South Carolina Law Review

Volume 48
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 12

Fall 1996

Environmental Law

Stephen J. Shaw

ENVIRONMENTAL LAW

DOES A "PRP" LETTER TRIGGER AN INSURER'S DUTY TO DEFEND IN SOUTH CAROLINA

South Carolina has yet to deal with the very troubling issue of whether a potentially responsible party (PRP) letter from the Environmental Protection Agency (EPA), or similar administrative action from a state environmental agency, triggers an insurer's duty to defend under a comprehensive general liability (CGL) insurance policy. Virtually all CGL policies contain a clause requiring the insurer to defend "any suit against the insured,"[1] yet few such policies define the word "suit."[2] As a result courts have ruled differently on the issue of whether administrative agency action rises to the level of a suit, thereby triggering the insurer's duty to defend.[3]

This survey will first examine the background and purpose of PRP letters in the litigation context, particularly EPA action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[4] or similar state action. Second, it will examine how courts throughout the United States have dealt with the issue of whether a PRP letter triggers an insurer's duty to defend. Finally, it will synthesize the reasoning in those cases with general rules of South Carolina contract interpretation.

In 1980 Congress enacted CERCLA[5] in response to public concern over deposits of hazardous materials throughout the United States.[6] CERCLA provides that persons who currently own or operate and those who owned or operated a hazardous waste facility at the time of disposal of any hazardous substance, who disposed of or arranged for the disposal of a hazardous substance at such a facility, or who accepted hazardous substances for transport to disposal facilities will be held liable for clean-up costs.[7] CERCLA authorizes the EPA to identify sites contaminated with hazardous

---

1. *See* Irene A. Sullivan et al., *Hazardous Waste Litigation: Comprehensive General Liability Insurance Coverage Issues*, 518 PRACTISING L. INST. LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 425 (1995).

2. *See, e.g.*, Aetna Cas. & Sur. Co. v. Pintlar Corp., 948 F.2d 1507, 1516 (9th Cir. 1991); EDO Corp. v. Newark Ins. Co., 898 F. Supp. 952, 955 (D. Conn. 1995).

3. *See* Margot A. Metzner, *Insurance Coverage for Environmental Claims*, 519 PRACTISING L. INST. LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES, 7, (1995).

4. 42 U.S.C. §§ 9601-75 (1994).

5. Pub. L. No. 96-510, 94 Stat. 2767 (1980).

6. United States v. Alcan Aluminum Corp., 964 F.2d 252, 257-58 (3d Cir. 1992) (citing S. DOC. NO. 97-14, 97th Cong., 2d Sess. 320 (1983)).

7. 42 U.S.C. § 9607(a) (1994). This section effectively imposes strict liability. *See* Hutchinson Oil Co. v. Federated Serv. Ins. Co., 851 F. Supp. 1546, 1548 n.3 (D. Wyo. 1994); Hazen Paper Co. v. United States Fidelity & Guar. Co., 555 N.E.2d 576, 581 (Mass. 1990).

materials and then to identify the parties potentially responsible for the contamination.[8] This process involves sending PRP letters to parties against whom there is sufficient evidence of potential liability.[9]

The ensuing cleanup can take one of three possible forms: the PRP can voluntarily elect to clean up the contaminated site,[10] the EPA can clean the site itself using Superfund monies,[11] or the EPA can issue an administrative order requiring the PRP to clean up the site.[12]

A PRP letter carries "immediate and severe implications."[13] If a PRP fails to respond, it is subject to both fines for noncompliance with EPA administrative orders and punitive damages.[14] As a result PRPs should actively participate in the administrative process as early as possible.[15] PRPs should obtain legal advice without delay to decide whether to initiate cleanup measures themselves or risk fines and punitive damages by waiting for the EPA to bring suit.[16]

Because CERCLA imposes strict liability, PRPs should actively pursue their few available defenses as soon as possible. Specifically, PRPs can only avoid liability if the release or threatened release of hazardous substances is caused by "(1) an act of God; (2) an act of war; [or] (3) an act or omission of a third party other than an employee or agent of the defendant."[17]

The administrative record developed during the EPA's, and some states', investigation is the sole basis for judicial review.[18] For that and the previous reasons, it is essential that PRPs obtain legal representation from the outset of an EPA investigation rather than wait for the EPA to bring a formal lawsuit and thereby trigger an insurer's duty to defend. Many courts in the United

---

8. *Hutchinson Oil*, 851 F. Supp. at 1548 n.3.

9. *See* Interim Guidance on Notice Letters, Negotiations and Information Exchange, 53 Fed. Reg. 5298, 5301 (1988).

10. 42 U.S.C. § 9604(a) (1994).

11. 42 U.S.C. § 9604(b) (1994).

12. *See* 42 U.S.C. § 9606(a) (1994) ("[T]he President . . . may require the Attorney General of the United States to secure such relief as may be necessary to abate [a] danger or threat . . . .").

13. Aetna Cas. & Sur. Co. v. Pintlar Corp., 948 F.2d 1507, 1516 (9th Cir. 1991).

14. 42 U.S.C. § 9606(b)(1) (1994) (allowing fines for noncompliance to reach $25,000 per day); 42 U.S.C. § 9607(c)(3) (1994) (stating that any person liable for a release or a threat of release of hazardous substances who, without sufficient cause, fails to take remedial action may be liable for punitive damages up to three times the amount of cleanup costs incurred by Superfund).

15. *See Pintlar*, 948 F.2d at 1517; Hazen Paper Co. v. United States Fidelity & Guar. Co., 555 N.E.2d 576, 581 (Mass. 1990).

16. *See Pintlar*, 948 F.2d at 1517.

17. 42 U.S.C. § 9607(b)(1)-(3) (1994).

18. 42 U.S.C. § 9613(j)(1) (1994); Employers Ins. of Wausau v. Petroleum Specialties, Inc., 69 F.3d 98, 107 (6th Cir. 1995).

States have adopted this view; however, some courts still require that a formal lawsuit be filed before an insurer's duty to defend is triggered under a CGL policy. Courts finding a duty to defend favor a broad construction of the word suit. They recognize that a PRP letter carries immediate and severe implications and imposes a level of coerciveness and rivalry equal to that of a summons and complaint.[19] Applying a reasonable policyholder standard of insurance contract construction, these courts have found that because an ordinary policyholder would reasonably believe coverage exists under such circumstances, the insurer has a duty to defend.[20]

Courts finding no duty to defend generally rely upon strict definitions of the word suit that refer only to a formal proceeding in a court of law.[21] Also, some courts simply find that an administrative action is not coercive or adversarial enough to trigger the insurer's duty to defend.[22]

A line of Michigan cases reflects the reasoning on both sides of this issue. In the 1992 case of *Ray Industries, Inc. v. Liberty Mutual Insurance Co.*,[23] the Sixth Circuit held that the receipt of a PRP letter did not trigger an insurer's duty to defend. The court considered decisions from other courts that had found a duty to defend[24] but ultimately ruled that because the Michigan Supreme Court would adopt a narrow meaning of the word suit,[25] and because PRP letters would not fall within this meaning, the insurer had no duty to defend.[26] The court relied upon the principle that "[i]f the terms of [an insurance] contract are plain and unambiguous, their plain meaning should be given effect."[27]

The court looked to the common usage of suit as well as legal and non-legal dictionaries and held that a PRP letter simply was not the functional equivalent of a lawsuit.[28]

---

19. *See Pintlar*, 948 F.2d at 1516-17.

20. *See, e.g., id.* at 1516; Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1206 (2d Cir. 1989).

21. *See, e.g.*, Ray Indus., Inc. v. Liberty Mut. Ins. Co., 974 F.2d 754, 761 (6th Cir. 1992); Harleysville Mut. Ins. Co. v. Sussex County, 831 F. Supp. 1111, 1131-32 (D. Del. 1993), *aff'd*, 46 F.3d. 1116 (3d Cir. 1994); City of Edgerton v. General Casualty Co. of Wis., 517 N.W.2d 463, 474 (Wis. 1994).

22. *See, e.g.*, Ryan v. Royal Ins. Co. of America, 916 F.2d 731, 741-43 (1st Cir. 1990).

23. 974 F.2d 754, 761 (6th Cir. 1992).

24. *Id.* at 760 (citing *Pintlar*, 948 F.2d at 1516).

25. *Id.* at 761.

26. *Id.* at 764.

27. *Id.* at 761 (alterations in original) (quoting Murphy v. Seed-Roberts Agency, Inc., 261 N.W.2d 198, 201 (Mich. Ct. App. 1977)).

28. *Id.* The court defined suit as "an attempt to gain an object in the courts" and concentrated on the "formal legal proceedings" aspect of a lawsuit rather than demands that have not been enforced by a court of law. *Id.* (emphasis omitted).

Two years later the Michigan Supreme Court defined the word suit. It was not the ruling the Sixth Circuit had anticipated. In *Michigan Millers Mutual Insurance Co. v. Bronson Plating Co.*[29] the supreme court rejected the holding of *Ray Industries* and decided that a PRP letter issued by the EPA is the functional equivalent of a suit.[30] In *Bronson Plating* the insured had engaged in the electroplating business since the early 1940s. The electroplating process involved the use of many different chemicals and compounds and generated waste water, the discharge of which was identified by the EPA as a possible source of environmental contamination.[31] The EPA issued a PRP letter requesting Bronson's "voluntary participation in connection with certain studies" and warning Bronson that "failure to [cooperate] could result in [Bronson] being held jointly and severally liable for any costs."[32] The letter also commanded Bronson to supply relevant information, encouraged good-faith negotiations, and informed Bronson that the EPA might bring a civil enforcement action against Bronson should it fail to comply with the orders.[33]

All of Bronson's insurers except for Michigan Millers declined to provide any defense against the PRP letter.[34] Michigan Millers agreed to defend Bronson subject to a reservation of its rights.[35] Michigan Millers then filed a declaratory judgment action, seeking a ruling that it was not obligated to defend Bronson.[36] Bronson counterclaimed and joined the rest of its insurers as counterdefendants.[37] The trial court found that Michigan Millers had no duty to defend, but the Michigan Court of Appeals reversed, holding that "a 'suit' ha[d] been brought."[38]

Limiting itself to the question of whether the PRP letter invoked the insurer's duty to defend under the terms of the applicable insurance contracts,[39] the Michigan Supreme Court affirmed the appellate decision. The court first addressed the question of whether the word suit was ambiguous. To answer this question, the court noted that suit was not defined in the policies at issue; however, that alone was insufficient to create the sort of ambiguity that, according to Michigan law, must be read in favor of the insured.[40] When "no definition is provided, the court must interpret the term according

29. *Id.* at 864.
30. *Id.* at 871.
31. *Id.* at 866.
32. *Id.* at 867.
33. *Id.*
34. *Id.*
35. *Id.* at 867-68.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 868.
40. *Id.* at 868-69.

to its 'commonly used meaning,' taking into account the reasonable expectations of the parties."[41] The court looked to dictionary definitions of suit in an attempt to determine the insured's reasonable expectations. Finding many variations on the definition of suit, the court justifiably held that a reasonable policyholder could expect the term suit to include a PRP letter.[42]

The real reason for the *Bronson Plating* decision may well lie in policy. The court spoke of the "modern realities of our legal system,"[43] highlighting the growing use of arbitration and the increasing power of administrative agencies to resolve disputes.[44] The opinion cited CERCLA as a prime example of this new reality.[45]

After establishing that suit could apply to nonjudicial proceedings, the court turned to the question of whether Bronson's receipt of a PRP letter constituted the initiation of a suit.[46] Concentrating on the coercive nature of a PRP letter, the court found that receipt of a PRP letter was comparable to the instigation of a suit and that it triggered the insurer's duty to defend.[47] The court then considered an argument that the goal of CERCLA, encouraging voluntary, immediate cleanups, would be circumvented if an insured had to wait until a suit was filed in order to receive protection from its insurer. The court recognized that such a rule would encourage PRPs to decline voluntary cleanups while waiting for a lawsuit and insurance coverage.[48]

The most recent case from the Sixth Circuit, *Employers Insurance of Wausau v. Petroleum Specialties, Inc.*,[49] reflects the interpretation of *Bronson Plating* and extends the ruling to PRP letters issued by state administrative

41. *Id.* at 868-69 (citation omitted).

42. *Id.* at 869-70. Although numerous lay dictionaries referred to court proceedings in the context of a suit, the court cited two dictionaries that defined suit in terms of "legal action" and "legal process." *Id.* at 869.

43. *Id.* at 870.

44. *Id.*

45. *Id.* The court described a "system in which a PRP has every incentive to 'voluntarily' cooperate with the EPA, before actual litigation, and where significant legal prejudice may develop if the PRP fails to do so." *Id.*

46. *Id.*

47. *Id.* at 871. Several factors impacted the court's decision: the possibility of fines, the potential existence of joint and several liability, CERCLA's strict liability stance, the administrative record generated by PRP proceedings and the impact of the proceedings on future litigation, and the reality that EPA-financed cleanups (which occur when PRPs do not actively and voluntarily cooperate from the start of the process) are considerably more expensive than PRP-sponsored cleanups. *Id.* at 871-72.

48. *Id.* at 872.

49. 69 F.3d 98 (6th Cir. 1995).

agencies.[50] In reaching its decision, the court in *Petroleum Specialties*, like others before it, concentrated on the coercive nature of the EPA's powers.[51]

Aetna Casualty and Surety Co. v. Pintlar Corp.[52] provides valuable insight into the major theories relating to this issue. Pintlar, a subsidiary of Gulf Corporation, was designated a PRP by the EPA as the result of pollution at one of Gulf's mining facilities.[53] The EPA pursued administrative remedies against Gulf. Shortly after discovering it was a PRP and after entering into preliminary negotiations with the EPA, Gulf requested its insurer provide a defense and indemnification.[54] In a declaratory judgment action brought by the insurer, the district court held that there was no duty to defend because no formal complaint had been filed.[55]

The Ninth Circuit Court of Appeals reversed, citing a number of reasons. First, the court found that a PRP letter exposes the insured to "immediate and severe implications"[56] because the PRP's substantive rights are affected by the EPA's opening of the administrative process.[57] Second, because the government chooses the response action under CERCLA, the PRP is advised to get involved in the administrative process from the beginning so that it may influence the nature and expense of the environmental studies and cleanup measures.[58] Third, if the PRP chooses not to cooperate, the EPA may utilize a vast array of persuasive responses, including heavy fines and litigation.[59]

Furthermore, the court held that a reasonable person faced with the adversarial nature of PRP/EPA proceedings would believe that the receipt of a PRP letter is "the effective commencement of a 'suit' necessitating a legal defense."[60] The receipt of a PRP letter forced Pintlar to hire experts and lawyers merely to protect its interests. The court also relied on the underlying purpose of CERCLA—promotion of voluntary settlements. The court was

---

50. *Id.* at 107. Although the court relied upon a "facial review" to support this extension, it noted the "significant arsenal of remedies" the Michigan Department of Natural Resources (MDNR) had at its disposal. One of these remedies is the limitation of judicial review to the administrative record developed by the MDNR after the issuance of a PRP letter. *Id.*

51. *Id.* at 106 ("[T]he court relied heavily on the coercive powers granted to the EPA, particularly its ability to formulate and implement a remediation plan even without the cooperation of the polluter." (citing Harrow Prod. v. Liberty Mut. Ins. Co., 64 F.3d 1015, 1025 (6th Cir. 1995))).

52. 948 F.2d 1507, 1516-18 (9th Cir. 1991).

53. *Id.* at 1509.

54. *Id.* at 1510.

55. *Id.* at 1510. The district court found as a matter of law that the CGL policies could not be interpreted to provide coverage in situations such as the case presented. *Id.*

56. *Id.* at 1516.

57. *Id.*

58. *Id.* at 1517.

59. *Id.*

60. *Id.*

concerned that if insurers were not obligated to provide a defense until the commencement of a suit, then PRPs would have an incentive not to cooperate with the EPA in an attempt to force a lawsuit.[61]

The insurer argued that the court's holding would obliterate all hope for a bright-line test.[62] Aetna argued that insurers rely on a distinct event, such as the filing of suit, to determine when coverage attaches. Thus, the court's acceptance of a lesser event as triggering coverage would create uncertainty.[63] The court rejected these claims, stating that "[t]he focus should be on the underlying rationale and not on the formalistic rituals. If the threat is clear then coverage should be provided."[64]

The Supreme Court of North Carolina has also dealt with this issue in the context of a state compliance order.[65] In *Spangler* the court concluded that the word suit is a non-technical term and should be given its ordinary meaning.[66] Looking to non-legal dictionaries and defining suit as "the attempt to gain an end by legal process,"[67] the court gave effect to a broader definition of suit and found coverage.[68]

Other courts have found no duty to defend. In *Ryan v. Royal Insurance Co. of America*[69] the First Circuit focused on the lack of coerciveness and adversariness in holding that a state's letter seeking voluntary cooperation in an environmental cleanup did not trigger the insurer's duty to defend.[70] Ryan had leased the property in question to Stuart-Oliver-Holtz, Inc. (SOH), whose operations contaminated the site with trichlorethylene and other dangerous chemicals.[71] SOH subsequently declared bankruptcy. During its attempts to sell the property, Ryan discovered the contamination and notified the New York Department of Environmental Conservation (NYDEC) and the EPA.[72] NYDEC sent numerous letters to Ryan and SOH, but none of the letters demanded that either party clean up the site.[73] The court found all correspondence between the regulatory agencies and the parties to be quite conciliatory,

---

61. *Id.*

62. *Id.*

63. *Id.* at 1517-18.

64. *Id.* at 1518.

65. C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co., 388 S.E.2d 557 (N.C. 1990).

66. *Id.* at 570.

67. *Id.* (quoting WEBSTER'S NEW WORLD INTERNATIONAL DICTIONARY 2286 (3d ed. 1976)). The court rejected definitions from three other dictionaries, including an alternate definition from *Webster's* that defined suit as an action in a court of law. *Id.*

68. *Id.*

69. 916 F.2d 731 (1st Cir. 1990).

70. *Id.* at 741-43.

71. *Id.* at 732.

72. *Id.*

73. *Id.* at 733.

rather than confrontational, and noted that no money had been expended by any party to clean up the property.[74]

Moreover, the court looked to the CGL policy between Ryan and Royal and found that the word suit should not be "accorded talismanic significance."[75] New York law mandates that the objectively reasonable expectation of the typical policyholder must be considered when construing an insurance contract. As a result, the court was not prepared to require that a formal suit be commenced in a court of law before coverage inheres.[76] However, the court found a common theme in cases addressing this issue—namely, that there must exist some cognizable degree of coerciveness or adversariness in the administrative body's actions.[77] No such activity existed in *Ryan*, and the court rested its holding on that deficiency.[78] The *Ryan* holding implies that fact-based inquiries as to the level of coerciveness or adversariness must be made in every case and the mere existence of an ambiguity is not enough.

Other courts have denied a duty to defend solely on the basis of the plain and unambiguous meaning of the word suit. For example, the Wisconsin Supreme Court, in *City of Edgerton v. General Casualty Co.*,[79] found suit to "denote[ ] court proceedings, not a 'functional equivalent.'"[80] Also, the court found no duty to defend would arise from non-court proceedings, no matter how coercive or adversarial the language of the PRP letter.[81]

The city and Edgerton Sand & Gravel, Inc. were identified as PRPs by both the Wisconsin Department of Natural Resources and the EPA.[82] The

74. *Id.* at 733. Soon after its first contact with NYDEC, Ryan demanded that Royal defend against the agency's claims. Royal refused the request and cancelled the policy. *Id.* Ryan then sold the property for less than it would have received absent any contamination and brought suit against Royal for the difference in price. The gravamen of Ryan's complaint was that Royal's breach of its duty to defend and indemnify Ryan for cleanup costs proximately caused the price difference. *See id.*

75. *Id.* at 735.

76. *Id.* at 736 ("Logic dictates that if a proceeding is the functional equivalent of a traditional suit, then coverage may inhere.").

77. *Id.* at 737-38.

78. *Id.* at 741-42 ("Evidence of coerciveness or a serious state enforcement effort is completely wanting. . . . Whatever ambiguity may lurk in the policy language, it is simply too much of a stretch to bind Royal by the CGL policy's duty-to-defend language to the acceptance of NYDEC's implied invitation to voluntary action.").

79. 517 N.W.2d 463 (Wis. 1994).

80. *Id.* at 477. The issue was one of first impression for the court. *Id.* at 467.

81. *Id.* at 477 ("[N]o matter how coercive the language of the DNR letter was considered to be, it was used within the realm of an *administrative* proceeding. It did not have the effect of initiating a suit.").

82. *See id.* at 468.

city's and the corporation's insurers denied coverage for and defense of all claims.[83]

The supreme court first looked at whether there was a "suit seeking damages" for which the insurers would be required to defend.[84] The court recognized that the expansive powers given to state and federal agencies by CERCLA have produced a "flood of litigation" attempting to determine whether the PRP or the PRP's insurer will pay environmental cleanup costs.[85] The court also noted that courts across the nation have reached competing definitions of what constitutes a suit.[86]

The *Edgerton* court directly rejected the Wisconsin Court of Appeals' reliance on *Ryan*, holding that "something more in the form of a court proceeding would be required to '*force or compel* the insured to take action or suffer serious consequences.'"[87] The court also held that the word suit is unambiguous. To find otherwise would have required the court to look beyond the complaint.[88] This would be contrary to existing Wisconsin law.[89]

In South Carolina the terms in a policy of insurance are given their plain, ordinary, and popular meaning,[90] and any ambiguities are resolved in favor of the insured.[91] An insurance contract is ambiguous only when it may fairly be understood in more than one way.[92]

Because of South Carolina's pro-insured rules of interpretation,[93] it is reasonable to assume that the word suit could be ambiguous in a CGL policy that offers no precise definition of suit. After all, the Michigan Supreme Court and numerous other courts have found competing definitions of suit.[94] This

---

83. *Id.* at 469.

84. *Id.* at 471.

85. *Id.*

86. *Id.*

87. *Id.* at 475 (quoting Professional Rental, Inc. v. Shelby Ins. Co., 599 N.E.2d 423, 430 (Ohio Ct. App. 1991)). The court recognized, however, that the EPA's use of § 9606(a) administrative orders could "come into play," but no such order was made in this case. Also, the court reasoned that the order ultimately would have to be enforced by a court of law—which intimates that under Wisconsin law a suit occurs only in a court of law. *Id.* at 475-76.

88. *Id.* at 477.

89. *Id.*

90. State Auto Property & Cas. Co. v. Brannon, 310 S.C. 388, 391, 426 S.E.2d 810, 811 (Ct. App. 1992) ("The court must enforce, not write, contracts of insurance and must give policy language its plain, ordinary and *popular* meaning.") (emphasis added).

91. *See* Edens v. South Carolina Farm Bureau Mut. Ins. Co., 279 S.C. 377, 379, 308 S.E.2d 670, 671 (1983).

92. Universal Underwriters Ins. Co. v. Metropolitan Property & Life Ins. Co., 298 S.C. 404, 407, 380, S.E.2d 858, 860 (Ct. App. 1989).

93. *See, e.g.*, Tobin v. Beneficial Standard Life Ins. Co., 675 F.2d 606, 608 (4th Cir. 1982); *Edens*, 279 S.C. at 379, 308 S.E.2d at 671.

94. *See* Ryan v. Royal Ins. Co. of America, 916 F.2d 731, 735-36 (1st Cir. 1990); Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., 519 N.W.2d 864, 872 (Mich. 1994).

split of authority combined with the possibility that a reasonable policyholder could expect suit to mean more than just a "proceeding at law" could create an ambiguity in the insurance contract that must then be construed against the insurer, thereby creating a duty to defend.

Having found an ambiguity, courts should look to the specific facts of each case, asking whether the degree of adversarial and coercive character rises to a level at which a reasonable policyholder would expect coverage. The key to this analysis lies in examining the effect on a PRP's rights. If the PRP could suffer irreparable legal or financial harm as a result of not having coverage and defense of its rights, then coverage should inure. This would fulfill the underlying policies of CERCLA, which mandate immediate, voluntary, cost-effective cleanup of contaminated sites. It would also allow a PRP to act positively from the outset rather than stall, delay, or frustrate the necessary cleanup in an attempt to provoke a lawsuit to create coverage.

The EPA's current practice is to use PRP letters rather than bring suit immediately upon identifying a polluter.[95] This likely results from a fundamental goal of CERCLA to promote voluntary settlements.[96] Failure to cooperate with the EPA can result in severe penalties.[97] Because of the EPA's increased use of administrative remedies and the penalties for noncompliance, it is imperative that insurers and insureds know how best to deal with this issue. South Carolina should follow the reasoning in *Bronson Plating*, *Pintlar*, and *Spangler* to (1) find the word suit to be ambiguous when it is not defined in the policy language and (2) look to the facts of each case, particularly the coerciveness and adversariness of administrative action, in asking whether a reasonable policyholder would expect coverage. This two step analysis should provide a balance between the needs of the insured for a legal defense and the right of the insurer to conserve its resources.

Stephen J. Shaw

95. EDO Corp. v. Newark Ins. Co., 898 F. Supp. 952, 960 (D. Conn. 1995).

96. Harleysville Mut. Ins. Co. v. Sussex County, 831 F. Supp. 1111, 1132 (D. Del. 1993), *aff'd*, 46 F.3d 1116 (3rd Cir. 1994).

97. Town of Windsor v. Hartford Accident & Indem. Co., 885 F. Supp. 666, 669 (D. Vt. 1995); *Harleysville*, 831 F. Supp. at 1132.