DOES THE TERM "DAMAGES" IN THE COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICY INCLUDE ENVIRONMENTAL CLEANUP COSTS?

INTRODUCTION

Environmental agencies discover hazardous waste sites in America almost daily. Consequently, the legal system has been exposed to extensive litigation involving environmental contamination. Insurance companies and their insureds are requesting declaratory judgments relating to policy coverage of environmental cleanup costs. Among the most controversial issues is whether the term "damages" in the comprehensive general liability ("CGL") insurance policy includes environmental cleanup costs.

In Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co.,4 ("NEPACCO") the United States Court of Appeals for the Eighth Circuit predicted that the Missouri Supreme Court would technically construe the term "damages" within the insurance context to exclude cleanup costs.5 Sitting en banc, the court reversed in part its prior panel decision which had held that cleanup costs were included within the ordinary meaning of damages.6

This Note examines the Eighth Circuit's decision in NEPACCO which construed "damages" as excluding cleanup costs. This Note then reviews Missouri's common law rules of insurance policy construction and the interpretations of "damages" forwarded by other jurisdictions.8 After reviewing this background, this Note analyzes

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2. Id.
5. Id. at 985-87.
6. Id.
7. See infra notes 11-72 and accompanying text.
8. See infra notes 73-146 and accompanying text.
the NEPACCO decision. Based on that analysis, this Note concludes that the restrictive interpretation of “damages” in NEPACCO is inconsistent with Missouri law.

FACTS AND HOLDING

From April 1970 to January 1972, the Northeastern Pharmaceutical & Chemical Co. (“NEPACCO”) produced hexachlorophene at its chemical plant in Verona, Missouri. The manufacturing process produced several toxic by-products, including dioxin. Initially, NEPACCO hired a chemical disposal company to dispose of this hazardous waste. Subsequently, NEPACCO changed its disposal method because of cost considerations.

In July 1971, NEPACCO transported approximately eighty-five drums, each containing fifty-five gallons of hazardous waste to a nearby farm (the “Denney farm” site) and buried the drums in a trench. While dumping the deteriorated drums into the trench, many drums cracked open. Consequently, a strong odor persisted at the Denney farm for several months.

Within the following year, NEPACCO contracted with Independent Petrochemical (“IPC”) for the disposal of additional hazardous wastes. Subsequently, IPC hired Russell Bliss to arrange the disposal of the hazardous waste. From 1971 to 1973, Bliss allegedly mixed NEPACCO’s hazardous waste with oil to create a dust suppressant. Bliss allegedly applied the dust suppressant at the Bubbling Springs Stables in Fenton, Missouri, and on the roads of Times Beach, Missouri. In 1974, a Mr. Minker purchased contaminated

9. See infra notes 147-219 and accompanying text.
10. See infra notes 147-219 and accompanying text.
14. Id.
15. Id. at 830.
16. NEPACCO, 842 F.2d at 979. Evidence of the deteriorated condition of the containers was revealed by the testimony of a worker, who told of stepping through the lid of a drum into the hazardous materials. Northeastern Pharmaceutical, 579 F. Supp. at 830.
17. NEPACCO, 842 F.2d at 979.
18. Id.
19. Id.
20. Id.
dirt from the Bubbling Springs Stables to improve his property located in Imperial, Missouri. In the same year, NEPACCO liquidated its assets, paid its creditors, and distributed the remaining proceeds to its shareholders.

In 1980, the Environmental Protection Agency (the "EPA") investigated, secured, and decontaminated the Denney farm site. The EPA subsequently brought suit. In United States v. Northeastern Pharmaceutical & Chemical Co. (the "EPA" lawsuit), the United States Court of Appeals for the Eighth Circuit held that "NEPACCO had the capacity to be sued" and that NEPACCO's corporate officers could be held personally liable. The Eighth Circuit ultimately held that NEPACCO and two of its corporate officers must pay for the cleanup costs incurred by the federal government.

Following the EPA lawsuit, several residents of Times Beach and Imperial and the state of Missouri filed related lawsuits. In Capstick v. Independent Petrochemical Corp., the residents of Times Beach and Imperial sued NEPACCO, Independent Petrochemical Corp., and other defendants. The residents sought "damages for present and future personal injury and property damage allegedly caused by the" improper disposal of NEPACCO's toxic waste. The residents also sought reimbursement of cleanup costs. In Missouri v. Independent Petrochemical Corp. ("IPC"), the state of Missouri filed a lawsuit against NEPACCO, Independent Petrochemical Corp., and other defendants, seeking recovery of cleanup costs. The state asserted claims based on the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and on the Missouri common law of public nuisance.

During the time the initial contamination occurred, Continental Insurance Companies ("Continental") insured NEPACCO under three standard-form comprehensive general liability ("CGL") insur-

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22. NEPACCO, 842 F.2d at 879. The Eighth Circuit referred to this site as "the Minker/Stout/Romaine Creek" site.
24. NEPACCO, 842 F.2d at 980.
25. Id.
26. 810 F.2d 726 (8th Cir. 1986).
27. Id. at 749.
28. Id. at 749-50.
29. NEPACCO, 842 F.2d at 980-81.
30. No. 832-00453 (Mo. Cir. Ct. filed Nov. 23, 1983).
31. NEPACCO, 842 F.2d at 980.
32. Id. at 980.
33. Id. at 980-81.
35. Id. at 4, 5.
The policies contained similar provisions; however, the second and third policies contained a pollution exclusion clause. In 1984, Continental initiated this suit seeking a declaration of its liability originating from the EPA and Capstick lawsuits. NEPACCO failed to reply to Continental’s complaint; consequently, the state of Missouri intervened to protect its interests in the IPC lawsuit.

The United States District Court for the Eastern District of Missouri granted Continental’s motion for summary judgment on count one and on the state’s counterclaim and Continental’s motion to dismiss without prejudice on count two. In count one, Continental sought a declaration of its obligation “to defend or indemnify NEPACCO for liability arising out of the EPA” lawsuit. In the state’s counterclaim, Missouri alleged that Continental, as NEPACCO’s liability insurer, was “obligated to indemnify the state for the amount of any judgment imposed on NEPACCO in the underlying IPC lawsuit.” The district court reasoned that cleanup costs are not “property damage” as defined by the CGL policies and

38. Id. at 979. The first policy was effective from Aug. 5, 1970 to Aug. 5, 1971; the second policy was effective from Aug. 5, 1971 to Aug. 5, 1972; and the third policy was effective from Aug. 5, 1972 to Nov. 17, 1972. Id.
39. Id. Under these policies, Continental agreed to:

(P)lay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies caused by an occurrence, and [Continental] shall have the right and duty to defend any suit against the insured seeking damages on account of such . . . property damage.

The policies defined “property damage” as:

(1) Physical injury or destruction of tangible property which occurs during the policy period, including the loss of use thereof at anytime resulting therefrom,

(2) Loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period . . . .
The policies further provided that “[t]his insurance applies only to . . . property damage which occurs during the policy period” and defined “occurrence” as “an accident, including continuous or repeated exposure to conditions, injury or property damage neither expected nor intended from the standpoint of the insured.” Id. at 979-80 (emphasis added).
40. Id. at 980. The pollution exclusion clause stated:

It is agreed that the insurance does not apply to . . . property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental.

Id.
41. Id. at 981.
42. Id. The other defendants included Milton Turkel, Edwin B. Michaels, and John W. Lee (NEPACCO’s former officers and directors). NEPACCO, 811 F.2d at 1183.
43. NEPACCO, 842 F.2d at 981-82.
44. Id. at 981.
45. Id.
thus are outside of the coverage of the policy.\textsuperscript{46} Furthermore, the
court stated that under Missouri law, an "occurrence" happens when
the loss is sustained and not when the tortious act is committed.\textsuperscript{47}
The loss (e.g., the cleanup costs) occurred after the expiration of the
CGL policies.\textsuperscript{48} Thus, the court held that the insurance coverage does
not extend to cleanup costs incurred after the termination of the
policies.\textsuperscript{49}

In count two, Continental sought a declaration of its obligation to
defend or indemnify NEPACCO for liability arising out of the Cap-
stick lawsuit.\textsuperscript{50} The court granted Continental's motion to dismiss
without prejudice on count two because more information was
needed to determine when the damages were incurred.\textsuperscript{51} The state
claimed that the district court had committed error on all points and
appealed to the United States Court of Appeals for the Eighth
Circuit.\textsuperscript{52}

In a panel decision, the Eighth Circuit affirmed the summary
judgment granted Continental on the state's counterclaim and the
judgment to dismiss without prejudice on count two.\textsuperscript{53} The Eighth
Circuit, however, reversed the summary judgment granted Continental
on count one (Denney farm site).\textsuperscript{54} The court concluded that
cleanup costs were "property damage" under the CGL policy defini-
tion.\textsuperscript{55} Furthermore, the court held that the federal and state gov-
ernments in addition to the private owners could sustain property
damage for contaminated land.\textsuperscript{56} Adopting the "exposure" theory,\textsuperscript{57}
the court reversed the summary judgment granted Continental on
count one because the contamination occurred during the policy pe-
riod.\textsuperscript{58} The dissent rejected the majority's determination that
cleanup costs were "damages" under the CGL policy definition be-

\begin{itemize}
\item 46. Id.
\item 47. Id.
\item 48. Id. at 981-82.
\item 49. Id.
\item 50. Id. at 981.
\item 51. Id. at 982.
\item 52. Id.
\item 53. NEPACCO, 811 F.2d at 1192-93.
\item 54. Id. at 1192.
\item 55. Id. at 1189.
\item 56. Id. at 1184-87.
\item 57. Id. at 1192 n.29 (defining "occurrence" as happening the moment the improper
release is committed).
\item 58. Id. at 1191-92. The court affirmed the summary judgment granted Continental
on the state's counterclaim because the contamination addressed by the IPC lawsuit
occurred after the expiration of the insurance policies. Id. at 1192. Furthermore, the
court affirmed the motion to dismiss without prejudice on count two (the Capstick
lawsuit) because of insufficient evidence as to when the polluting activities actually oc-
curred. Id. at 1193.
\end{itemize}
cause cleanup costs constitute equitable monetary relief. The court granted both parties' petitions to rehear the issue en banc.

Sitting en banc, the Eighth Circuit reversed the panel's decision on count one and granted summary judgment for Continental. After reviewing the Missouri common law rules of insurance policy construction, the court agreed that ambiguous language in the insurance policy should be construed against the insurer. The court also conceded that the term "damages" was ambiguous when viewed outside the insurance context. However, the court held that the term "damages" in the insurance context is unambiguous and refers only to legal damages, not equitable damages. Classifying cleanup costs as equitable damages, the court excluded cleanup costs from the meaning of "damages" under the CGL insurance policy. The court affirmed the panel's decision on the state's counterclaim and on the second count.

Three judges vigorously dissented from the majority opinion. The dissenting judges agreed that ambiguous language in the insurance policy should be construed against the insurer and agreed that the majority's concession of the ambiguity of the term "damages" should have been dispositive. The dissenting judges also argued that the Missouri Supreme Court's decision in Jack L. Baker Cos. v. Pasley Manufacturing & Distributing Co. should control because the restoration cost of the Denney "Farm site is less than the value of the damage to the government's property interest in the environmental resources damaged." According to the dissent, if any question existed as to the amounts, the Eighth Circuit should have remanded to the district court for a determination. In conclusion, the dissenting judges argued that the term "damages" in the CGL insurance policy is ambiguous and should be construed against the insurer.

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59. Id. at 1193-95. The dissent accepted the determination that cleanup costs were "property damage" under the CGL policy definition. Id. at 1193. However, the dissent argued that use of the term "damages" excludes the insurer's obligation to pay equitable damages. Id. at 1194-95.
60. NEPACCO, 842 F.2d at 983.
61. Id. at 981, 987 (5-3 decision).
62. Id. at 985.
63. Id.
64. Id.
65. Id. at 987.
66. Id. at 981-82, 987.
67. Id. at 987-90 (Heaney, J., dissenting).
68. Id. at 987-88 (Heaney, J., dissenting).
69. 413 S.W.2d 268 (Mo. 1967).
70. NEPACCO, 842 F.2d at 989 (Heaney, J., dissenting).
71. Id.
72. Id. at 988-90 (Heaney, J., dissenting).
BACKGROUND

The central issue in Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co. was the proper meaning of the term “damages” in the CGL insurance policy. Webster’s Third New International Dictionary defines “damages” as “the estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right.” This definition fails to distinguish legal damages from equitable compensation. In determining the proper construction of the term “damages” in the CGL insurance policy, particular attention should be given to the Missouri common law rules of insurance policy construction, to decisions from other jurisdictions construing “damages,” and to a Missouri case suggesting the proper construction of “damages.”

THE MISSOURI COMMON LAW RULES OF INSURANCE POLICY CONSTRUCTION

In construing provisions in the CGL insurance policy, it is helpful to examine the Missouri rules of construction. In Robin v. Blue Cross Hospital Service, the Missouri Supreme Court articulated the rules of construction regarding insurance policies. In Robin, a former employee sought to recover the benefits under her former employer’s group health plan. The court declared that the language of insurance policies must “be given its plain meaning.” It stated that the test for determining ambiguity was whether the language was “reasonably open to different constructions.” In testing the language of the policy, the court applied a layperson standard. The court concluded that if the language was unambiguous, then the policy would be enforced according to such language; however, if the language was ambiguous, then the language would be construed
against the insurer.  

Two Missouri cases clarified the rules of construction presented in Robin. First, in Hammontree v. Central Mutual Insurance Co., Mary Hammontree, plaintiff, sought recovery under a homeowner's policy. The court explicated the layperson standard. Insurance policy terms should be construed as "the ordinary insured of average intelligence and common understanding reasonably would [construe] the words or language under consideration." The court rejected a higher standard of construction based on the understanding of insurance specialists and lawyers. Second, in Bellamy v. Pacific Mutual Life Insurance Co., the beneficiary sought recovery under a group life and accident policy following the insured's death. The court emphasized the principle that ambiguous provisions should be strictly construed against the insurer. The court stated that "an insurance contract reasonably susceptible of any interpretation favorable to the insured will be so construed... to avoid a forfeiture."

CASE LAW FROM OTHER JURISDICTIONS CONSTRUING DAMAGES

The Term "Damages" Excludes Equitable Relief

In Maryland Casualty Co. v. Armco, Inc., the United States Court of Appeals for the Fourth Circuit faced the issue of whether equitable claims for reimbursement of environmental cleanup costs are claims for "damages" under the CGL insurance policy. In Armco, the insured had allegedly contaminated land in Missouri, and the federal government brought an action under CERCLA seeking injunctive and restitutionary relief. Subsequently, the insurer brought a declaratory judgment action in the United States District Court for the District of Maryland to determine its liability to the insured. The court held that the insurer had neither a duty to defend nor to indemnify the insured.
In affirming the district court's decision, the Fourth Circuit reasoned that insurers employ the language "to pay as damages" to limit their liability. Even though the standard of construction was a reasonably prudent layperson, the court applied a narrow technical rule of construction to honor the use of such language. The court concluded that "damages" means only payments owed to persons having legal, but not equitable, claims.

Having defined "damages," the court distinguished "damages" and "restitution" and formulated a test for determining whether a claim was legal or equitable. The court stated that relief sought is the determinative factor, not the nature of the underlying action. The court based the test on the policy language "to pay as damages" and noted that this language was framed in terms of relief sought and not in terms of the nature of the proceedings.

The Armco opinion relied on several pre-CERCLA decisions which recognized a distinction between recovery of damages and recovery of other types of relief. In Aetna Casualty & Surety Co. v. Hanna, the United States Court of Appeals for the Fifth Circuit held that the liability insurer had no obligation to defend or indemnify the insureds for a mandatory injunctive suit. A storm had destroyed the Hannas' retaining wall causing boulders, trash, and other debris to wash onto adjoining land. Hannas' neighbors brought a lawsuit to compel the Hannas to remove the debris, to prevent further trespass, and to repair and maintain the retaining wall.

In reversing the district court's decision, the Fifth Circuit stated that the term "damages" in a homeowners' policy provides no cover-

100. Id. at 1352.
101. Id.
102. Id.
103. Id. at 1352-54. The court reasoned:

[It] is not necessarily correct that the measure of relief is unrelated to whether the government sues for reimbursement or for damages. Damages is a form of substitutional redress which seeks to replace the loss in value with a sum of money. Restitution, conversely, is designed to reimburse a party for restoring the status quo. It might very well cost far more to restore a contaminated marsh than it would to pay damages for its loss.

Id. at 1353.

The court further stated that even if the insured's liability was equivalent, whether the claim was for damages or for restitution, it would not extend the insurer's liability "beyond the well-illumined area of tangible injury and into the murky and boundless realm of injury prevention." Id. at 1353-54.

104. Id. at 1352.
105. Id. at 1352-53.
106. Id. at 1352.
107. 224 F.2d 499 (5th Cir. 1955).
108. Id. at 503.
109. Id. at 500.
110. Id. at 500-01.
The court explained:

Clearly, the policy covers only payments to third persons when those persons have a legal claim for damages against the insured on account of injury to or destruction of property. The obligation of the insurer to pay is limited to "damages", a word which has an accepted technical meaning in law.

The court concluded that the costs for complying with an injunction were not "damages" within the meaning of the insurance policy. Consequently, the insurer had no obligation to defend the insured.

Several jurisdictions have held that claims for equitable relief are not "damages" within the meaning of insurance policies.

The Term "Damages" Includes Equitable Relief

By contrast, many jurisdictions have held that the term "damages" includes equitable relief. In United States Aviex Co. v. Travelers Insurance Co., the Michigan Court of Appeals held that "damages" should not be construed narrowly. In Aviex, the state environmental agency ordered the insured, United States Aviex Co., to decontaminate percolating waters underneath the insured's property. The insured brought suit in the Berrien Circuit Court seeking a declaration of the insurer's liability for cleanup costs. The circuit court entered judgment for the insured. In affirming the circuit court's decision, the Michigan Court of Appeals reasoned that

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111. Id. at 503-04.
112. Id. at 503.
113. Id.
114. Id. at 503-04.
116. Id. at 503-04.
117. Id. at 503-04.
118. Id. at 503-04.
119. Id. at 503-04.
120. Id. at 503-04.
"[i]t 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 costs of clean-up itself and then suing plaintiff to recover those costs." 121 The court, therefore, required the insurer to defend and indemnify the insured.122

In *New Castle County v. Hartford Accident & Indemnity Co.*, 123 the United States District Court for the District of Delaware rejected a technical interpretation of "damages" and ruled that the term "damages" should be given an ordinary meaning which makes no distinction between legal and equitable actions. 124 In *New Castle*, the county brought a declaratory judgment action against its insurers to determine the insurers' obligation to defend and to indemnify the county. 125 Several public and private parties sued the county for allegedly releasing pollution from its landfills and for the resulting cleanup costs. 126 The court applied an ordinary meaning standard and concluded that the term "damages" makes no distinction between legal and equitable actions. 127 The court held that the insurance policy covered all of the claims against the county because "the [c]ounty may become 'legally obligated to pay' as a result of injuries sustained by the respective [p]laintiffs or compensation imposed by law for a wrong." 128

In *Intel Corp. v. Hartford Accident & Indemnity Co.*, 129 the United States District Court for the Northern District of California held that CERCLA cleanup costs were "damages" under the CGL policy. 130 The district court reasoned that the term "damages" should be construed "in the light of the reasonable and normal expectations of the parties as to the extent of the coverage" and not in a technical manner. 131 The court, therefore, declared that all cleanup costs under a CERCLA consent decree are "damages" covered by the CGL insurance policy. 132 Many courts have held directly or impliedly that environmental cleanup costs constitute "damages" under CGL policies. 133

121. *Id.* at __, 336 N.W.2d at 843.
122. *Id.*
124. *Id.* at 1365.
125. *Id.* at 1361.
126. *Id.*
127. *Id.* at 1365.
128. *Id.*
130. *Id.* at 1172, 1189 (applying California law).
131. *Id.* at 1189-90.
132. *Id.* at 1190.
133. *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1194 (9th Cir.)
A MISSOURI CASE SUGGESTING THE PROPER CONSTRUCTION

As well as having various decisions from other jurisdictions, the NEPACCO court also had Missouri caselaw to assist in interpreting the term "damages." In *Jack L. Baker Cos. v. Pasley Manufacturing & Distributing Co.*, the Missouri Supreme Court stated that expenses for restoring real property to its original condition may be recovered if the restoration costs are less than the diminution in value. In *Baker*, the Pasley Manufacturing & Distributing Co. ("Pasley") hired the Jack L. Baker Co. ("Baker") to clean a propane tanker. The tanker exploded while in Baker's shop causing serious damage to the building and property. Baker sued Pasley for the diminution in value of the property resulting from the explosion. Baker estimated the diminution in value to be $13,380. The Circuit Court of Jackson County, Division No. 1, entered a judg-

134. 413 S.W.2d 268 (Mo. 1967).
135. Id. at 273.
136. Id. at 270.
137. Id.
138. Id. at 273.
139. Id.
ment for Baker in the amount of $3,000. Baker appealed to the Missouri Supreme Court and claimed that the award was inadequate.

Baker claimed that the jury instruction failed to "inform the jury as to what factors should be considered in arriving at its verdict." In Baker, the supreme court stated that the jury was not required to award Baker diminution in value. The court noted that the jury could have awarded diminution in value if the jury had determined that such an amount would have been fair and just compensation for Baker’s damages. The court also stated that the jury could award Baker the cost of restoring real property to its original condition if the restoration costs are less than the diminution in value. Therefore, the Missouri Supreme Court unanimously affirmed the circuit court’s judgment.

ANALYSIS

In Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co., the United States Court of Appeals for the Eighth Circuit predicted that the Missouri Supreme Court would technically construe the term “damages” in the CGL insurance policy. The Eighth Circuit held that “damages” has a technical meaning in the insurance context which excludes cleanup costs. The court failed to substantiate its factual premise that the insurance industry intentionally uses the term “damages” to preclude coverage for equitable claims. Furthermore, a review of the court’s decision indicates that the court distorted or ignored Missouri’s rules of insurance policy construction. A logical explanation for the court’s decision is that the court feared the enormous economic burden that the insurers would bear if CGL policy coverage is found to cover environmental cleanup costs. Such a public policy argument, however, is indeterminate. Therefore, the court improperly predicted how the

140. Id. at 270.
141. Id.
142. Id. at 273.
143. Id. at 274.
144. Id.
145. Id. at 273.
146. Id. at 274.
148. Id. at 985-87.
149. Id. at 985.
150. See infra notes 155-70 and accompanying text.
151. See infra notes 171-95 and accompanying text.
152. See infra notes 208-19 and accompanying text.
153. See infra notes 208-19 and accompanying text.
Missouri Supreme Court would construe the term "damages."^{154}

**Unsubstantiated Insurance Industry Custom**

In *NEPACCO*, the Eighth Circuit held that the term "damages" has a technical meaning in the insurance context which excludes equitable monetary relief.^{155} The court relied on this determination of insurance industry custom to declare that the term "damages" was unambiguous.^{156} The court held that the insurer had no duty to indemnify because the Missouri common law rule of insurance policy construction requires unambiguous language to be enforced as it is written, not strictly construed against the insurer.^{157} Thus, the majority's determination of the insurance industry custom was crucial to the outcome of the case.

In *NEPACCO*, the majority failed to substantiate its determination of insurance industry custom in two respects.^{158} First, the majority relied on *Maryland Casualty Co. v. Armco, Inc.*^{159} to substantiate the premise that the term "damages" has a technical meaning in the insurance industry.^{160} In *Armco*, the United States Court of Appeals for the Fourth Circuit applied Maryland law.^{161} Judicial decisions regarding insurance industry custom and insurance law may be unreliable in other jurisdictions because custom and law vary in different states.^{162}

Second, the *NEPACCO* majority made its determination of insurance industry custom without any expert testimony.^{163} Normally, expert testimony is required to substantiate an alleged insurance custom.^{164} The lack of expert testimony in *NEPACCO* is evidenced by the majority's failure to mention any expert testimony; furthermore, the "damages" issue was raised for the first time on appeal, not at trial.^{165} Incidentally, the *Armco* decision also lacked expert testimony on the "damages" issue.^{166} Therefore, the *NEPACCO* majority

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154. See infra notes 155-219 and accompanying text.
155. *NEPACCO*, 842 F.2d at 985.
156. Id. at 985-87.
157. Id.
158. See infra notes 159-66 and accompanying text.
159. 822 F.2d 1348 (4th Cir. 1987).
160. *NEPACCO*, 842 F.2d at 985-86.
163. *NEPACCO*, 842 F.2d at 985-87.
165. *NEPACCO*, 842 F.2d at 984-87.
166. *Armco*, 822 F.2d at 1351-54 (failing to mention any expert testimony).
failed to substantiate its assumption that the term “damages” in the insurance context has a technical meaning excluding equitable relief.

In Shell Oil Co. v. Accident & Casualty Insurance Co., the California Superior Court for San Mateo County ruled that the decisions in NEPACCO and Armco were inapplicable to the Shell Oil case because “those courts did not have the benefit of testimony of policy underwriters and drafts.” A commentator suggested that the Shell Oil case “demonstrate[s] that policyholders can defeat the application of . . . [the NEPACCO and Armco decisions] to their coverage actions by . . . [using expert testimony to attack] the factual premise of” those decisions. Again, the factual premise of the NEPACCO and Armco decisions was that the term “damages” has a technical meaning in the insurance industry excluding equitable relief.

A DISTORTION OR ABOLITION OF THE LAYPERSON STANDARD

The Missouri common law rules of insurance policy construction require that policy language be given its plain meaning. The Robin v. Blue Cross Hospital Service test for ambiguity is whether the language is reasonably open to different constructions. The standard for testing language is the meaning that an ordinary laypurchaser of the policy would understand. If the language is ambiguous, then the language should be construed against the insurer. If the language is unambiguous, then the policy should be enforced according to such language.

The NEPACCO majority determined that the ambiguity of the term “damages” depends upon the context of its usage. The court declared that outside of the insurance context the term “damages” is ambiguous; however, the term “damages” is unambiguous within the insurance context. The court used the phrase “in the insurance context” to distort or to abolish Missouri’s established standard of in-

168. Id. at 334.
170. NEPACCO, 842 F.2d at 985-87; Armco, 822 F.2d at 1352-54.
171. See supra note 82 and accompanying text.
172. 637 S.W.2d 695 (Mo. 1982) (en banc).
173. See supra note 83 and accompanying text.
174. See supra note 84 and accompanying text.
175. See supra note 85 and accompanying text.
176. See supra note 85 and accompanying text.
177. NEPACCO, 842 F.2d at 985.
178. Id.
Average lay policy holders are unaware of the distinction between legal and equitable remedies. Furthermore, lay policy holders are unaware of the legal definition of terms like "restitution" or fail to appreciate the consequences of legal classifications. They most likely interpret the policy language "all sums which the insured shall become legally obligated to pay as damages" as any compensatory obligation imposed upon them. The dictionary definition confirms the lay policy holders' perception of "damages." Remarkably, the NEPACCO majority expressly conceded that the lay policy holders' perception of "the term 'damages' could reasonably include all monetary claims, whether such claims are described as damages, expenses, costs, or losses." As the three dissenting judges argued, this concession should have been dispositive.

The NEPACCO majority, however, used the phrase "in the insurance context" to completely avoid the application of the lay policy holders' understanding of the term "damages." Instead, the court construed the term "damages" in a highly technical manner. In using the phrase, the majority appears to have charged lay policy holders with constructive knowledge equivalent to a lawyer or insurance specialist. Requiring such knowledge distorts the layperson standard. If the insurer wished to employ a technical meaning to the term "damages," the insurer should have given notice to the in-

179. Id. at 985-87. See also supra notes 73-94 and accompanying text.
182. See supra note 39 (quoting language in NEPACCO's standard form CGL policy). The United States District Court for the Eastern District of Michigan stated that "the insurers construe their policies too narrowly: coverage does not hinge on the form of action taken or the nature of relief sought, but on an actual or threatened use of legal process to coerce payment or conduct by a policyholder." Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 662 F. Supp. 71, 75 (E.D. Mich. 1987). See also New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1367 (D. Del. 1987). The United States District Court for the District of Delaware stated that "claims for injunctive relief, statutory response costs, or other required remedial actions enforceable in a legal proceeding come within [the 'damages'] provision." Id.
183. See supra note 74 and accompanying text.
184. NEPACCO, 842 F.2d at 985.
185. Id. at 988 (Heaney, J., dissenting).
186. Id. at 985-87.
187. See supra notes 148-49 and accompanying text.
188. See NEPACCO, 842 F.2d at 985-86 (acknowledging that the term "damages" is ambiguous outside of the insurance context and is not defined in CGL policies, but failing to differentiate between levels of understanding of laypersons and specialists).
189. See id.
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sured by using explicit language in the insurance policy. The majority may have disregarded the layperson standard and decided instead to use an insurance professional standard. It is unclear whether the NEPACCO majority simply distorted the layperson standard or functionally abolished the standard altogether. It is clear, however, that the NEPACCO majority refused to follow Missouri’s established standard of insurance policy construction.

Some commentators suggest that the Armco and NEPACCO decisions appear to demonstrate well-reasoned arguments. Assuming that CERCLA cleanup costs are purely equitable, these arguments may be based on sound legal reasoning. However, what may be legally elementary to a lawyer could be too complex for laypersons to understand without adequate explanation or legal training. Under a layperson standard, sound legal reasoning should not be required.

MISSOURI’S DEFINITION OF “DAMAGES”

In Jack L. Baker Cos. v. Pasley Manufacturing & Distributing Co., the Missouri Supreme Court stated that property damages may include restoration cost if that cost is less than the diminution in value. This interpretation does not restrict “damages” to its technical meaning; instead, this interpretation allows both legal and equitable relief. In his dissent, Judge Heaney argued that Baker controls because the restoration cost of the Denney “farm site is less than the value of the damage to the government’s property interest in the environmental resources damaged.” Judge Heaney added that if any question existed as to the amounts, the court should have remanded to the district court for a determination. The majority failed to discuss the applicability of Baker.

190. Id. at 988.
191. See id.
192. Id. at 988 (Heaney, J., dissenting).
194. See supra notes 95-115 and accompanying text.
195. See supra notes 180-81 and accompanying text.
196. 413 S.W.2d 268 (Mo. 1967).
197. See supra notes 134-35 and accompanying text.
198. NEPACCO, 842 F.2d at 989 (Heaney, J., dissenting).
199. Id.
200. Id.
201. Id. The NEPACCO majority limited its discussion of Baker to support for its conclusion that the difference between the liability for damages to natural resources and for cleanup costs may influence whether the government brings an action for damages or cleanup costs. See id. at 987.
THE NEPACCO Majority Refused to Follow the Missouri Test for Ambiguity

The Missouri test for ambiguous language is whether the language is reasonably open to different interpretations. In *Bellamy v. Pacific Mutual Life Insurance Co.*, the Missouri Supreme Court stated that "an insurance contract reasonably susceptible of any interpretation favorable to the insured will be so construed in order to avoid a forfeiture." The NEPACCO majority conceded that the term "damages" is reasonably open to different constructions. The NEPACCO majority could have utilized the layperson interpretation of "damages" or the *Baker* interpretation of "damages." Either one provided a reasonable interpretation favoring the insured to prevent forfeiture. The NEPACCO majority refused to follow the Missouri rules of insurance policy construction.

A LOGICAL EXPLANATION FOR THE NEPACCO MAJORITY'S DECISION

One possible explanation for the majority's decision favoring the insurer is that the court feared the enormous economic burden that the insurers would bear if CERCLA cleanup costs were included within CGL policy coverage. Such a public policy argument, however, fails to settle the issue.

From the perspective of the insurance industry, environmental contamination liability is already straining the industry. If CGL policy coverage included CERCLA cleanup costs, the industry would suffer large losses, forcing many insurance companies to liquidate. A result for the insurers, however, could have harsh economic repercussions on the insureds; moreover, a determination that CGL policy coverage excluded CERCLA cleanup costs would force many insureds into bankruptcy. Experts suggest that "[o]nly the largest corporations or those with the technical skill to perform the clean-up themselves [would] survive the cost of cleaning up a major hazardous waste site."

The federal government also has a significant interest in the out-
come of this dispute. The Environmental Protection Agency's purpose of hazardous waste cleanup is served best when its funds are supplemented with funds from the liable parties' insurers. Without insurance coverage, many companies would be unable to contribute to cleanup efforts.

If the NEPACCO majority based its decision on a fear of placing an enormous economic burden on the insurance industry, then the majority failed to consider the economic burden that it placed on insured corporations. Both industries stand to bear a staggering economic burden. Thus, such a public policy argument fails to settle the issue.

CONCLUSION

The Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co. decision was contrary to Missouri's established rules of insurance policy construction. The majority opinion distorted or ignored the layperson standard for testing the ambiguity of policy language. Unless the insurer explicitly inserts a technical legal meaning to a term, the lay policyholder's understanding of the policy language should control. The majority incorrectly predicted that the Missouri Supreme Court would construe the term "damages" in a legally technical manner. The Missouri Supreme Court very likely would have given the term "damages" a nontechnical, layperson meaning. Thus, in Missouri, the term "damages" in the CGL insurance policy should include CERCLA cleanup costs.

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215. Id. at 1193; Crisham & Davis, supra note 193, at 30-31.
217. See supra notes 210-16 and accompanying text.
219. See supra notes 210-18 and accompanying text.
220. 842 F.2d 977 (8th Cir. 1988) (en banc).