Insurance for CERCLA Claims: The Premium Pays for What?

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INSURANCE FOR CERCLA CLAIMS: THE PREMIUM PAYS FOR WHAT?

by Gerald M. Levine*

I. Introduction

Unless one has a garden-variety claim, insurance coverage is not always certain. So, the question in the title of this Article could apply to automobile and homeowner policies purchased by the ordinary consumer as well as to the comprehensive general liability policies purchased by all levels of business consumers, including the largest corporations. At the heart of all coverage disputes is a disagreement about the meaning of words. It need hardly be said that the creation of meaning is a heavy burden and that clear writing involves effort.

This Article discusses the twin questions of text and context. It will focus on the language of the comprehensive general liability ("CGL") policy, although what is said about it is equally applicable to other kinds of policies as well. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA") created significant new liabilities for a magnitude of costs so substantial as to tax even the largest corporate consumers.

II. The Creation Of Insurance Policies

Discovering meaning in texts is one of the principal intellectual occupations that judges are called upon to perform. Textual analysis of statutes and contracts concerns itself with examining the expressive substance of human interaction, cooperation and agreement. Statutes and contracts, distinct in every other way, are alike in that they are constructed with words chosen for a purpose. Indeed, the process of creating text implies that an author has worked purposefully with language and arrangement to most nearly express the author's intention. The same is true regarding the drafting of insurance policies and documents.

Converting intention to text involves making choices, which requires a degree of foresight and judgment. It is not surprising, therefore, that a substantial amount of judicial energy should be involved in determining what drafters, whether lawmakers or individuals, meant by their choices. It should be equally unsurprising that the parties who chose the words are, in courts of law and other forums, held to be responsible for the consequences of not saying what they mean. As Lord Mansfield said: "[m]ost of the disputes in the world arise from words."2

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Generally, social documents come into being through a form of dialogue known as negotiation, which takes place between parties with differing interests. It is important to recognize the cultural and societal benefits of dialogue. It presupposes both an attitude and an aptitude. It is the human means by which parties are able to reach a resolution, not necessarily from discord to concord, but to agreement, even if reluctantly achieved. What dialogue involves is testing and weighing words, choosing among alternatives and, ultimately, matching words with intent.

While the creation of standard insurance policies certainly involves dialogue within the industry,3 the finished policies are offered to consumers on a take it or leave it basis. Like other contracts, the parties must live with the choice of words made by the drafter of the contract. In insurance disputes there is a well settled principle that ambiguities are construed against the insurer. One court has stated that "if the controlling language supports two meanings, one favorable to the insured, and the other favorable to the insurer, the interpretation sustaining coverage must be applied."4 However, before this principle can be invoked the language in dispute must be analyzed to determine whether it is ambiguous.

Apparently, words in insurance policies that are clear and certain to some are ambiguous to others. Some courts have taken the view that disagreements among jurisdictions about the meanings of words, or different definitions in competing dictionaries, confirm the argument for ambiguity.5 Others take the position that it is not merely definitions but context which determines meaning.6 When parties litigate over words and courts at different levels and in different jurisdictions agree or disagree with each other's constructions, they are engaging in a dialogue which, in some respects, is a substitute for the negotiation that insured parties and insurers never had.

As will be discussed later,7 there is a discordance among jurisdictions about the meaning of certain words and phrases, even though it is generally agreed that the terms of an insurance policy should be accorded their natural and reasonable meaning. For the parties, the financial stakes are high. A holding that certain words and phrases are ambiguous favors the insured because it enlarges coverage, while the reverse restricts it.8

III. The Meaning Of The Word "Insurance"

Insurance is a risk contract.9 The type of risk drives the premium. Consumers in the market for insurance want security that should (continued on page 84)

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there be an occurrence\(^\text{10}\) for which they have purchased a policy, their losses will be made whole and their liabilities will be indemnified. The Oxford English Dictionary does not record any use of the word "insurance," in the sense of security against risk of loss or indemnification against exposure to liability, before the 17th century.\(^\text{11}\)

However, it is certain that insurance was available before that time since there was a late Elizabethan statute which established a Court of Policies of Assurance.\(^\text{12}\) The statute recites the immemorial use of policies of assurance in England "by means whereof it cometh to pass, upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few."\(^\text{13}\) A seventeenth century definition of insurance emphasizes that during the "time of the risque" losses or damages must be "with out ... fault of the insured, [and] by unavoidable accidents."\(^\text{14}\) Generally speaking, "intentional," which is equivalent to "fault" in this context, is the opposite of "accidental."\(^\text{15}\)

Consumers of insurance want to be sure that the premiums they pay will protect them from particular enumerated risks which they hope will not happen. However, insurance is a particularly litigious area of the law and insured parties do not always find the security they are seeking. Indeed, the reverse may even be true. The dockets are filled with examples of insurers disclaiming liability and insured parties suing for declaratory judgment.

IV. CERCLA

Among the most contentious insurance issues today are those concerning coverage for environmental claims under CERCLA.\(^\text{16}\) One court has noted that the area of CERCLA claims is "a genre of litigation that has become a staple of many federal courts' dockets."\(^\text{17}\) The reason for such litigiousness is the financial magnitude of cleaning up hazardous waste sites.

There is disagreement not only about the type of notice that triggers the duty to defend against government actions, but whether there is coverage. If there is coverage, disagreement ranges from its extent, as, for example, whether CERCLA response costs are "damages," to the distribution of the burdens of proof. On the issue of type of notice, disagreement revolves around the meaning of the word "suit."

Ultimately, the disagreements center on the direct and specific meaning of the text because even the most specific textual disputes, there is room for legitimate inference about the implied meaning of words. If "damages" is read to exclude response costs and an insurer's liability is only for "damages," then insured parties would be responsible for paying the first, and most substantial, expenses on any hazardous waste site. Determining the meaning of words thus carries a significant economic burden either for insured parties or insurers.\(^\text{18}\)

V. What Constitutes A "Suit"

Disagreement about the meaning of insurance policies begins as early as the insurer receives notice. The standard CGL provides that the insurer shall have "the right and duty to defend any suit against the insured seeking damages on account of ... property damage."\(^\text{19}\) The word "suit" is defined in Webster's Third New International Dictionary as "an attempt to gain an end by legal process."\(^\text{20}\) Ordinarily, claims are announced by the service of a summons and complaint. Typically, an insurer's involvement is triggered by this service of process. The question then becomes whether an action short of a legal process can constitute a suit. If an action short of a legal process can constitute a suit, then it must be determined what kind of action and notice is necessary to accomplish this.

Disagreement about the meaning of insurance policies begins as early as the insurer receives notice.

These questions are imperative because frequently it is from letters, not from summonses and complaints, that parties learn of government demands and positions. Indeed, letters can trigger a process\(^\text{21}\) that has significant adverse consequences for a potentially responsible party ("PRP")\(^\text{22}\) as that term is defined under CERCLA and comparable state laws.

Whether a letter is a "suit" depends upon whether the government's language is sufficiently coercive or adversarial. The dividing line is not easily discernible and requires close textual analysis. The insurer's duty to defend is only

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triggered if the letter crosses a threshold. It is not enough for the government simply to demand that a PRP respond. Most letters request voluntary action, yet voluntary action is precisely what an insured cannot take, for the reasons discussed below.23 Courts pay particular attention to the consequences if a PRP fails to act on the governmental notice. The issue has been examined in a number of federal and state cases and a consensus is forming about the kind of language notices must contain if they are to qualify as "suits."24

For an insured to have a right to compel an insurer to defend and indemnify, it must avoid taking "voluntary" action. The CGL contains a standard clause which is part of the cooperation provision: "The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of the accident."25 Insured parties, particularly small property owners and operators, are confronted by a dilemma: on the one hand, they dare not take voluntary action and, on the other, if insurers do not participate in settlement, the PRPs cannot possibly meet the crippling expense of incurred and projected cleanup costs for a site.

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The problem of an insured taking voluntary action is brought into sharp focus by a Massachusetts case, Augat, Inc. v. Liberty Mut. Insurance Co.26 The case involved the failure of a water treatment system which resulted in a discharge of contaminated water into the local sewer system and the ground at the site. The Commonwealth presented Augat with a complaint. Augat did not give notice to its insurer at that time but consented to the entry of judgment and agreed to decontaminate the site at its own expense. Only after it had incurred cleanup costs exceeding one million dollars did it give the insurer notice of the judgment. The insurer disclaimed and Augat commenced an action for declaratory judgment.

Augat contended that its consent to judgment was not voluntary but was coerced by the threat of a more costly verdict. It contended further that it was presented with a "Hobson's choice": it could either accept the offered settlement or risk paying treble damages resulting from a suit.27 To resolve the dispute the court turned to Webster's Third New International Dictionary for the meaning of "voluntary" and concluded that Augat's decision was "voluntary" from the dictionary definition.28 The word is defined as "by an act of choice" or "not constrained, impelled, or influenced by another."29

The court held that alternatively Augat could have demanded that Liberty Mutual defend the claim and assume the obligation to pay for the cleanup. Although Augat's decision was not "voluntary" in the sense of "spontaneous" or uninfluenced, it was "voluntary" in the sense of "by an act of choice."30 In retrospect, it seems obvious that Augat should have immediately put the insurer on notice, but it was clearly less obvious in prospect.

To understand the "Hobson's choice" that an insured must face, consider the language of two notices received by the Hazen Paper Company, one from the United States Environmental Protection Agency ("EPA") and the other from the Massachusetts Department of Environmental Quality Engineering ("DEQE").31 The notice from the EPA read that the EPA had determined there were actual releases of hazardous substances at Hazen's facility. The EPA was prepared to spend public funds on "activities in response to these releases" and to contract for the "longer term phases of cleanup of the site ... unless EPA determines that such action will be done properly by a responsible party."32 In this connection the EPA wished to discuss Hazen's "voluntary involvement in the measures necessary to remedy the problems presented by the hazardous substances [at the site]."33

The court found the EPA letter was analogous to a complaint because the letter stated that "the only form of voluntary involvement" that the EPA would consider was an implementation of all the measures described in the letter, including the reimbursement of expenses incurred by the EPA and the DEQE. The court concluded that the litigation defense protection that Hazen purchased from the insurer "would be substantially (continued on page 86)
CERCLA Claims
(continued from page 85)

compromised if [the insurer] had no obligation to defend Hazen’s interests in response to the EPA letter.34

However, the letter to Hazen from the DEQE had a different tone. That letter “claim[ed] only a threat of the release of hazardous material from certain ‘overpacked drums’ temporarily stored on the ... site.”35 The court recognized that the insured risked substantial prejudice through EPA enforcement procedures unless it acceded to the EPA’s invitation, despite the DEQE’s less demanding request. The DEQE’s request would have been a voluntary action but Hazen could not accede to this voluntary action without losing its coverage. A coercive letter from a state environmental agency was the subject of Avondale Industries, Inc. v. Travelers Indemnity Co.36 In Avondale, the court held that a notice from the office of the Attorney General of Louisiana issued at the request of the Louisiana State Department of Environmental Quality (“DEQ”) was coercive and adversarial. The letter notified Avondale of the DEQ’s intention “to take immediate action to bring about the prompt and thorough cleanup of a hazardous waste site ... and to recover all costs of remediation expended by the State ... at that site.”37

The letter concluded with a demand that Avondale “submit a plan for remedial action at the site ... or ... pay to the Secretary the full costs of a remedial action incurred by the State.”38 The Avondale court held:

We have little trouble viewing this administrative proceeding as a suit. The demand letter commences a formal proceeding against Avondale, advising it that a public authority has assumed an adversarial posture toward it, and that disregard of the DEQ’s demands may result in the loss of substantial rights by Avondale. These strike us as the hallmarks of litigation, and are sufficiently adversarial to constitute a suit under New York law and within the meaning of the policy.39

A similar result was reached in a decision from a lower court in New York. The letter in issue in County of Niagara v. Fireman’s Fund Ins. Co.40 uses the subjunctive tense in its introductory sentences, which in isolation would probably disqualify the letter as a “suit.” However, the subjunctive is followed by explicitly threatening language. PRP recipients of the letter are given sixty days to “submit a good faith proposal to undertake the financing of the ... remedial investigation and feasibility study.”41 The letter informed the Niagara County Refuse Disposal District that the EPA:

intends to investigate the release or threatened release of pollutants and that it may expend public funds on the investigation and for any corrective measures which are necessary to control such release. The letter also provides that unless the EPA determines that responsible parties will properly perform such action that it will then do so on its own initiative pursuant to the authority vested in it by CERCLA.42

The court held that for “those insurers whose policies did not contain a pollution exclusion clause ... an obligation to defend arose when the PRP letter was received by the County.”43 Regrettably, the judgment in County of Niagara has not been appealed, so it is not clear how New York appellate courts would rule on this issue.

The court in Ryan v. Royal Ins. Co. of America44 was presented with a different issue. After discovering hazardous waste on his property which was generated or deposited by a former tenant, Ryan notified the New York Department of Environmental Conservation (“NYDEC”) and received letters requesting Ryan to submit a closure plan. The property was subsequently sold, although at a steep discount because of the waste. The insurance company refused to reimburse the property owner for the decrease in the value of the property and Ryan commenced an action for judgment declaring that it was entitled to a defense and indemnification from the insurance company.

The language of the policy and the government letter were examined by the court in Ryan. The court found that the policy expressly required the insurer to defend the insured in respect to “any suit ... seeking damages” and to indemnify the insured for amounts the insured was “legally obligated to pay.”45 The court noted that no suit or formal administrative proceeding existed in the case. The insured argued, however, that “the duty to defend arises whenever a...
state agency takes the position that an environmental condition requires remediation and notifies the policyholder to that effect." The court rejected this line of reasoning.

The court ruled that the ultimate issue required an examination of whether correspondence Ryan received from NYDEC constituted a "suit" sufficient to trigger the duty to defend under the terms of the policy. Under this analysis, Royal had no duty to defend under the terms of the policy or New York insurance law. In addition, Royal had no obligation to indemnify because the insured party never became "legally obligated to pay as damages any sums on account of NYDEC's claim." Hence, there was no "suit" involved.

It is clear from these cases that even in those states that recognize letters as commencing a "suit" there must be some evidence that government action is probable and imminent. In some states, Maine among them, administrative notice alone does not trigger a duty to defend.

While a court's refusal to accept letters as commencing a "suit" is understandable in a case such as Ryan, such a view fails to deal with a serious problem faced by small property owners and operators designated as PRPs which may affect the cleanup of hazardous waste sites. If the letter is indefinite and does not refer to imminent adverse government action, then insurers have no incentive to attend any negotiation before a cost recovery lawsuit. This leaves the insured with little, if any, guidance. It compels the insured either to incur substantial expense for a declaratory judgment while under continuing pressure from the government to settle, or to wait for the inevitable cost recovery action to commence, by which time the cleanup costs will have significantly escalated. The pressure on a PRP is obvious because once the government announces a finding of actual release, the PRP is liable without regard to fault. Thus, it is in a PRP's best interest to respond positively to avoid the prejudice that can result in dispositive, extra-judicial solutions, while the insurer feigns indifference.

If the letter does not refer to imminent adverse government action, then insurers have no incentive to attend any negotiation before a cost recovery lawsuit.

VI. Allegations Warranting Coverage

It is a maxim of insurance law that the duty to defend is greater than the duty to indemnify. However, in order to trigger the duty to defend there must be coverage. Whether coverage exists is determined principally by the allegations in the complaint, or, in the case of government action, in letters. If a complaint or letter can be fairly read to allege that the "discharge, dispersal, release or escape" is both "sudden" and "accidental" then the insurer has a duty to defend.

How carefully a complaint must be drafted is illustrated by one court's analysis of the word "disposing." Without qualifying words, an allegation accusing a party of "disposing" waste "connotes a deliberate and intentional activity" that would not be within the meaning of the policy. The same court held: "We decline to oblige an insurer to extend coverage based on a reading of the complaint that is linguistically conceivable but tortured and unreasonable." Since a plaintiff's characterization of the occurrence may be dispositive, it is important to qualify the charge so that the complaint can reasonably be read to include unforeseen accidents or occurrences not deliberately caused by the insured. In Travelers Indem. v. Dingwell, plaintiffs alleged three causes of action, two of which released the insurer from any duty to defend. The third cause read: "as a result of negligence ... products containing [toxic] chemicals permeated the ground to the ground water table ... resulting in the contamination of water in the Plaintiffs' wells." The court held that these allegations "do not necessarily describe a 'deliberate process'" and, therefore, the complaint triggered the insurer's duty to defend.

In Technicon Electronics Corp. v. American Home Assurance Co., the insured manufacturer sought judgment against insurance carriers for a declaration that it was entitled to defense and indemnification for damages claimed by plaintiffs in an underlying lawsuit arising out of long-term discharge of toxic waste chemicals. The court found that the insurance policy contained the standard definition of the word "occurrence" and a "pollution exclusion" clause that narrowed the type of event for which coverage was afforded but which, in turn, contained an exception to the exclusion which revived the coverage if the release or discharge was "sudden and accidental." The manufacturer conceded that the discharge of the toxic waste chemicals was intentional. However, the manufacturer argued that because it had not intended to cause environmental harm or the specific injury claimed by plaintiffs in an underlying lawsuit, the discharge was accidental. The court disagreed and held that the manufacturer's argument failed "because the pollution exclusion clause, by its own terms, does not distinguish between intended or unintended consequences of intentional discharges; rather, it excludes from coverage liability based on all intentional discharges of waste whether consequential damages were intended or unintended."
CERCLA Claims
(continued from page 87)

there is a duty to defend, others determine the ultimate question of whether the insured has coverage, that is, whether the insurer owes a duty to indemnify, not simply to defend.60 Surprisingly, disagreement about the extent of coverage revolves around the meaning of only a few words. By present standard exclusionary provisions in CGL policies, insurers have attempted to significantly limit their liability to defend and indemnify landowners and operators for response and cleanup costs incurred in complying with CERCLA and comparable state laws. The reason for saying that the carriers have attempted to limit their liability is because in the tug of war between insurers and insured parties over the interpretation of the contract and exclusionary provisions not all states agree whether the language is as narrow as the insurers argue.

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Key words and phrases, such as "sudden and accidental," have been found to have surprising and subtle, even elusive, elasticity. For example, the Georgia Supreme Court, when asked on a certified question to determine the definition of "sudden," found that there were two possible meanings, "abrupt" and "unexpected and unintentional."61 Wisconsin's highest court also found the word "sudden" ambiguous.62 Neither court engaged in a contextual analysis of the words.

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The result is a reading that insurance companies probably find unexpected and disturbing. What the analysis illustrates is the power of words to carry multiple meanings. The interpretation of the term "sudden and accidental" is not viewed uniformly by all courts. Some find that the phrase is no more than a reaffirmation of coverage as defined in "occurrence." Others find that coverage is limited to discharges and releases that are both sudden, meaning abrupt and lasting only a short time, and accidental, meaning unexpected.

"Occurrence" is defined in the policy as an accident, including continuous or repeated exposure to conditions, resulting in bodily injury or property damage neither expected nor intended by the insured. This wide net of coverage is itself limited by an exclusion. An occurrence that would otherwise be covered but which results in bodily injury or property damage resulting from discharge, release or escape of contaminants or pollutants is not covered unless the discharge, release or escape is sudden and accidental.

Contemporaneous documents created by or generated within the insurance industry prior to the standard CGL being offered, tend to support the notion that the phrase "sudden and accidental" had a less restrictive meaning and that strict textual interpretation has limited it. Of course, courts in jurisdictions that find the phrase clear and unambiguous exclude any consideration of such extrinsic evidence. Nevertheless, such documents provide eloquent testimony that there has been a subtle change which attempts to balance the interests of the parties.

Damages resulting from intentional and deliberate acts of the insured are not covered occurrences, while such acts by third parties are. Discharges and releases of environmentally harmful wastes may be covered if they are both "sudden" and "accidental." Clearly courts have a particular aptitude for analyzing text and making fine discriminations. This is part of an ongoing dialogue between parties and among judges, the ultimate purpose of which is to clarify the meaning of words in a particular context.

There are situations in which a court will find no coverage and, therefore, no duty to defend.63 Then there are situations where the courts hold that the "pollution exclusion" clause is simply a restatement of the definition for "occurrence."64

New York in *Technicon Electronics v. American Home Insurance*65 and Massachusetts in *Lumbermens Mutual Casualty Co. v. Belleville Industrial, Inc.*66 have determined that the term "sudden and accidental" is clear and unambiguous. The court in *Lumbermens* stated:

For the word "sudden" to have any significant purpose, and not to be surplusage when used generally in conjunction with the word "accidental," it must have a temporal aspect to its meaning, and not just the sense of something unexpected.... The issue is whether the release was sudden. The alternative is that it was gradual. If the release was abrupt and also accidental, there is coverage for an occurrence arising out of the discharge of pollutants.67

This analysis insists that the word...
"sudden" is not mere surpluses.

A recent case from the United States Court of Appeals for the Third Circuit agrees that the word "sudden" is ambiguous and should be interpreted as meaning "unexpected" but suggests that the analysis be refocused. Instead of inquiring whether the "damage" was sudden and accidental, the proper inquiry should be whether the "discharge" of the pollutants was both sudden and accidental. The case was remanded to the district court to reconsider its treatment of the distinction between damages and discharges.

Courts that have held that the phrase "sudden and accidental" has a clear meaning have no problem in finding coverage where "discharge" was "unexpected," that is, "sudden," but not deliberate, even though the result may be expected. This interpretation is wide enough to afford coverage for acts of vandalism, which are deliberate acts by third parties, although neither expected nor intended by the insured.

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In contrast to courts applying a contextual analysis are courts that look at words in isolation. In Just v. Land Reclamation, Ltd., the Wisconsin Supreme Court held that the term "sudden" was "reasonably susceptible to different meanings and is therefore ambiguous." The court supported its holding by reference to two different dictionaries and numerous cases from other jurisdictions. However, the finding of ambiguity goes further than the word, "sudden." The finding affects the word, "accidental." According to this interpretation, the phrase "sudden and accidental" is simply a restatement of the term "occurrence," which, as already noted, is a defined term in the CGL policy. "In other words, the policy will cover claims where the injury was 'neither expected nor intended.'" By equating the word "accident" with "occurrence" the independent meaning of "accident" is subverted.

Although the Wisconsin Supreme Court's position is comforting to insured parties there are problems with its reasoning. The Wisconsin courts pay less attention to a distinction which New York and Massachusetts courts, among others, make between an active polluter, that is, one who intends the act but not the result, and a non-intentional polluter. This distinction is brought full circle in Technicon, which although it was decided by New York's highest court before Just, is not cited by the Wisconsin Supreme Court.

Plaintiffs in Just alleged that defendant's landfill was the source of unexpected and unintended pollution which caused them bodily injury and property damage. The fact that the damages were the result of leachate to the groundwater that was "unexpected" but not "abrupt" was not a relevant determinant. This is in contrast to other courts which hold that discharge of pollutants as an ordinary part of a company's business operations cannot be regarded as "sudden and accidental." The Third Circuit includes Delaware and Pennsylvania. Under Delaware law, the insurer has the burden of proving an exception to an exclusion, whereas under Pennsylvania law, the insurer has the burden. In practical terms, one state requires the insured to prove that discharges are both, "sudden and accidental," and the other state requires the insurer to prove the negative. This results in the same court reaching different decisions depending upon which state analysis is applied.

IX. Damages

The remaining term which causes difficulties is the word "damages." Damages are not defined in the standard CGL policy. Definition within a contract is generally regarded as a way of limiting meaning. Unless a word is specifically limited, it is construed from the point of view of what the ordinary business person reading the policy believes it covers. The United States Court of Appeals for the Eighth Circuit has held that CERCLA cleanup costs are not covered by the CGL. Apparently, the court reached this conclusion by assuming that the policy would only be used "by astute insurance specialists or perspicacious counsel." The court determined that the term did not include equitable monetary relief.

In a more recent case decided by the United States Court of Appeals for the District of Columbia, applying Missouri law, the court held that cleanup costs were "damages." On the other hand, Maine
follows the minority view as to the meaning of "damages." Remedi- al funds "may be substantial and may effectively alleviate or prevent property damage to others, but we do not believe the 'ordinarily intelligent insured,' engaged in a 'more than casual reading of the policy,' . . .would consider them to be sums which the insured [is] legally obligated to pay as damages." According to the D.C. Circuit Court of Appeals, the difference of interpretation turns on the point of view which is applied: an expert's understanding of the term versus a layperson's understanding. That court reasoned that a layperson's understanding of damages would include cleanup costs. However, the elusiveness of this distinction is highlighted by the Maine court's view that the "ordinarily intelligent insured" would not read the policy to include cleanup costs as damages.

When regarded from the point of view of social policy it is clearer that the word "damages" should not be read in any narrow sense. In the words of one state court: "the utility of a CGL policy would be highly dubious if coverage were allowed to hinge upon whether plaintiff's complaint was framed in equity rather than law."

X. Conclusion

In all contract disputes parties contend for different interpretations of language. Wrong choices carry the possibility of including more than the drafter may have intended. That is why courts, the final arbiters, spend so much effort on textual analysis. Words are capable of carrying a great deal of meaning. Additional meanings that spill over, sometimes uninvit- ed, are made possible by the richness of language.

In contracts of insurance the issue of interpretation is sharpened because the language of the parties' bargain is not negotiated. Insurance policies are contracts of adhe- sion. Parties must adhere to the terms of a standard form on a take it or leave it basis without negotia- tion.

When a consumer buys insurance, the consumer would like to know what the premium buys and what events or occurrences trigger the duty to defend and indemnify. This desire for knowledge will be the same for the individual con- sumer who is seeking home protec- tion as it will be for the largest corporate consumer who is looking to protect against the unforeseen risks of doing business. The standard form comprehensive general liability policy came into use several years before the enactment of CERCLA, when the dimensions of the problem and the magnitude of costs were little understood. Now that the liabilities and costs are better understood, insurers are attempt- ing to limit the meaning of their words.

ENDNOTES

3 Extrinsic evidence consisting of indus- try dialogue has been admitted where policies have been found to be ambigu- ous. E.g., Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 573-75 (Wis. 1990).
5 Just, 456 N.W.2d at 578 ("[T]he fact that substantial conflicting authority ex- ists with respect to the 'correct' inter- pretation of the exclusionary terms merely serves to strengthen the conclu- sion that the terms are susceptible to more than one meaning, and thus am- biguous.").
7 See infra notes 18-85 and accompany- ing text.
8 See A. Johnson & Co. v. Astina Casualty and Sur. Co., 741 F. Supp. 298, 302 (D. Mass. 1990), aff'd 933 F.2d 66 (1st Cir. 1991) ("[c]ommentators have identified as particularly pronounced in the envi- ronmental area the fashioning of 'judge-made insurance,' a trend char- acterized by judicial decisions in a number of environmental liability insurance disputes ... [that] have created coverage even in the face of contrary policy language."). (citing Kenneth S. Abraham, Environmental Liability and the Limits of Insurance, 88 COLUM. L. REV. 942, 960-61 (1988)).
10 In the standard form CGL policy since 1966, occurrence is defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property dam- age Neither expected nor intended from the standpoint of the insured." Just, 456 N.W. 2d at 574. Other courts have identified the same definition for occurrence in the policies before the court. See, e.g., International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co., 522 N.E.2d 758, 764 (III. App. Ct. 1988); Technicon Elect. Corp. v. American Home Assurance Co., 542 N.E.2d 1048, 1050 (N.Y. 1989).
12 Passing reference is made to this statu- te, 43 Eliz. c. 12., in 1 COUCH CYCLOPEDIA ON INSURANCE 2d (Rev. ed. Ronald A. Anderson) § 1:1 (Mark S. Rhodes ed. 1984). This is dealt with in more detail in John Weskett, On INSURANCE 150, 289 (London 1794).
13 Weskett, supra note 12, at 150.
14 Id. at 289.
15 See Technicon Elect. v. American Home Insurance, 542 N.E.2d 1048, 1050-51 (N.Y. 1989). (finding that the pollution exclusion clauses from cov- erage liability "based on all intentional discharges" and thereby removed the insurer's duty to defend because "[i]nasmuch as the ... dumping of wastes was deliberate, the occurrence cannot be accidental within the meaning of the policy").
18 "Courts agonize over the prospect of rendering judgment of far-reaching aff- ect based on the construction of a single word." Carey Canada, Inc. v. Columbia Cas. Co., 940 F.2d 1548, 1550 (D.C. Cir. 1991); see also Independent Petrochemical Corp. v. Astina Ca- sualty & Sur. Co., 944 F.2d 940, 944 (D.C. Cir. 1991) (recognizing that the court's interpretation of damages, if conflicting with other courts, can only be resolved by the Supreme Court).
20 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2265 (1961).
21 See EPA Interim Guidance on Notice, Letters, Negotiations, and Information Exchange Under Section 122 of CER- CLA, 53 Fed. Reg. 5258, 5302 (1988) (Potentially Responsible Party ("PRP") letter "should be used as a vehicle for informing PRPs of the availability of an administrative record that will contain documents which form the basis for the Agency's decision on the selection of a remedy").

23 See infra notes 25-50 and accompanying text.


27 Id. at 360.

28 Id.

29 Id. (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2564 (1961)).

30 Id.


32 Id. at 580.

33 Id.

34 Id.

35 Id.

36 887 F.2d 1200 (2d Cir. 1989).

37 Id. at 1202.

38 Id.

39 Id. at 1206 (emphasis added).

40 No. 71134 slip op. at Appendix A (N.Y. Sup. Ct. Niagara Cty., Mar. 6, 1990) reprinted in 4 MEALEY’S LITIG. REP. (Ins.) C-1, C-6 (Mar. 27, 1990) (copy of the letter sent to the Niagara County Refuse Disposal District by the United States Environmental Protection Agency).

41 Id. at C-7.

42 Id. at C-4.

43 Id. at C-5.

44 916 F.2d 731 (1st Cir. 1990).

45 Id. at 735.

46 Id. at 736.

47 Id. at 737.

48 Id. at 743.


51 State of New York v. Amro Realty Corp., 936 F.2d 1420, 1428 (2d Cir. 1991); see also EAD Metallurgical, Inc. v. Aetna Casualty & Surety Co., 905 F.2d 8, 11 (2d Cir. 1990) (allegations that insured “disposed or arranged for the disposal of the pollutant” shows the damage resulted “from purposeful conduct [that] cannot be considered accidental”).


54 414 A.2d 220 (Me. 1980).

55 Id. at 224.


57 Id.

58 Id.

59 Id.

60 Id. (court recognized rule that insurer’s duty to defend is broader than its duty to indemnify) (citing cases).


62 Just, 456 N.W.2d at 571.

63 Technicon, 542 N.E.2d at 1051.

64 See, e.g. Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 575 (Wis. 1990) (explaining the historical intent of the insurance industry “to clarify that the definition of occurrence excludes damages that can be said to be expected or intended.”) (citation omitted).

65 542 N.E.2d 1048, 1051 (N.Y. 1989) (“The plain language of the exclusion clause does not support this interpretation.”)


67 Id. at 572.


69 Id. at 1182.

70 Just, 456 N.W.2d 570 (Wis. 1990).

71 Id. at 571.

72 Id. at 573 (citation cases).

73 Id. at 575.

74 542 N.E.2d 1048 (N.Y. 1989).

75 456 N.W.2d 570 (Wis. 1990).


81 Id. at 988, (Heaney, J., dissenting) (criticizing the majority for relying on the technical meaning of “damages”).


84 Id.


MORTGAGE SERVICING FACTS

The Federal Trade Commission has these fast facts on mortgage servicing for consumers:

Your current servicer usually must notify you at least 15 days before the effective date of the transfer of your loan servicing.

During a 60-day grace period, you cannot be charged a late fee if you mistakenly send your mortgage payment to the old servicer and the new servicer cannot report to a credit bureau that payments were late.

Write to your servicer if you think there are any problems with your account. Within 60 business days of receiving your inquiry, the servicer must correct your account or determine it is accurate.

Do not subtract any disputed amount from your mortgage payment. The servicer may consider this different amount to be partial payment and declare the mortgage in default.

If you have a complaint, contact your local or state consumer protection office. If your lender is certified by the Department of Housing and Urban Development (“HUD”), you may want to file a complaint with HUD. Write: Office of Single Family Housing, HUD, Room 9282, Washington, D.C. 20410.

You may also want to contact an attorney to advise you of your legal rights. Under the National Affordable Housing Act, consumers can initiate class action suits and obtain actual damages, plus additional damages, for a pattern or practice of noncompliance. In successful actions, consumers also may obtain court costs and attorneys fees.