Circuit Court of Appeals for the District of Columbia concluded that the provision for coverage of damages in the standard comprehensive general liability policy included the payment for hazardous waste cleanups. Independent became liable for $96 million for the cost of cleaning up dioxin-laced oil. Several of its insurers sued to prevent payment and relied on an Eighth Circuit case, *Continental Insurance Co. v. Northern Pharmaceutical and Chemical Co.*, (*NEPACCO*), that held that environmental clean up costs were not damages. The district court, deferring to the prior decision, held that the insurer did not need to provide coverage. The court of appeals, claiming that the Eighth Circuit had misread Missouri law, reversed.

Under federal rules covering the applicable law for deciding a case, federal courts are bound by the decisions of the state courts in which the action is governed. In this case, the applicable law was that of Missouri. That state's highest court, however, had not issued a decision concerning the coverage of cleanup costs under comprehensive general liability policies. In *NEPACCO*, the Eighth Circuit anticipated that the state courts would interpret the term damages contained in the policy to exclude cleanup costs since its technical meaning did not extend to equitable recoveries of money. The Court of Appeals for the District of Columbia, however, concluded that interpretation violated some basic rules of construction applied by the Missouri courts and refused to defer to the Eighth Circuit's interpretation.

Under Missouri law, the courts interpret insurance contracts in light of the ordinary meaning of their terms. If the technical meaning of the term conflicts with the ordinary meaning, the ordinary meaning will control unless a party provides additional evidence to the court that the technical meaning is what the parties intended. In the case of the term damages, the ordinary meaning encompassed all financial liabilities one is obligated to pay as a result of another's loss. Under this definition , cleanup costs were damages.

The court then rejected two arguments that are raised commonly in these cases. First, the insurer argued that the statute creating liability defined damages differently from cleanup costs. The court responded that other sections treated cleanup costs as part of the damages caused by the waste. Second, the insurer argued that the court's definition of damages would result in making it liable for any cost incurred by the insured including penalties. The court also rejected that argument, noting that the common definition of damages did not encompass penalties or other forms of financial punishment.

AIDS Limitation Does Not Violate ERISA

McGann v. H&H Music Co., 946 F.2d 401 (5th Cir. 1991).

A change in an employee welfare benefit plan to limit coverage for acquired immune deficiency syndrome (AIDS) after an employee is diagnosed with the disease is not a discriminatory act under Employee

Retirement Income Security Act (ERISA). In this case, McGann, the employee of the defendant-employer H&H Music, sued to recover damages under a provision of ERISA that prohibits discrimination in the provision of benefits. McGann was diagnosed with AIDS in December 1987 and filed claims under the employer's group medical plan. At that time, the plan provided for lifetime medical benefits of up to $1 million for each employee. In July 1988, the employer changed the plan. One of the changes limited AIDS coverage to a lifetime maximum of $5000. McGann charged that the change violated a provision of ERISA that prohibited discrimination against plan participants for exercising any right under a plan or interference with the attainment of any right to which the participant was entitled. The district court dismissed McGann's claim and the court of appeals affirmed.

Initially, the court found that McGann could not show a specific intent to interfere with his benefit rights. Even though he was the only employee diagnosed with AIDS at the time of the change, the court stated that he failed to show any evidence that the change was specifically directed at him. On the other hand, the court noted that all present and future employees would face a similar limitation in their benefits.

Second, the court concluded that McGann did not have any expectation that the benefits would continue at their prior levels. In the plan documents, the employer retained the right to change the coverage. The employer did not make any oral representations to McGann indicating that the coverage would stay the same. Finally, the right to medical benefits, unlike pension benefits, does not vest. Therefore, McGann did not have an expectation to a certain level of benefits.

McGann attempted to avoid the effects of these two conclusions by arguing that any change directed at an identifiable group of employees constituted discrimination. The court rejected this argument as well. The court noted that ERISA did not require employers to provide a specific level of welfare benefits. Further Congress recognized the need to allow employers flexibility when it rejected automatic vesting for welfare benefits. The court concluded that ERISA does not prohibit discrimination among categories of diseases.