming a PRP steering committee. Through such a committee, EPA can negotiate collectively with the PRPs and implement

62. Guidance on Notice, supra note 58, at 5299. Components of a general notice letter include: (1) notification of potential liability for response costs; (2) discussion about future notices and possibility of future use of a special notice; (3) general discussion about differing site response activities; (4) a request for additional information regarding the site in question; (5) discussion about the merits of forming a PRP steering committee; (6) notice of establishment of an administrative record; and (7) deadlines for response to the notice. Id. at 5307. Components of a special notice are similar to those of general notices but also contain: (1) a copy of a workplan and draft consent decree; (2) a discussion of what constitutes good faith; (3) a demand for payment of EPA costs incurred to date pursuant to § 107(a) plus interest; and (4) identification of actions taken and the costs of the actions and notice of the anticipation of expending additional fund monies. Id. The special notice letter triggers formal negotiations between EPA and the PRP and prohibits EPA from taking §§ 104(a) or 106 response actions for 60 days after receipt of the notice. Id. If the PRP responds with a good faith attempt to negotiate, no response action is taken. Id. at 5299.


63. Guidance on Notice, supra note 58, at 5300.

64. Id. at 5299.

65. For a discussion of PRP and EPA responses under CERCLA, see supra notes 10-13 and accompanying text.
uniform remedial and removal actions in a more effective and expeditious manner.66

D. Insurance Considerations and the Duty to Defend

As environmental laws have been enacted, the insurance industry has responded with a variety of liability limiting clauses.67 Although parties may insure against CERCLA liability,68 strict and retroactive CERCLA liability exposes an insured to an inestimable magnitude of risk.69 Obviously, insurers faced with huge CERCLA claims seek to avoid covering the liability and associated costs.

Avoiding coverage of CERCLA claims depends primarily on whether the policy language is interpreted to encompass environmental losses. A commonly-used standard CGL policy states in part:

[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability (under the CGL policy) has been exhausted by payment of judgments or settlements.70

Although several terms used throughout the CGL policy are defined within the policy itself, an overwhelming majority of policies

66. Those PRPs at specific hazardous waste sites who decide to negotiate a settlement with EPA or perform the cleanup themselves usually form a PRP steering committee to facilitate negotiations and communications with EPA.

67. See Hendrick & Wiezel, The New Commercial General Liability Forms - An Introduction and Critique, 36 FED'N INS. & CORP. COUNS. Q. 319 (1986). The revised CGL now excludes liability coverage for “bodily injury” or ‘property damage’ arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants.” Id. at 346-47. A pollution exclusion was also incorporated into the CGL, limiting coverage to "sudden and accidental" occurrences only. Id. at 344.

68. CERCLA § 107(e) (1), 42 U.S.C. § 9607(e) (1).


now in effect do not define the term "suit." It is this ambiguity that is at the center of the dispute between insureds and insurers, which is the topic of this Comment.

Courts recognize that the duty to defend an insured against a claim is separate from and broader than the duty to indemnify an insured for losses. Generally, courts construe insurance contracts liberally, resolving all ambiguities in favor of the insured. There are at least two reasons for such a rule: (1) insurers draft the policies' language and therefore should not benefit from ambiguities in the contract; and (2) the ultimate purpose of insurance coverage is to protect the insured. However, despite the presumption in favor of the insured, courts will not disregard express language because of an alleged ambiguity. A court may be bound to define ambiguous terms based on precedent. As with other contracts, insurance contracts must be construed to effectuate the parties' intent.


As a general rule, if the claims asserted against an insured potentially fall within a policy’s coverage, the insurer has a duty to defend against the claims. Therefore, in terms of a PRP letter, courts must consider whether a reasonable PRP would view receipt of an EPA letter as triggering the insurer’s duty to defend under the standard CGL policy.

III. Case Analysis

Courts are split on whether an insurer’s duty to defend is triggered by an insured’s receipt of a PRP letter. The current trend is to broaden traditional definitions of the term “suit” to encompass receipt of PRP letters. Courts finding that the duty to defend is not triggered by receipt of a PRP letter have relied on the plain language of the CGL policy in holding that the term “suit” is unambiguous and applies only to actions involving a court of law.

Under the reasonable expectation doctrine, courts construe an insurance policy in accordance with the objectively reasonable expectations of the insured. Okada v. MGIC Indem. Corp., 823 F.2d 276, 281 (9th Cir. 1986) (“[E]xamine[e] the entire contract to ascertain and fulfill the reasonable expectations of the parties.”). See also Miller, supra note 72, at 1849 n.1.

Courts are split on whether an insurer’s duty to defend is triggered by an insured’s receipt of a PRP letter. The current trend is to broaden traditional definitions of the term “suit” to encompass receipt of PRP letters. Courts finding that the duty to defend is not triggered by receipt of a PRP letter have relied on the plain language of the CGL policy in holding that the term “suit” is unambiguous and applies only to actions involving a court of law.

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77. American Motorist Ins. Co. v. General Host Corp., 946 F.2d 1489, 1490 (10th Cir. 1991) (adding that some courts look beyond pleadings and consider relevant facts); EAD Metallurgical, Inc. v. Aetna Casualty & Sur. Co., 905 F.2d 8, 11 (2d Cir. 1990) (recognizing that courts consider allegations “arguably or potentially” leading a reasonable person to believe claims are covered by policy); Continental Casualty Co. v. Rapid-American Corp., 609 N.E.2d 506, 509 (N.Y. 1993).

The duty to defend may also arise prior to the filing of a suit. Keeton & Widiss, supra note 71, § 9.1(c), at 989. For example, the duty may arise when a third party advises the insurer directly of an occurrence, when the insured makes a request, or when a third party makes a claim without filing a suit. Id.

78. Keeton & Widiss, supra note 71, § 9.1, at 990.

79. Most cases involving an insurance company’s refusal to defend commence with an insured filing a declaratory judgment action. In those circumstances the insured asks the court to “declare” that the rights and duties under the policy include the duty to defend once a PRP letter has been received. E.g., Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1202 (2d Cir. 1989), cert. denied, 496 U.S. 906 (1990); Arco Indus. Corp. v. Travelers Ins. Co., 730 F. Supp. 59, 62 (W.D. Mich. 1989). Occasionally, insurance companies will initiate declaratory judgment actions. See, e.g., Aetna Casualty & Sur. Co. v. Pintlar Corp., 498 F.2d 1507, 1510 (9th Cir. 1971).


Courts finding that the duty to defend is triggered have broadly defined "suit" to include administrative claims, such as the receipt of a PRP letter, citing the adversarial nature of the situation to support their interpretation. Michigan's state and federal courts have issued several opinions on this issue that demonstrate the judicial dichotomy. These opinions are discussed below.

A. Michigan Courts' Analysis of the CGL Policy and the Duty to Defend

1. Federal Courts

Two 1989 Michigan federal district court opinions illustrate judicial divisiveness over the effect of a PRP letter on an insurer's duty to defend. In Harter Corp. v. Home Indemnity Co. and Arco Industries Corp. v. Travelers Insurance Co., the United States District Court for the Western District of Michigan held that a PRP letter is not the equivalent of a "suit" triggering an insurer's duty to defend. The Harter and Arco courts emphasized that "suit" refers to court proceedings, not investigative EPA actions where no complaint or administrative orders have yet been filed. However, in


83. For a discussion of the split between courts in Michigan, see infra notes 84-104 and accompanying text.


85. 730 F. Supp. 59 (W.D. Mich. 1989). In Arco, the insured received a PRP letter which informed them as to the extent of their potential liability under CERCLA and requested participation in a RI/FS. The letter also required Arco to provide information regarding the hazardous waste disposal site at issue. Id. at 62.

86. Harter, 713 F. Supp. at 233; Arco, 730 F. Supp. at 62. The Harter court found the term "suit" to be unambiguous and held that it referred to a court proceeding, which did not include a PRP letter. Harter, 713 F. Supp. at 233. The Arco court reaffirmed the decision in Harter and refused to find the insurer had a duty to defend. Arco, 730 F. Supp. at 68. The court determined EPA's actions to be investigative since no complaints or administrative orders were filed. Id.

both *Higgins Industries, Inc. v. Fireman's Fund, Inc.* 88 and *Ray Industries, Inc. v. Liberty Mutual Insurance Co.* 89 the District Court for the Eastern District of Michigan reached the opposite conclusion, determining that a PRP letter effectively institutes a "suit" and thus triggers the duty to defend.90

The United States Court of Appeals for the Sixth Circuit attempted to resolve this split at the district court level in *Ray Industries, Inc. v. Liberty Mutual Insurance Co.* 91 In that case, the Sixth Circuit held that receipt of a PRP letter does not trigger the insurer's duty to defend.92 *Ray Industries* involved an insured who received a PRP letter from EPA advising the insured that it may be jointly and severally liable for the costs of studying and remediating a hazardous waste site.93 The insured unsuccessfully sought a defense from the insurance company. The insured argued that the insurer had a duty to defend because: (1) civil penalties and punitive damages may be assessed if the insured failed to disclose information or otherwise respond; (2) judicial review may not be sought for EPA actions until after a cost recovery suit; and (3) a reviewing court is statutorily limited to the administrative record prepared by EPA.94 The insured also contended that contesting EPA's claim would open a crucial period of discovery in which the insured would have to submit evidence for the administrative record.95

The *Ray Industries* court, relying on the principle that unambiguous terms in a policy are given their ordinary meaning, found "suit" to mean "formal legal proceedings, as opposed to demands and other tactics."96 However, the court acknowledged the seriousness of a PRP letter. According to the court, the PRP letter may

91. 974 F.2d 754 (6th Cir. 1992).
94. Id. at 759.
95. Id. Commentators have also noted that the defense of an insured PRP may best be served with the insurer's active involvement, once the possibility of an eventual suit is indicated, to prevent the weakening of a worthy defense. See *Keeton & Widiss*, *supra* note 71, § 9.1(c), at 989.
96. *Ray Industries*, 974 F.2d at 761. In defining the term "suit," the court recited definitions from Webster's and Black's dictionaries to illustrate the assertion that a suit necessarily involves legal proceedings in a court. Id.
“even represent a unique legal creation, with no true parallel in any other area of administrative law.”

2. State Courts

Without Michigan Supreme Court guidance on the issue, Michigan's lower state courts have split on whether a PRP letter triggers a duty to defend. However, on August 31, 1993, the Michigan Supreme Court agreed to hear appeal in Michigan Millers Mutual Insurance Co. v. Bronson Plating Co. The forthcoming decision may resolve the issue that forced lower Michigan state courts and federal courts to speculate as to how the Michigan Supreme Court would rule if confronted with the issue.

The facts in Michigan Millers Mutual are typical of cases addressing this issue. An insured received a PRP letter from EPA, which demanded information regarding a hazardous waste site and directed the PRP to undertake an RI/FS study. The letter also warned that failing to comply could result in enforcement action, assessment of fines, or an injunctive order. The Michigan Court

97. Id. at 764.
98. E.g., Polkow v. Citizens Ins. Co. of Am., 447 N.W.2d 853 (Mich. Ct. App. 1989), rev'd on other grounds, 476 N.W.2d 382 (Mich. 1991). In Polkow, Michigan's Department of Natural Resources ("DNR") and EPA separately initiated the administrative actions leading to the litigation. Under those circumstances, the court found that "subjecting the insured to administrative mechanisms mandating an environmental investigation and cleanup, backed by the power to expose the insured to a money judgment in a court of law, amounts to a 'suit' for purposes of invoking the coverage of the policy." Id. at 856. In United States Aviex Co. v. Travelers Ins. Co., 336 N.W.2d 838 (Mich. Ct. App. 1983) [hereinafter Aviex], the same court held that the duty to defend any suit depended on the definition of "damages" and that "damages" included money spent in complying with the orders of the state DNR. Aviex, 336 N.W.2d at 842. The court further reasoned that an insurance company's duty to defend would be clear if the PRP was sued to recover "traditional" damages. Id. at 843. Specifically, the court stated: "It is merely fortuitous from the standpoint of either plaintiff or defendant that the state has chosen to have plaintiff remedy the contamination problem, rather than choosing to incur the cost of clean-up itself and then suing plaintiff to recover those costs." Id. The Sixth Circuit in Ray Industries distinguished the holding in Aviex finding that the primary issue in Aviex dealt with defining "damages" and not "suit." Ray Industries, 974 F.2d at 769.
101. Michigan Millers Mut. Ins. Co., 496 N.W.2d at 376. The PRP was listed on the National Priorities List ("NPL") two months after the insured received the PRP letter. Id. at 375. Michigan Millers Mutual, the PRP's only insurance company to undertake a defense, soonafter filed a declaratory judgment action seeking to be absolved from any duty to defend. Id. at 376.
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of Appeals, relying on Polkow v. Citizens Insurance Co. of America, 102 reversed a trial court’s summary disposition and held that receipt of an EPA PRP letter constituted a “suit.” 103 The court found that as long as coverage is not excluded under other provisions of the policy, an insurer has a duty to defend against CERCLA liability claims. 104

B. Federal Courts Finding No Duty to Defend

Several federal courts in other circuits have determined that a PRP letter, whether sent by EPA or a state environmental agency, does not trigger the duty to defend. 105 For example, in Detrex Chemical Industries, Inc. v. Employers Insurance of Wausau, 106 the District Court for the Northern District of Ohio concluded that a claim for damages that may result in legal liability is not the functional equivalent of a “suit,” and therefore does not trigger the duty to defend. 107 The court reasoned that the duty to defend would be


104. Id. The court noted that the combination of the administrative actions available to EPA and “the power to expose the insured to a money judgment in a court of law” lead to the conclusion that an insurer’s duty to defend is triggered upon receipt of a PRP letter. Id. (citing Polkow, 447 N.W.2d at 856).

The sole dissenting judge disagreed that the term “suit” was ambiguous and reaffirmed the court’s unpublished holding in a prior case, City of Evart v. Home Ins. Co., 479 N.W.2d 638 (Mich. 1992), which agreed with the Sixth Circuit’s Ray Industries holding that a PRP letter is not the equivalent of a “suit.” Id. at 380 (Reilly, J., dissenting).


107. Detrex, 681 F. Supp. at 446. Detrex sought defense coverage from Wausau in response to actions taken by various state agencies as well as EPA. Id. at 441. In one of several PRP letters sent to Detrex as a result of investigations into several waste sites, EPA requested that Detrex voluntarily negotiate and perform response actions or be liable for an EPA cleanup using federal funds. Id. at 444. Later, Detrex received another EPA letter advising of the completion of an EPA conducted RI/FS and requesting negotiation of possible clean-up actions. Id.

The court distinguished Detrex from Aviex based on the fact that the PRP letters in Aviex were from a state agency and not EPA, and no actions were taken comparable to those in Aviex. Id. at 449. The court also refused to follow a Michigan federal district court’s determination in Fireman’s Fund Ins. Co. v. Ex-Cell-O Corp., 662 F. Supp. 71 (E.D. Mich. 1987) that the duty to defend was triggered. Id. In Ex-Cell-O, the district court required the insurer to defend after the insured received an EPA PRP letter. Ex-Cell-O Corp., 662 F. Supp. at 74. The letter concerned liability for sixteen hazardous waste sites, some of which EPA had begun to remediate. Id. The Ex-Cell-O court based its decision requiring the insured to defend on the actual or threatened use of legal means to force an insured to perform certain actions or pay for EPA actions. Id. at 75.
triggered only upon filing of a CERCLA section 106 injunction request, an administrative order, or a section 107 cost recovery action.\textsuperscript{108} The \textit{Detrex} court also declared that because the developing administrative record would be the basis of any future EPA actions, a PRP’s defense costs in adding to the record would be reimbursable if EPA eventually filed suit.\textsuperscript{109} The court avoided defining “suit,” but impliedly agreed with the insurer that the term denoted an action in a court of law.\textsuperscript{110} The court noted that in \textit{Detrex}, the three PRP letters received did not obligate the PRP to pay any money to the government and thus did not create a duty to indemnify.\textsuperscript{111}

In \textit{Ryan v. Royal Insurance Co. of America},\textsuperscript{112} the First Circuit affirmed a district court’s holding that a state environmental agency’s letter seeking voluntary cooperation with a cleanup sent to an insured plating and painting business did not trigger the insurer’s duty to defend. The \textit{Ryan} court found no duty to defend because the letter lacked coerciveness and did not represent a serious state enforcement effort.\textsuperscript{113} The court rejected a bright-line standard and instead determined that any analysis of the issue must focus “on the data most relevant to the probability of actual toxic waste liability: coerciveness, adversariness, the seriousness of the effort...”

\textsuperscript{Detrex also sought indemnification from Wausau of costs incurred in cleaning up a hazardous waste site in Kentucky. \textit{Detrex}, 681 F. Supp. at 451. This suit involved an action by Kentucky’s National Resources and Environmental Protection Cabinet for injunctive relief to compel Detrex to clean up the site. \textit{Id}. The court stated that the first requirement of the duty to defend, the existence of a “suit,” was satisfied by the suit for injunctive relief. \textit{Id}. However, the second requirement, that Detrex be liable for “damages on account of . . . property damages” was not satisfied because suits for equitable relief are generally outside the scope of an insurer’s duty to defend. \textit{Id}. The civil penalties sought by the State were for Detrex’s failure to comply and not compensation for damages, as there was no evidence of actual property damage. \textit{Id}. at 451-52.

\textsuperscript{108.} \textit{Id}. at 446. On reconsideration, the court reaffirmed that EPA remedial orders, issued pursuant to CERCLA §§ 9604 or 9606, trigger an insurer’s duty to defend. \textit{Detrex Chem. Indus., Inc. v. Employers Ins. of Wausau}, 746 F. Supp. 1310, 1316 (N.D. Ohio 1990). Because the district court was interpreting Michigan law, by the time the \textit{Detrex} court reconsidered the issues originally decided in 1987, the Michigan courts had exhaustively debated the issue of whether receipt of a PRP letter triggered an insurer’s duty to defend. See \textit{supra} notes 98-104.

\textsuperscript{109.} \textit{Detrex}, 681 F. Supp. at 447.

\textsuperscript{110.} \textit{Id}. at 445.

\textsuperscript{111.} \textit{Id}. at 446.

\textsuperscript{112.} 916 F.2d 731 (1st Cir. 1990).

\textsuperscript{113.} \textit{Id}. at 741. In reviewing the state PRP letters, the court stated that “[t]he communications patently lack[ed] any significant indicia of adversariness. In none of the letters does NYDEC use hortatory terminology.” \textit{Id}. at 742. The court also noted that NYDEC letters do not mention a “demand” or an “order.” \textit{Id}.
with which the government hounds an insured, and the gravity of imminent consequences."\(^{114}\)

C. Federal Courts Finding A Duty to Defend

In 1991, the Ninth Circuit ruled that EPA administrative claims can trigger an insurer's duty to defend.\(^{115}\) After receiving an EPA PRP letter, the recipient in *Aetna Casualty & Surety Co. v. Pintlar Corp.* negotiated with EPA to complete an RI/FS and, pursuant to a subsequent administrative consent order, agreed to perform and pay for the RI/FS.\(^{116}\) The *Pintlar* court evaluated the consequences and administrative threats associated with a PRP letter and concluded that a PRP letter indicates a likelihood of legal action.\(^{117}\) The court noted that receipt of a PRP letter brings "immediate and severe implications" because "[g]enerally, a party asserting a claim can do nothing between the occurrence of the tort and the filing of the complaint that can adversely affect the insureds' rights"; however, with the administrative processes available under CERCLA, EPA can significantly affect a PRP's "substantive rights and ultimate liability."\(^{118}\) The court recognized the significance of a PRP letter:

> The extent of CERCLA liability is far-reaching. The ability to choose the response action greatly empowers the government. In order to influence the nature and costs of the environmental studies and cleanup measures, the PRP must get involved from the outset. In many instances, it is

\(^{114}\) *Id.* at 741. The court acknowledged that CERCLA's strict liability provided some certainty to the possibility of PRP liability. *Id.* However, the court noted that "there must be some cognizable degree of coerciveness or adversariness in the administrative body's actions." *Id.* at 738. The First Circuit distinguished other cases interpreting New York law based on the nature and extent of the actions taken against the PRPs. *Id.; see also Technicon Electronics Corp. v. American Home Assurance Co.*, 533 N.Y.S.2d 91 (N.Y. App. Div. 1988) (holding duty to defend not triggered by EPA PRP letter requesting participation), *aff'd on other grounds*, 542 N.E.2d 1048 (N.Y. 1989); *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989) (holding state PRP letter triggered duty to defend in light of adversarial posture of letter), *cert. denied*, 496 U.S. 905 (1990). For further discussion of *Avondale*, see *infra* notes 122-24 and accompanying text.

\(^{115}\) *Aetna Casualty & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1517 (9th Cir. 1991) (interpreting Idaho law).

\(^{116}\) *Id.* at 1509-10. The PRP sought defense and indemnification from the insurance company, which refused and brought declaratory judgment actions. *Id.* at 1510.

\(^{117}\) *Id.* at 1518. "The focus should be on the underlying rationale and not on the formalistic rituals. If the threat is clear then coverage should be provided. The filing of an administrative claim is a clear signal that legal action is at hand." *Id.*

\(^{118}\) *Pintlar*, 948 F.2d at 1516 (citing *Avondale Indus., Inc. v. Travelers Indem. Co.*, 697 F. Supp. 1314, 1321 (S.D.N.Y. 1988)).
more prudent for the PRP to take the environmental studies and cleanup measures itself than to await the EPA's subsequent suit in a cost recovery action.\textsuperscript{119}

The court considered the insured's reasonable expectations and concluded that "receipt of a PRP notice is the effective commencement of a 'suit' necessitating a legal defense."\textsuperscript{120} Furthermore, the \textit{Pintlar} court reasoned that if the duty to defend does not arise until a suit is filed, PRPs may attempt to instigate a suit, thus guaranteeing coverage and a defense, by being uncooperative with EPA.\textsuperscript{121}

In \textit{Avondale Industries, Inc. v. Travelers Indemnity Co.}, the Second Circuit decided that receipt of a state environmental agency PRP letter constituted a suit where the PRP letter: (1) advised of the agency's plans to clean up a site and recover the costs from the PRP; (2) demanded that the PRP submit to a remedial action plan; (3) requested information regarding the site; and (4) warned of possible penalties for failing to comply with the foregoing orders.\textsuperscript{122} The court viewed the PRP letter as a demand letter which technically began formal proceedings against the PRP. According to the court, the letter created an "adversarial posture," and threatened possible penalty actions that "[could] result in the loss of substantial rights" by the PRP.\textsuperscript{123} The court found these actions to be "the hallmarks of litigation" and "sufficiently adversarial to constitute a suit."\textsuperscript{124}

D. State Courts Analyzing the Issue

1. \textit{State Courts Finding a Duty to Defend}

State courts have also split on whether the receipt of a PRP notice letter triggers the duty to defend.\textsuperscript{125} In \textit{Coakley Landfill, Inc.}

\textsuperscript{119} \textit{Id.} at 1517.

\textsuperscript{120} \textit{Id.} As a result of the PRP letter, the PRP incurred technical expert expenses. \textit{Id.}

\textsuperscript{121} \textit{Id.} For further discussion of delay tactics that instigate further adversarial posturing by EPA, see infra note 161 and accompanying text.

\textsuperscript{122} 887 F.2d 1200, 1206 (2d Cir. 1989).

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{Id.} The \textit{Avondale} court adopted an analysis similar to that used by the First Circuit in \textit{Ryan v. Royal Insurance Co.} by considering the wording of the letters and determining their coercive and adversarial nature. If the letter merely requests information or participation in conducting remedial actions, then the duty to defend will not be triggered because the letter would not be considered the equivalent of a "suit." \textit{Id.} The court distinguished \textit{Technicon Electronics Corp. v. American Home Assurance Co}, 141 A.D.2d 124, 533 N.Y.S.2d 91 (N.Y. App. Div. 1988) by showing the lack of coerciveness in the PRP letter.

\textsuperscript{125} \textit{See, e.g., A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am.}, 475 N.E.2d 607 (Iowa 1991) (finding duty to defend); \textit{Professional Rental, Inc. v.}
v. Maine Bonding & Casualty Co., the New Hampshire Supreme Court found that the PRP letter in question gave rise to a duty to defend. The court acknowledged that the term “suit” was not defined in the policy, and that the language used in the policy distinguished between a “suit” and a “claim.” For the court, this distinction was significant because a suit is more adverse to a PRP than a claim. The court used a dictionary definition of “suit” to ascertain the plain and ordinary meaning of the term, and found the appropriate definition to be “the attempt to gain an end by legal process.” The court concluded that because the notice letter advised the PRP that “EPA had begun a legal process to conclusively and legally determine, subject only to review for abuse of discretion . . . the appropriate ‘response activities’ liable parties must perform or pay for,” the insurer had an obligation to defend the PRP.

In A.Y. McDonald Industries v. Insurance Co. of North America, the Iowa Supreme Court defined “suit” to include PRP letters. The court distinguished an EPA demand letter from a “conven-


126. Coakley Landfill, Inc. v. Maine Bonding & Casualty Co., 618 A.2d 777 (N.H. 1992). After discovery of contaminants closed the landfill, the state environmental agency notified the owner of the need to cooperate with officials in conducting the RI/FS. Id. at 779. The owner failed to cooperate and EPA performed the RI/FS itself at a cost in excess of $1.2 million. Id. First, EPA sent a CERCLA § 104(e) “Request for Information” to the owner, and later sent a “Notice of Potential Liability.” Id. This second letter warned of potential liabilities associated with being a PRP and demanded the PRP compensate EPA for the $1.2 million spent on the RI/FS. Id.

127. Id. at 786. The court agreed with the insurer’s differentiation of the terms, but did not agree that the actions taken by EPA were merely claims as defined by the policy. Id.

128. Id.

129. Id. (citing WEBSTER’S DICTIONARY).

130. Id. The EPA action did not involve deciding whether a PRP is liable, but rather the extent to which it is liable. Id. The court held that the state’s environmental agency’s issuance of an administrative order requiring the PRP to perform certain remedial actions also satisfied the “suit” requirement. Id. at 787. According to the court, an administrative order indicates the presence of an administrative proceeding. Id.


132. Id. The court defined “suit” as “any attempt to gain an end by legal process.” Id. (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2286 (P. Gove ed. 1961)).
tional” demand letter in that the PRP recipient faces far more serious consequences than a recipient of a “conventional” demand letter.\(^{133}\) The North Carolina Supreme Court in *C.D. Spangler Construction Co. v. Industrial Crankshaft & Engineering Co.*\(^{134}\) similarly used the broad definition of “suit” adopted in *A.Y. McDonald.*\(^{135}\) In *Spangler*, the state environmental agency required the insured to develop a plan similar to EPA’s RI/FS. The agency later served a compliance order requiring clean-up action.\(^{136}\) The *Spangler* court held that the compliance order constituted a “suit” under the CGL policy involved. The court found the issuing of compliance orders to be an attempt “to gain an end by legal process.”\(^{137}\)

2. State Courts Finding No Duty to Defend

In *Professional Rental, Inc. v. Shelby Insurance Co.*,\(^{138}\) the Ohio Court of Appeals determined that although an EPA PRP letter reflects the agency’s “confrontational and seemingly coercive” strategy, receipt of a PRP letter alone does not trigger an insurer’s duty to defend.\(^{139}\) The court reasoned that further agency action, such as the issuance of an administrative order or the filing of a cost recovery action, was necessary to invoke the duty.\(^{140}\) Although the PRP received three PRP letters from EPA, each increasingly demanding and adversarial,\(^{141}\) the *Professional Rental* court concluded that those notifications were “‘claims’ of liability and demands for

133. *Id.* at 628-29. The court noted that EPA’s actions extended beyond the demand letter and in fact EPA had filed a complaint and a compliance order against the insured. *Id.* at 629.


135. *Id.* at 570 (noting not all definitions of “suit” require court proceedings).

136. *Id.* at 559.

137. *Id.* at 570. The court also acknowledged the consideration given to the reasonable expectations of an insured. The court concluded that a reasonable person in the insured’s position may not have realized that the term limited the insurer’s duty to defend to require the filing of a complaint in a court or some form of adjudicatory proceeding. *Id.*


139. *Id.* at 430.

140. *Id.*

141. Professional Rental Inc.’s (“PRI”) first notice requested voluntary remediation. According to that letter, if PRI refused, it risked being responsible for the cost of any government undertakings in removing the waste. *Id.* at 425. A second PRP “Special Notice” letter, received twenty months later, demanded restitution for costs incurred by EPA and gave PRI a short time to enter into “good faith” negotiations with EPA to continue clean up efforts. *Id.* Three months later, EPA sent PRI a letter requesting payment in excess of $3.6 million for costs incurred. *Id.*
restitution - coupled with threats of unilateral action," but were not the functional equivalent of a suit.142

State versions of CERCLA contain provisions which further complicate the issue of an insurer's duty to defend in this context. For instance, in *Patrons Oxford Mutual Insurance Co. v. Marois*,143 the Maine Supreme Court held that a state environmental agency's letter naming the insured as a PRP accompanied by a cleanup order did not constitute a suit. The court reasoned that although the state was authorized to compel cleanup, it was statutorily unable to recover damages and, therefore, the action did not constitute a suit.144 Under Maine law, however, the state can recover money paid out of a fund allocated to pay for a hazardous waste cleanup by referring the matter to the state's attorney general for collection.145 The *Marois* court implied that the duty to defend would be triggered if the state followed that procedure.146

Courts must also contend with situations in which both EPA and a state environmental agency issue PRP notices (or a functional equivalent) to the same PRP. Currently, state court opinions are split on which notice, if either, triggers a duty to defend. In *Hazen Paper Co. v. United States Fidelity & Guaranty Co.*,147 the Massachusetts Supreme Court found that an EPA notice letter triggered the insurer's duty to defend, while the state agency's notice letter did not, because of EPA's assertion that actual releases had occurred.148 The court emphasized that the state notice simply advised of a threatened release.149 To the court, EPA's use of administrative procedures rather than the judicial system would compromise an insured's defense if a duty to defend were not imposed.150 The court concluded that "[t]he consequences of the receipt of the EPA letter

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142. *Id.* at 430.
143. 573 A.2d 16 (Me. 1990).
144. *Id.* at 20.
145. *Id.*
146. *Id.*
148. *Id.* at 580.
149. *Id.* The PRP letter sent by EPA indicated a desire to discuss "voluntary involvement" in remediying the contamination. *Id.* However, the letter continued to say that "the only form of voluntary involvement" EPA would allow was the PRP's "commitment to complete implementation of all the measures needed . . . and reimbursement of the expenses already incurred by EPA" and the state's environmental agency. *Id.*
150. *Id.* at 581.

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were so substantially equivalent to the commencement of a lawsuit that a duty to defend arose immediately.”

In *City of Edgerton v. General Casualty Co.*, the Wisconsin Court of Appeals held that a CERCLA section 104(e) Information Request did not trigger the insurer’s duty to defend, but a state enforcement letter did. The court held that the state agency’s letter meant that either the PRP must perform the remedial cleanup action or the site would be listed on the NPL or the PRP would bear the expenses of a cleanup. Conversely, EPA’s Information Request required only completion of the questionnaire. The Edgerton court adopted the reasoning in *Ryan v. Royal Insurance Co.* and held that the duty to defend is triggered when an identified PRP is unequivocally required to pay costs associated with a hazardous waste site cleanup.

IV. Analysis

Satisfying CERCLA objectives requires the cooperation of several parties including EPA, PRPs and their respective insurance companies. Presently, many courts focus on the wording of PRP letters to determine the degree of adversity present between EPA or a state agency and the PRP. In light of this, and given EPA’s emphasis on aggressive CERCLA enforcement, EPA may try to word PRP letters in a way that an insurer’s duty to defend will clearly be triggered. This result would further the goals of CERCLA because the insured is more likely to cooperate with EPA. Otherwise, what often occurs is that PRPs without insurer-provided legal defense are less likely to cooperate with EPA. Instead, these PRPs investigate and pursue every conceivable option in an attempt to

151. *Id.* For further discussion of EPA enforcement policies, see *supra* notes 53-57 and accompanying text. The court also noted the effect of imposition of strict and joint and several liability under CERCLA. *Id.*


153. *Id.* at 771. Both of these options entail considerable expense.

154. *Id.*

155. For a discussion of *Ryan v. Royal Insurance Co. of America*, see notes 112-14 and accompanying text.

156. *Id.* at 775. The court balanced broad definition approaches against those approaches which strictly defined “suit” to require the initiation of a court proceeding. *Id.*

157. *See supra* note 3 and accompanying text.


159. *See supra* notes 53-57 and accompanying text.
avoid financial responsibility for the cleanup. These attempts frustrate CERCLA's objective of prompt removal of hazardous waste.

One method of avoiding liability involves PRPs not responding to EPA notices and not cooperating in any investigation into potential CERCLA liability. Through this strategy, the PRP hopes to receive either a more threatening adversarial notice or trigger the filing of an EPA or Department of Justice complaint. In either case, the triggering of the insurer's duty to defend would at least be more likely. One increasingly common method involves seeking contribution from the small companies and municipalities that have also dumped hazardous substances at the waste site. In one case, a group of PRPs at a waste site under EPA investigation sought contribution from other companies and municipalities that had deposited small amounts of waste and allegedly raised so much money from settling with these companies that the targeted group of PRPs only had to pay a minimal amount for the entire cleanup effort. Predictably, this procedure is becoming increasingly popular.

This tactic results from the perception of large companies that EPA unfairly targets them because of their size and financial resources. Many critics of CERCLA complain that the cost of negotiating and litigating CERCLA violations is disproportional to the actual cleanup expenditures. Critics are concerned that while the parties litigate, the hazardous waste site continues to threaten the public health and welfare and the environment. This argument clearly applies to disputes between insurers and insureds.

160. Several courts have acknowledged this tactical possibility and noted that a PRP prolongs the cleanup process to the detriment of the environment, the public and adds costs to the cleanup. See e.g., Coakley Landfill, Inc. v. Maine Bonding & Casualty Co., 618 A.2d 777, 784 (N.H. 1992). This is also contingent on the inapplicability of exclusions in other parts of the insurance policy.


162. See Mike Williams and Wylie Gerdes, Companies that Sent Toxics to a Rural Landfill Try to Bill Small Towns and Little Firms, DETROIT FREE PRESS (March 20, 1992) NWS section, at A1. In one case, two PRPs involved in a New York state hazardous waste site cleanup threatened 603 smaller businesses and organizations, forcing 85% of them to settle for a total of $2 million. 32 Env'T WK. (Aug. 12, 1993).

163. 24 Env't Rep. (BNA) 193 (May 28, 1993) (citing Price Waterhouse survey showing two year increase in recovering from other PRPs from 29 to 80 percent).

164. See 60 Fed. Cont. Rep. (BNA) d25 (Oct. 4, 1993). Usually, only large, solvent companies are targeted as PRPs, forcing some to turn to contribution from parties not targeted by government agencies. Id. For a discussion of EPA guidance on the consideration of PRP financial viability, see supra note 13.

165. Id. (citing Office of Technology estimates that out of every dollar spent by the U.S. government on Superfund, 44 percent goes to administrative and litigation costs, 16 percent to site studies, and remaining 40 percent is spent on
V. Conclusion

The split among federal and state courts as to when an insurer’s duty to defend is triggered illustrates the need to resolve the issue presented when a “person” receives a PRP letter. Insurance companies should be expected to defend PRPs who paid for insurance to protect themselves against environmental liability. The United States Supreme Court should take advantage of the next appeal dealing with an insurer’s duty to defend a PRP to resolve this issue. Congress should also take steps to amend CERCLA to fulfill the statute’s objectives and resolve this issue and others which create unnecessary CERCLA litigation. 166

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166. The programs and fundings authorized in the 1986 SARA amendments were to have expired in five years. Congress extended that expiration another three years with expiration to occur on September 30, 1994. Omnibus Budget Reconciliation Act of 1990, 104 Stat. 1388, Pub. L. No. 101-508, 6301, 1388-319 (1990). In preparation for the reauthorization, a Congressional subcommittee has pronounced possible reforms to reduce Superfund liability litigation including: promoting alternative dispute resolutions through arbitration and mediation, promoting the use of de minimis settlements and allocating costs through the use of “nonbinding allocation of responsibility (NBAR) agreements.” ADMINISTRATION OF THE FEDERAL SUPERFUND PROGRAM, REPORT OF SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON PUBLIC WORKS AND TRANSPORTATION, H.R. Rep. No. 103-35, 103d Cong., 1st Sess. at 11 (November 1993) [hereinafter Subcomm. Report] (suggesting EPA promote the allocation of costs of PRPs to reduce litigation costs and expedite Superfund cleanups). The imposition of strict, joint and several, and retroactive liability on PRPs must also be considered by Congress. It is the unknown and possible inequitable costs potentially facing PRPs that prolong negotiations. Commentators have suggested that Congress should expressly eliminate the imposition of joint and several liability and instead entrust the power to fairly allocate the amount of liability to the courts. See, e.g., Fed. Cont. Rep. (BNA) d23 (Oct. 4, 1993).

A Congressional subcommittee has also opted to avoid interfering with insurer liability by the preempting of state insurance laws, noting insurers are regulated by individual states, therefore placing insurance contract interpretations on state courts. See Subcomm. Report, supra, at 181. The committee-suggested alternative methods may reduce PRPs and insurers’ Superfund clean-up liabilities, but those methods were not sufficient reasons to change liability under Superfund because transaction costs may always be reduced by negotiating settlements with EPA. Id. at 182.

The opportunity to change the liability scheme under CERCLA is ripe. In February 1994, the proposed bill to amend CERCLA was introduced and includes...
various methods aimed at making Superfund more effective. See Proposed Superfund Reform Act of 1994, S. 1834, 103d Cong., 2d Sess. (February 7, 1994); see also 24 Env't Rep. (BNA) 1755 (February 11, 1994) (listing proposals from Carol Browner, Administrator of EPA when testifying before Congressional subcommittee). One proposal includes taxing commercial insurance companies to create a fund that would be used to settle Superfund litigation for cleanup costs prior to 1986. See Superfund Reform Act, supra, Title VIII - Environmental Insurance Resolution Fund. See also 24 Env't Rep. (BNA) 1755, supra (expressing tax fund of $3.1 billion to be created over a five year period).