

MCGINNES INDUSTRIAL MAINTENANCE CORPORATION, APPELLANT,
v.
THE PHOENIX INSURANCE COMPANY AND THE TRAVELERS INDEMNITY COMPANY,
APPELLEES
No. 14-0465
SUPREME COURT OF TEXAS
Argued January 15, 2015
June 26, 2015

ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHIEF JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE GREEN, JUSTICE WILLETT, JUSTICE DEVINE, and JUSTICE BROWN joined.

JUSTICE BOYD filed a dissenting opinion, in which JUSTICE JOHNSON, JUSTICE GUZMAN, and JUSTICE LEHRMANN joined.

The standard-form commercial general liability ("CGL") insurance policies at issue in this case¹ give the insurer "the right and duty to defend any suit against the insured seeking damages". The United States Court of Appeals for the Fifth Circuit asks² whether "suit" includes superfund cleanup proceedings conducted by the Environmental Protection Agency (the "EPA") under the

Page 2

federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").³ We agree with the overwhelming majority of jurisdictions to have considered the issue that the answer is yes.

IA

Relief from pollution was first afforded in suits for nuisance and other common law causes of action.⁴ The United States Supreme Court held that litigants could bring suit based on the federal common law of nuisance⁵ as long as the common law had not been displaced by federal statute.⁶ The

Page 3

Resource Conservation and Recovery Act of 1976⁷ and other federal statutes often served as other bases for suits by the EPA.⁸ State and local governments sued on state statutes and under the common law.⁹

The enactment of CERCLA in 1980 changed the landscape dramatically, giving the EPA "broad power to command government agencies and private parties to clean up hazardous waste sites."¹⁰ The EPA has two options for obtaining a cleanup under CERCLA. "It may conduct the cleanup itself and later seek to recover its costs from potentially responsible parties [(PRPs)] in a subsequent cost recovery action"—a lawsuit—"or it can compel the PRPs to perform the cleanup (either voluntarily or involuntarily) through administrative or judicial proceedings."¹¹ "[E]veryone

Page 4

who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup."¹² The only defenses are an act of God, an act of war, and in some instances, an act or omission of a third party.¹³

As amended, CERCLA also creates a process that begins in the EPA and ends, only if necessary, in the courts. The process starts with a notice letter informing the recipient that it is a potentially responsible party ("PRP").¹⁴ The letter may invite the PRP to negotiate with the EPA over its liability.¹⁵ But because defenses to liability are limited, the invitation is effectively a demand.¹⁶ The EPA can request information and sanction a PRP's failure to respond with significant fines.¹⁷ It can issue a "unilateral administrative order" directing a PRP to conduct a "remedial investigation

Page 5

and feasibility study",¹⁸ or else—the else being civil penalties and punitive damages.¹⁹ The EPA need turn to the courts only for enforcement of its decisions. A PRP cannot seek judicial review until the process is complete,²⁰ and then only for EPA actions that are arbitrary and capricious, based on the agency's own record.²¹ As a practical matter, courts afford PRPs no hope of relief, and consequently they have no choice but to comply with the EPA's directives.²² There will seldom be a court proceeding.

B

In the 1960s, petitioner McGinnes Industrial Waste Corporation dumped pulp and paper mill waste sludge into disposal pits near the San Jacinto River in Pasadena, Texas ("the Site"). In 2005,

Page 6

the EPA began investigating possible environmental contamination at the Site. In November 2007, the EPA served a general notice letter on McGinnes's parent company, stating that it was a PRP and offering it "the opportunity to enter into negotiations concerning cleaning up the Site and reimbursing EPA for costs incurred". In December 2008, the EPA served a similar letter on McGinnes. That letter included 58 requests for detailed information covering virtually every aspect of McGinnes's involvement with the Site. The letter noted that a failure to respond could result in penalties of up to \$32,500 a day.

In July 2009, the EPA sent McGinnes a special notice letter stating that it had determined that McGinnes was responsible for cleaning up the Site and demanding that McGinnes pay \$378,863.61 in costs. The letter required McGinnes to make a good-faith offer to settle with the EPA within 60 days. When McGinnes did not make an offer, the EPA issued a unilateral administrative order directing McGinnes to conduct a "remedial investigation and feasibility study" in accordance with the

EPA's specifications. The letter warned McGinnes that its willful failure to comply without cause would subject it to \$37,500 per day in civil penalties and punitive damages up to three times the resulting costs to the EPA.

C

During the time McGinnes was dumping waste at the Site, it was covered by standard-form CGL insurance policies issued by Phoenix Insurance Company and Travelers Indemnity Company (collectively "the Insurers").²³ Each policy provided that

Page 7

[t]he company will pay 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 the company shall have the right and duty to defend any suit against insured seeking damages on account of such . . . property damage, . . . and may make such investigation and settlement of any claim or suit it deems expedient

In May 2008, in the interim between the EPA's first two notice letters, McGinnes requested a defense in the EPA proceedings from the Insurers. The Insurers refused on the ground that the proceedings were not a "suit" under the policy.

McGinnes sued the Insurers in federal district court for a declaration that the policies obligated them to defend the EPA's CERCLA proceedings and also seeking attorney fees already incurred. The court granted the Insurers' motion for partial summary judgment on the duty-to-defend issue, denied McGinnes's motion, and certified its order for interlocutory appeal. The United States Court of Appeals for

the Fifth Circuit certified to us the following question²⁴:

Whether the EPA's PRP letters and/or unilateral administrative order, issued pursuant to CERCLA, constitute a "suit" within the meaning of the CGL policies, triggering the duty to defend.²⁵

As usual, the Circuit "disclaim[ed] any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the question certified."²⁶

Page 8

II

We agree with the Insurers that "suit" commonly refers to a proceeding in court.²⁷ Although the word is sometimes defined more generally as "the attempt to gain an end by legal process",²⁸ the more specific connotation is an attempt through process in court. But for three reasons we think "suit" in the CGL policies at issue must also include CERCLA enforcement proceedings by the EPA.

A

When the policies at issue were written, the main avenue of redress for pollution was by suing in court on common law or statutory claims. One effect of CERCLA was to authorize the EPA to conduct on its own what otherwise would have amounted to pretrial proceedings, but without having to initiate a court action until the end of the process. The PRP notice letters serve as pleadings. The EPA obtains discovery through requests for information, indistinguishable from interrogatories under the rules of civil procedure. It engages in mediation through its invitations to settle. A unilateral administrative order resembles summary judgment. The fines and penalties for willful non-cooperation in the process are like sanctions in a court proceeding, only prescribed by statute. And part of the judicial function is ceded to the EPA by limiting a PRP's opportunity for review

until the end of the process, and then limiting that review to an abuse of discretion by the EPA, based on its own record.

Page 9

McGinnes argues that EPA proceedings are the functional equivalent of a suit, but in actuality, they are the suit itself, only conducted outside a courtroom. Had the EPA wanted to force McGinnes to clean up the Site before 1980, it would have been required to sue first, and the CGL policies would have obligated the Insurers to defend—to challenge the pleadings, to contest the scope of discovery, to engage in mediation on a level playing field, to resist judgment, and to settle—all without fear of being sanctioned at the very end for not having cooperated with the opponent. CERCLA effectively redefined a "suit" on cleanup claims to mean proceedings conducted by one of the parties, the EPA, followed by an enforcement action in court, if necessary. McGinnes's rights under its policies should not be emasculated by the enactment of a statute intended not to affect insurance, but to streamline the EPA's ability to clean up pollution.²⁹

The Insurers argue that to hold that their duty to defend applies to EPA enforcement proceedings is to extend that obligation to every demand letter. But a simple demand letter threatening or prefacing a lawsuit is nothing like a PRP letter or unilateral administrative order, which, to use the United States Supreme Court's choice of words, "command" compliance.³⁰ Likewise, the Insurers' argument that a PRP letter or unilateral administrative order is but a claim,

Page 10

as distinguished from a suit in the policies themselves, simply blinks reality. The EPA's demands and directives, backed by threats of fines and penalties, are more like interlocutory rulings than claims. The Insurers argue that EPA proceedings are really pre-suit settlement mechanisms. The point is that before CERCLA

those mechanisms were available to the EPA only in judicial proceedings.

The Insurers argue that if "suit" includes CERCLA enforcement proceedings, it must also include all administrative proceedings. We disagree. EPA enforcement proceedings are unusual: not only are they like judicial proceedings, they were judicial proceedings before CERCLA was enacted.

We cannot conclude that CERCLA deprived McGinnes of the coverage for pollution cleanup enforcement proceedings it bought years earlier.

B

It is relatively well-settled, in the Fifth Circuit and other courts, that cleanup costs under CERCLA are "damages" covered by the form CGL policies at issue here.³¹ The Insurers do not dispute this interpretation of the policies, though they do insist that McGinnes's damages were not the result of an "occurrence"—that is, an accident—under the policies. To interpret the policies as covering the damages incurred as a result of pollution cleanup proceedings without giving the

Page 11

Insurers the right and duty to defend those proceedings creates perverse incentives and consequences for insurers and insureds alike.

McGinnes argues that an insurer's duty to indemnify without a right or duty to defend creates an incentive for the insured to mount no defense itself, assured that whatever damages result will not be its responsibility but the insurer's. The Insurers argue that an insured who does not defend against incurring damages may be denied coverage for breaching its duty to cooperate with the insurer to avoid such damages. Whether either scenario is likely, both illustrate the problem with a duty to indemnify without a duty or right to defend.³²

C

Finally, the Insurers' interpretation of "suit" in these standard-form policies³³ has been rejected by thirteen out of sixteen state high courts to have considered the issue: Alabama, Colorado, Connecticut, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, North Carolina, Vermont, and Wisconsin.³⁴ Only high courts in California, Illinois, and Maine have

Page 12

sided with the Insurers' position, and California, the most recent of the three, did so in 1998.³⁵ Since then, seven state high courts have sided with insureds.³⁶ The results in lower courts are similarly lopsided in favor of the insureds.³⁷

Page 13

"We have repeatedly stressed the importance of uniformity when identical insurance provisions will necessarily be interpreted in various jurisdictions."³⁸ We cannot achieve uniformity with our decision; the courts have already split. Still, "we think it prudent to strive for uniformity as much as possible."³⁹

We conclude that insureds in Texas should not be deprived the coverage insureds have in thirteen other states.

* * * * *

We answer the Fifth Circuit's certified question yes.

/s/ _____
Nathan L. Hecht
Chief Justice

Opinion delivered: June 26, 2015

Footnotes:

¹ The policies, issued in the late 1960s and early 1970s, were then called comprehensive general liability policies but have since been more accurately referred to as commercial general liability policies. The acronym remains the same. See JEFFREY W.

STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES § 14.01 (2d ed. 1999).

² 571 F. App'x 329 (5th Cir. 2014) (per curiam).

³ Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675).

⁴ See 3 ENVIRONMENTAL LAW PRACTICE GUIDE § 16.01 (Michael B. Gerrard ed., 2013) (indicating that suits under the common law remain important because most environmental legislation does not provide for the recovery of damages, CERCLA being the major exception); Daniel M. Steinway, *Environmental Law as a System*, in ENVIRONMENTAL LAW HANDBOOK ch. 1, §§ 3.8-4.4 (Thomas F.P. Sullivan ed. emeritus, 22d ed. 2014) (electronic version) (discussing common law sources of environmental liability); Jeff Belfiglio, Note, *Hazardous Wastes: Preserving the Nuisance Remedy*, 33 STAN. L. REV. 675, 676 (1981) ("The courts offered damages and injunctive relief from pollution under the common law long before environmental statutes existed. Nuisance has been the most popular doctrine used by the courts in attacking pollution problems."); Robert R. Lohrmann, Comment, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085, 1115-1123 (1970); Note, *Strict Liability for Generators, Transporters, and Disposers of Hazardous Waste*, 64 MINN. L. REV. 949 (1980).

⁵ *Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972) ("As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States." (quoting *Texas v. Pankey*, 441 F.2d 236, 240 (10th Cir. 1971))); see also *Federal Common Law of Nuisance Reaches New High Water Mark as Supreme Court Considers Illinois v. Milwaukee II*, 10 ENVTL. L. REP. 10101, 10101 (1980) ("The federal common law of nuisance, which was unknown at the time the National Environmental Policy Act was enacted [in 1969], appears to be coming to the fore as a doctrine offering adaptable and effective relief to victims of pollution.").

⁶ *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (holding that the Federal Water Pollution Control Act Amendments of 1972 displaced a federal common law nuisance claim for pollution of Lake Michigan).

⁷ 42 U.S.C. § 6973 (1976). The 1976 version of the RCRA provides in part: "[U]pon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste is presenting an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person for contributing to the alleged disposal to stop such handling, storage, treatment, transportation, or disposal or to take such other action as may be necessary."

⁸ See *Hazardous Waste: EPA, Justice Invoke Emergency Authority, Common Law in Litigation Campaign Against Dump Sites*, 10 ENVTL. L. REP. 10034, 10035 (1980); *Justice's Hazardous Waste Prosecutor Expects to File 100 New Cases This Year*, 10 ENVTL. REP. 2243, 2243 (1980) (stating that the Resource Conservation and Recovery Act "largely codified the common law of public nuisance"); Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584, 593 n.41 (1981) ("Federal Government suits have also invoked the Refuse Act of 1899 ch. 425, § 13, 33 U.S.C. § 407 (1976), the Federal Water Pollution Control Act § 504, 33 U.S.C. § 1364 (Supp. III 1979), and the Safe Drinking Water Act § 1431, 42 U.S.C. § 300i (1976). These statutes can be important adjuncts to the RCRA since they provide explicitly for recoupment of abatement expenses incurred by the Government, see, e.g., 33 U.S.C. § 1321(f) (Supp. III 1979).").

⁹ See *Allocating the Costs*, supra note 8, at 593-594. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the United States Supreme Court addressed the interaction of the federal Clean Water Act and state law of nuisance. The Court recognized that the law of the state in which pollution has its source may impose higher common law requirements than federal law, and therefore the source state's law of nuisance may be available as an additional remedy. 479 U.S. at 497-500.

¹⁰ *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994).

¹¹ Ronald E. Cardwell & Jessica J.O. King, *Comprehensive Environmental Response, Compensation, and Liability Act*, in ENVIRONMENTAL LAW HANDBOOK, *supra* note 4, ch. 9, § 3.0.

¹² *United States v. Bestfoods*, 524 U.S. 51, 56 n.1 (1998) (emphasis omitted) (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (plurality opinion of Brennan, J.)); *see* 42 U.S.C. § 9607(a).

¹³ 42 U.S.C. § 9607(b).

¹⁴ *See* Interim Guidance on Notice Letters, Negotiations, and Information Exchange, 53 Fed. Reg. 5298, 5302 (Feb. 23, 1988); *see also* Sidney S. Liebesman, Comment, *Triggering an Obligation: Receipt of an EPA PRP Letter and An Insurer's Duty to Defend*, 5 VILL. ENVTL. L.J. 479, 480 (1994); Robin K. Luce, Comment, *If the Threat is Clear: PRP Letters as a "Suit" Within the Duty to Defend Clause*, 3 DET. COLL. L. REV. 1275, 1279 (1993).

¹⁵ Interim Guidance on Notice Letters, Negotiations, and Information Exchange, 53 Fed. Reg. 5298, 5302 (Feb. 23, 1988); *see also* Luce, *supra* note 14, at 1279.

¹⁶ *See Travelers Cas. & Sur. Co. v. Ala. Gas Corp.*, 117 So. 3d 695, 705 (Ala. 2012) (quoting *Mich. Millers Mut. Ins. Co. v. Bronson Plating Co.*, 519 N.W.2d 864, 872 (1994), *abrogated in part by Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776 (Mich. 2003)).

¹⁷ 42 U.S.C. § 9604(e)(2), (5) (granting authority to request information and setting out statutory penalties of \$25,000 per day for noncompliance); 40 C.F.R. § 19.4 (adjusting statutory penalties for inflation).

¹⁸ 42 U.S.C. §§ 9604(b) (authorizing the President to conduct investigations and studies), 9622(a) (granting the President authority to "enter into an agreement with any person", including a PRP, to "perform any response action"—that is, to settle), 9606(a) ("The President may . . . issue[] such orders as may be necessary to protect public health and welfare and the environment.").

¹⁹ *Id.* §§ 9606(b)(1), 9607(c)(3).

²⁰ *Id.* § 9613(h) (limiting federal jurisdiction over any action "to review any challenges to removal or remedial action" to the causes of action authorized

by CERCLA itself); *see* Lucia Ann Silecchia, *Judicial Review of CERCLA Cleanup Procedures: Striking a Balance to Prevent Irreparable Harm*, 20 HARV. ENVTL. L. REV. 339, 341-343 (1996) (citation omitted) ("These [jurisdictional] limitations reflect the 'clean up first, litigate later' philosophy behind [CERCLA].").

²¹ 42 U.S.C. §§ 9606(b)(2)(D), 9613(j)-(k).

²² *See Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 622 (Colo. 1999) (en banc) (citing *Mich. Millers Mut. Ins. Co. v. Bronson Plating Co.*, 519 N.W.2d 864, 871 (Mich. 1994), *abrogated in part by Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776 (Mich. 2003)) (recognizing the "coercive nature" of CERCLA enforcement); *A.Y. McDonald Indus. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 628-629 (Iowa 1991) (discussing EPA's powers under CERCLA); *see also* 4A ENVIRONMENTAL LAW PRACTICE GUIDE, *supra* note 4, § 30.05[4] ("Because the filing of litigation to seek a judicial injunction [requiring cleanup] is time-consuming and runs some risk that a court, rather than [the] EPA, will shape the scope and type of relief obtained, [the] EPA's strong preference is to issue an administrative order and then, if necessary, seek enforcement of the order in a court of law. . . . [B]ecause there is generally no pre-enforcement judicial review of such orders, a PRP who receives one and does not comply runs the risk that a court will later find that there was not sufficient cause for the failure to comply and impose steep penalties in addition to ordering a response action at the site.").

²³ The policies were written by the Insurance Services Office, Inc., "the industry organization responsible for issuing nearly all standard CGL forms." *PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630, 633 n.1 (Tex. 2008).

²⁴ TEX. CONST. art. V, § 3-c(a) ("The supreme court [has] jurisdiction to answer questions of state law certified from a federal appellate court.").

²⁵ 571 F. App'x 329, 335 (5th Cir. 2014) (per curiam).

²⁶ *Id.*

²⁷ BLACK'S LAW DICTIONARY 1603 (rev. 4th ed. 1968) (defining "suit" as "any proceeding by one person or persons against another or others in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the

redress of an injury or the enforcement of a right, whether at law or in equity").

²⁸ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2286 (1961) (defining "suit" as "the attempt to gain an end by legal process", "prosecution of right before any tribunal", "an action or process in a court for the recovery of a right or claim" and "a legal application to a court for justice").

²⁹ The dissent argues that we are rewriting McGinnes's policies under the assumption that, had it and the Insurers anticipated CERCLA, they would have agreed that the Insurers would have the right and duty to defend those proceedings. We assume no such thing. The parties used the word "suit" to refer to the kinds of proceedings the Insurers had the right and duty to defend. When the policies issued, before CERCLA, the duty to defend would have covered cleanup enforcement proceedings in the only place they could be brought—in court. We hold that the parties' intention should not be defeated by a subsequent federal regulatory statute that authorizes the EPA to conduct those same proceedings itself before going to court. The dissent argues that the real meaning of "suit"—the proceedings and costs it actually entails—and thus the parties' bargain can be changed over time by a federal regulatory statute like CERCLA. We disagree, not despite our duty to interpret the policies as the parties intended in the text, but because of it.

³⁰ *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994).

³¹ See, e.g., *SnyderGeneral Corp. v. Century Indem. Co.*, 113 F.3d 536, 538-539 (5th Cir. 1997) (holding that "environmental cleanup costs, whether incurred by the federal government under CERCLA or by an individual who voluntarily undertakes the task of cleaning up hazardous waste, are damages and thus are covered"); *Bituminous Cas. Corp. v. Vacuum Tanks, Inc.*, 75 F.3d 1048, 1053 (5th Cir. 1996) ("[G]overnment cleanup costs, incurred in responding to the dumping of hazardous wastes on property, and imposed on the insured by CERCLA, are covered by . . . the policy."); *Aetna Cas. & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1513 (9th Cir. 1991) ("The plain meaning of 'damages' from the perspective of an ordinary person would include CERCLA response costs."); *Indep. Petrochem. Corp. v. Aetna Cas. & Sur. Co.*, 944 F.2d 940, 947 (D.C. Cir. 1991) (holding that "'damages' includes costs the insured is legally

obligated to pay to the United States and Missouri as reimbursement for their activities in remedying environmental harm"). *But see Indus. Enters. v. Penn Am. Ins. Co.*, 637 F.3d 481 (4th Cir. 2011) (interpreting Maryland law).

³² See 14 COUCH ON INSURANCE § 201:13 (observing that "because any administrative procedures subject an insured to out-of-pocket expenses to correct the property damage and to execute various documentation pertaining to the loss, it would behoove the insurer to get involved in the process early on and not allow the insured to commit to the costs of extensive remediation"); 4A ENVIRONMENTAL LAW PRACTICE GUIDE, *supra* note 4, § 30.05[2][b] (advising that a request for information be used by the PRP "as an opportunity to clarify its role with respect to the site in question and, if possible, to begin establishing the basis for minimizing its future liability at the site" and that requests "should be carefully evaluated and answered, much like discovery requests during litigation").

³³ As noted, the CGL policies at issue here are standard-form policies "developed by the Insurance Services Office" and are "used throughout the United States." *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 5 (Tex. 2007) (citation omitted).

³⁴ See *Travelers Cas. & Sur. Co. v. Ala. Gas Corp.*, 117 So. 3d 695, 703-708 (Ala. 2012); *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 622 (Colo. 1999) (en banc); *R.T. Vanderbilt Co. v. Cont'l Cas. Co.*, 870 A.2d 1048, 1058-1060 (Conn. 2005); *A.Y. McDonald Indus. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 627-629 (Iowa 1991); *Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830, 836-838 (Ky. 2005); *Hazen Paper Co. v. U.S. Fid. & Guar. Co.*, 555 N.E.2d 576, 579-582 (Mass. 1990); *Mich. Millers Mut. Ins. Co. v. Bronson Plating Co.*, 519 N.W.2d 864, 868-870 (Mich. 1994), *abrogated in part by Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776 (Mich. 2003); *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 315 (Minn. 1995) (finding duty to defend applies in administrative action by the Minnesota Pollution Control Agency), *overruled on other grounds by Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910 (Minn. 2009); *Dutton-Lainson Co. v. Cont'l Ins. Co.*, 778 N.W.2d 433, 446-449 (Neb. 2010); *Coakley v. Me. Bonding & Cas. Co.*, 618 A.2d 777, 786-788 (N.H. 1992); *C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co.*, 388 S.E.2d 557, 569-570 (N.C. 1990); *State v. CNA Ins. Cos.*,

779 A.2d 662, 667 (Vt. 2001) (finding duty to defend applies in environmental cleanup action conducted by the Vermont Agency of Natural Resources); *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 665 N.W.2d 257, 263-264 (Wis. 2003).

³⁵ *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.*, 959 P.2d 265, 279-287 (Cal. 1998) (holding that orders from California environmental agencies do not trigger the duty to defend); *Lapham-Hickey Steel Corp. v. Prot. Mut. Ins. Co.*, 655 N.E.2d 842, 846-848 (Ill. 1995); *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16, 20 (Me. 1990) (finding no duty to defend administrative proceedings under Maine's environmental cleanup statute).

³⁶ See *Travelers*, 117 So. 3d at 703-708; *Compass Ins. Co.*, 984 P.2d at 622; *R.T. Vanderbilt Co.*, 870 A.2d at 1058-1060; *Aetna Cas. & Sur. Co.*, 179 S.W.3d at 836-838; *Dutton-Lainson Co.*, 778 N.W.2d at 446-449; *CNA Ins. Cos.*, 779 A.2d at 667; *Johnson Controls*, 665 N.W.2d at 263-264.

³⁷ See *Travelers Indem. Co. v. Summit Corp. of Am.*, 715 N.E.2d 926, 933-934 (Ind. Ct. App. 1999); *Schnitzer Inv. Corp. v. Certain Underwriters at Lloyd's of London*, 104 P.3d 1162, 1167-1169 (Or. Ct. App. 2005) (recognizing that orders from the Oregon Department of Environmental Quality can trigger the duty to defend); *Gull Indus., Inc. v. State Farm Fire & Cas. Co.*, 326 P.3d 782, 790 (Wash. Ct. App. 2014) (concluding that state law "administrative enforcement acts" trigger the duty to defend); see also *Profl Rental, Inc. v. Shelby Ins. Co.*, 599 N.E.2d 423, 430-431 (Ohio Ct. App. 1991) (concluding that an administrative order from the EPA is a "suit" triggering the duty to defend, although a PRP letter is not).

Federal decisions likewise favor McGinnes's interpretation. See, e.g., *Anderson Bros. v. St. Paul Fire & Marine Ins. Co.*, 729 F.3d 923, 931-935 (9th Cir. 2013) (applying Oregon law); *Land O' Lakes, Inc. v. Emp'rs Ins. Co. of Wausau*, 728 F.3d 822, 827-829 (8th Cir. 2013) (citing, *inter alia*, *SCSC Corp.*, 536 N.W.2d at 315) (applying Minnesota and Oklahoma law); *Pac. Hide & Fur Depot v. Great Am. Ins. Co.*, 23 F. Supp. 3d 1208, 1213-1218 (D. Mont. 2014) (finding duty to defend proceedings under Montana's analogue to CERCLA); *Hutchinson Oil Co. v. Federated Serv. Ins. Co.*, 851 F. Supp. 1546, 1550-1552 (D. Wyo. 1994); *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 868 F. Supp. 1278, 1306-1311 (D. Utah 1994), *aff'd*, 52 F.3d 1522 (10th Cir. 1995); *Time Oil Co. v. Cigna Prop. & Cas. Ins. Co.*, 743 F. Supp. 1400, 1420 (W.D. Wash. 1990). But see, e.g., *Ray Indus., Inc. v. Liberty Mut. Ins. Co.*, 974 F.2d 754, 758-764 (6th Cir. 1992) (interpreting Michigan law), *abrogated by Mich. Millers*, 519 N.W.2d 864; *Simon Wrecking Co. v. AIU Ins. Co.*, 350 F. Supp. 2d 624, 635-639 (E.D. Pa. 2004); *Harleysville Mut. Ins. Co. v. Sussex Cnty., Del.*, 831 F. Supp. 1111, 1130-1132 (D. Del. 1993).

³⁸ *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 496-497 (Tex. 2008) (internal quotation marks omitted); see *Nat'l Union Fire Ins. Co. v. CBI Indus.*, 907 S.W.2d 517, 522 (Tex. 1995) ("Courts usually strive for uniformity in construing insurance provisions, especially where, as here, the contract provisions at issue are identical across the jurisdictions.").

³⁹ *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 824 (Tex. 1997).

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APPELLEES
NO. 14-0465
SUPREME COURT OF TEXAS
June 26, 2015

ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUSTICE BOYD, joined by JUSTICE JOHNSON, JUSTICE GUZMAN, and JUSTICE LEHRMANN, dissenting.

If you do not like your insurance policy, the Supreme Court of Texas can now change it for you. Never mind all those times the Court has said "we may neither rewrite the parties' contract nor add to its language."¹ Forget that we have repeatedly said "[i]f an insurance contract uses

Page 2

unambiguous language, we will . . . enforce it as written."² Ignore our former commitment to interpreting insurance policies by relying on the "ordinary, everyday meaning of its words to the general public."³ Disregard our prior conviction that a contract's language is the best

Page 3

representation of what the parties mutually intended.⁴ Those are just rules of construction, and we have only followed them because they support freedom of contract,⁵ promote transactional stability and predictability,⁶ and facilitate industry and commerce.⁷ As it turns out, those objectives are now provisional, and like a contract, the Court's precedential opinions are just words on paper, so you cannot assume we really meant what we chose to say.

At times, the Court's members have characterized other members' opinions as ignoring these rules while claiming to follow them.⁸ The Court makes no such pretensions today. Instead, it

Page 4

flatly abandons the rules and openly superimposes a meaning onto the term "suit" that the Court concedes to be outside the term's ordinary meaning, unsupported by the context, and indisputably beyond what the contracting parties actually contemplated. Today the Court demonstrates that it can and will rewrite your insurance policy if it wants to. We may look beyond the policy's words to decide what we think you must (or should) have meant. We will even make up our own definitions so your words can mean something completely new. Why would the Court do this, in spite of everything we've always said about construing insurance policies? Because it seems like a good thing to do here (and on top of that, everyone else is doing it). My law professors (and my momma) taught me better. I respectfully dissent.

I. "Suit"

The policies at issue require the Insurers to "defend any *suit* against [McGinnes] seeking damages on account of" covered bodily injury or property damage. (Emphasis added.) Separately, the policies require the Insurers to indemnify McGinnes by paying "all sums [McGinnes] shall become legally obligated to pay as *damages* because of" covered bodily injury or property damage "caused by an occurrence." (Emphasis added.) And finally, the policies give the Insurers the right (but not the duty) to "make such investigation and settlement of any *claim or suit* it deems expedient." (Emphasis added.) The issue here is whether the policies require the Insurers to defend McGinnes against notices, requests, demands, and orders that the federal Environmental Protection Agency (EPA) sent to McGinnis as a "potentially responsible party" (PRP) under the federal

Page 5

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). *See* 42 U.S.C. §§ 9601-28.

The policies obligate the Insurers to defend a "suit," and as the Court concedes, the EPA's letters and orders under CERCLA do not fit within the ordinary meaning of "suit." When McGinnes purchased these policies in the 1960s, dictionaries defined "suit" to mean a proceeding in a court or tribunal.⁹ This Court has repeatedly done the same. *See Schwartz v. Jefferson*, 520 S.W.2d 881, 886 (Tex. 1975) (defining "suit" as "any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him") (quoting *Nat'l Life Co. v. Rice*, 167 S.W.2d 1021, 1023 (Tex. 1943)); *see also H.H. Watson Co. v. Cobb Grain Co.*, 292 S.W. 174, 176 (Tex. 1927) (same) (quoting *Weston v. City Council of Charleston*, 27 U.S. 449, 454 (1829)). So has the United States Supreme Court, from which we first quoted our definition. *See Weston*, 27 U.S. at 454; *Fed. Hous. Admin., Region No. 4 v. Burr*, 309 U.S. 242, 247 n.8 (1940); *Upshur Cnty. v. Rich*, 135 U.S. 467, 474 (1890); *Kohl v. United States*, 91 U.S. 367, 375-76 (1875); *Case of Sewing Mach. Cos.*, 85 U.S. 553, 585 (1873); *Ex parte Milligan*, 71

Page 6

U.S. 2, 112-13 (1866).¹⁰ Faced with this clear precedent, the Court agrees today that the common, ordinary meaning of "suit" is "a proceeding in court."¹¹ *Ante* at ____.

And the context, in which the policies contrast the term "suit" with the term "claim," confirms that the parties intended the ordinary meaning of "suit." The policies provide that the Insurers "may make [an] investigation and settlement of any *claim or suit* it deems expedient," but they only "have the right and duty to defend any *suit*." (Emphases added.) This distinction between a "suit" and a "claim" is also consistent with the common, ordinary meaning of the term "claim," which is "a

demand for compensation or an assertion of a right to be paid," *Johnson & Higgins of*

Page 7

Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 531 (Tex. 1998), "[t]he assertion of an existing right; any right to payment or to an equitable remedy," BLACK'S LAW DICTIONARY 281-82 (9th ed. 2009), or "[t]he aggregate of operative facts giving rise to a right enforceable by a court," *id.* at 281. A claim is thus similar in this context to a "cause of action," at least in the sense that they both "may exist before a *suit* is instituted." *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 564 (Tex. 2014) (plurality op.) (emphasis added) (quoting *Magill v. Watson*, 409 S.W.3d 673, 679 (Tex. App.—Houston [1st Dist.] 2013, no pet.)). A "claim" is readily distinguishable from a "suit" if both words are given their common, ordinary meanings. A party may make a "claim" merely by asserting a legal right or remedy against the insured, and the Insurers may elect to investigate or settle that claim even in the absence of any further actions. But to bring a "suit," the party must invoke the authority of a court or tribunal to adjudicate the claim, and only that kind of action will trigger the Insurers' duty to defend.

EPA letters and orders do not fall within the common, ordinary meaning of the term "suit," and the policies' context does not in any way indicate the contrary. Under our well-established rules for construing insurance contracts, that should end the matter. Unfortunately, the Court proceeds, unrestrained by those rules.

II. "Suits . . . Conducted Outside a Courtroom"

McGinnes argues that, even if the term "suit" means proceedings in a court or tribunal, we should construe the term to include EPA letters and orders because they are the "functional equivalent" of a "suit." The obvious problem with this argument is the policies require the Insurers

Page 8

to defend a "suit," not "the functional equivalent of a suit,"¹² and "we may neither rewrite the parties' contract nor add to its language."¹³ *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003). Undeterred by such formalities, the Court concludes that "EPA proceedings" are not just the "functional equivalent of a suit," they are, "in actuality, . . . the suit itself, only conducted outside a courtroom." *Ante* at _____. The Court provides three justifications for its newly invented definition: (1) CERCLA did not exist when the parties entered their contract; (2) environmental cleanup costs can qualify as "damages" under the policies; and (3) most other courts have reached a similar conclusion. None convinces me, but more importantly, our well-established rules of construction do not recognize any of the Court's reasons as a legitimate basis for ignoring or rewriting the unambiguous language of an insurance policy.

A. The Policies Predate CERCLA

The Court asserts that EPA letters and orders under CERCLA are the modern equivalent of what would have been a suit at the time the policies were written. *Ante* at _____. It assumes that

Page 9

McGinnes and the Insurers intended the policies to cover the kinds of expenses at issue here, but they fell a little short because they defined coverage according to the mechanism the EPA used to impose environmental cleanup costs at the time ("suits") instead of using a broader term that would include the mechanism the EPA now uses to impose such costs. The Court supports this conclusion by describing the EPA's CERCLA activities as particularly onerous, one-sided prosecutions, implying that if McGinnes and the Insurers intended the Insurers to pay for the defense of pollution lawsuits, surely they intended the Insurers to pay the costs associated with this far more draconian means of compelling companies to remediate their past

pollution. I am not convinced, for at least three reasons.

First, the post-policy changes to the EPA's enforcement authority provide no basis for the Court's rewriting of the insurance policies here. "Prior to the passage of pollution control laws, which began in the late 1960s, there was no dispute over the meaning of the term 'suit' as used in CGL insurance policies. It was generally understood that a 'suit' was initiated with the traditional summons and complaint." 48 A.L.R. 5th 355, § 2[a] (1997). The parties contracted for a duty to defend "suits" and only "suits," expressly granting the Insurers discretion as to whether to defend against or settle "claims" that were not asserted in a "suit." The Court replaces these ordinary meanings with some other, as-yet undefined meanings. The Court denies that its holding extends the Insurers' duty to defend "to every demand letter," but does not say when a demand letter is a "claim" like any other demand letter and when it is a "suit." *Ante* at _____.

Similarly, the Court denies that its holding extends the Insurers' duty to defend to "all administrative proceedings," but does not say which administrative proceedings will amount to a "suit," like those under CERCLA, and which administrative proceedings will not. *Ante* at _____. The

Page 10

Court simply says that "a simple demand letter threatening or prefacing a lawsuit is nothing like a PRP letter or unilateral administrative order," *ante* at _____, and "EPA enforcement proceedings are unusual," *ante* at _____. The difference that the Court finds between CERCLA demand letters and other demand letters, and the difference between CERCLA investigations and other administrative proceedings, appears to be the severity of the potential ramifications of failing to cooperate with the EPA. But neither the EPA's PRP letters nor its unilateral administrative orders are self-executing under CERCLA. As with any party who receives a demand letter, a PRP has the right to deny the EPA's accusations and force the EPA to bring

suit. *See* 42 U.S.C. §§ 9607(a)(4)(A), (C), 9613(b), (e), (f), (g); *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 114 (D.C. Cir. 2010).

No doubt, CERCLA strongly incentivizes voluntary compliance and grants the EPA substantial power to obtain it. But the EPA can only compel a PRP's compliance by pursuing its claims against the PRP in court. *See Gen. Elec.*, 610 F.3d at 114. As the D.C. Circuit has explained, the EPA's four options for cleaning up a contamination site are to (1) negotiate a settlement with the PRPs, *see* 42 U.S.C. § 9622; (2) clean up the site itself and seek reimbursement from PRPs in a subsequent suit, *see id.* §§ 9604(a), 9607(a)(4)(A); (3) file an abatement action in federal district court to compel PRPs to conduct the clean-up, *see id.* § 9606; or (4) issue a unilateral administrative order instructing PRPs to clean the site. *Gen. Elec.*, 610 F.3d at 114. The unilateral administrative order is the only option that does not involve a voluntary settlement or proceedings in a court of law. *Id.* But unlike a court's judgment or a settlement agreement, PRPs are not legally compelled to comply with unilateral administrative orders. Instead, they have the "choice" to "refuse to comply with the [order], in which case the EPA may either bring an action in federal district court to enforce the [order] against the noncomplying PRP . . . or clean the site itself and

Page 11

then sue the PRP to recover costs." *Id.* at 115. In other words, while CERCLA provides for strict liability and grants the EPA extensive power to enforce its provisions, it does not render the EPA judge and jury of a PRP's liability. Instead, a "suit" is necessary to impose liability against the PRP's will, and nothing in CERCLA's scheme transforms the EPA's "claim" into a "suit," under the common, ordinary meanings of those terms.

Second, the facts do not support the Court's assumption that McGinnes and the Insurers would have chosen to insure against the defense expenses if they had anticipated them. Contrary

to the Court's suggestion, the policies were not written at a time when the EPA was imposing liability for violation of federal environmental regulations through suits rather than administrative processes. Instead, they were written at a time when neither the EPA nor the modern federal environmental regulatory scheme existed at all. The EPA was created in December 1970, after both policies were drafted and executed.¹⁴ Nor did extensive federal regulation of pollution exist when the policies were drafted. Before 1970, pollution control was left primarily to the states, which had done very little to implement and enforce pollution remediation requirements on private companies.¹⁵ We cannot presume that McGinnes and the Insurers anticipated that the federal

Page 12

government (or any government) would impose on McGinnes the kind of substantial environmental cleanup costs at issue here through judicial proceedings rather than an administrative process because we cannot presume that they anticipated that the federal government (or any government) would impose these kind of costs at all. The kind of massive pollution liability that exists under modern environmental regulation did not exist when these policies were drafted.

Moreover, the Court's assumption that McGinnes and the Insurers intended coverage for pollution cleanup costs is further undermined by the reality of what happened when the EPA and governmental pollution liability did come into existence. In 1970, the year the EPA and the modern age of federal environmental regulation and enforcement were born, the insurance industry drafted an exclusion that denied coverage for pollution under standard-form CGL policies.¹⁶ The 1970 pollution exclusion was incorporated into the standard-form CGL policy in 1973.¹⁷ In short, the Court's assumption that the parties anticipated the kinds of pollution-related costs at issue here and intended the "duty to defend any suit" to cover them finds no support in reality. The kinds of costs that McGinnes incurred here were largely

nonexistent when it purchased these policies, and if it had purchased them a few years later, after Congress created the EPA and enacted substantial environmental regulation, a standard-form CGL policy would have excluded them from coverage.

Page 13

Third, even if the Court were correct that McGinnes and the Insurers would have written their policies to cover CERCLA response costs if they had known that such activities would someday take place outside of judicial proceedings, Texas law does not permit courts to rewrite the parties' policies to say what the parties might have wanted them to say if they had contemplated subsequent events. "[T]he parties' intent is governed by what they said, not by what they *intended* to say but did not." *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 746 (Tex. 2006). "[I]t is not for this court to vary the terms of the contract into which the parties entered, nor to speculate as to what might or might not have been the consequences if the contract had been differently expressed." *Dorroh-Kelly Mercantile Co. v. Orient Ins. Co.*, 135 S.W. 1165, 1167 (Tex. 1911). As the author of today's opinion has himself explained, to "divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit." *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 208 n.9 (Tex. 2004) (Hecht, J., joined by Owen, J., dissenting) (quoting *Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776, 782 (Mich. 2003)). We cannot infer that the parties must have intended the policies to cover non-existent forms of "proceedings" that might one day arise. Even if that had been their unexpressed intent, we must determine their intent from the words they actually used, and the word "suit" does not include such proceedings.

B. Coverage for "Damages"

The Court's second reason for imposing a duty to defend here is that courts in other

jurisdictions have construed the policies' coverage for "damages" to include CERCLA cleanup costs—i.e., that the Insurers have a duty to indemnify against such costs. The Court reasons that "[t]o interpret the policies as covering the damages incurred as a result of pollution cleanup

Page 14

proceedings without giving the Insurers the right and duty to defend those proceedings creates perverse incentives and consequences for insurers and insureds alike." *Ante* at _____. The Court then identifies possible disincentives and indicates that these possibilities, whether likely or not, "illustrate the problem with a duty to indemnify without a duty or right to defend." *Ante* at _____.

This ground for rewriting the parties' policies is problematic for several reasons. First, it presupposes this Court's ruling on a question that we have never decided and that is not presented here. Not all courts have agreed that CERCLA cleanup costs are "damages" under a CGL policy. *See, e.g., Indus. Enters., Inc. v. Penn Am. Ins. Co.*, 637 F.3d 481, 489-90 (4th Cir. 2011) (noting that the standard CGL policy language preceded the enactment of CERCLA in 1980 and finding no evidence that subsequently created CERCLA liabilities somehow became automatically includable in the term "property damage" upon the enactment of CERCLA, without any change to the policy language). We have never addressed that issue, and we need not (and thus cannot) do so here.

Second, even if the term "damages" includes CERCLA cleanup costs that the insured voluntarily accepts without any court proceedings, the Court ignores the policies' distinction between the Insurers' duty to indemnify and their duty to defend. "The duty to defend and the duty to indemnify are distinct and separate duties." *King v. Dall. Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002). If we treat the two duties as the same, we render meaningless the contract's express distinction between them. This we cannot do, even if we think our

approach represents better policy and better alignment of the parties' interests and incentives.

Third, recognizing the contract's distinction between the duty to defend and the duty to indemnify does not necessarily create "perverse incentives." *See ante* at _____. If in fact the Insurers'

Page 15

duty to indemnify requires them to pay all liabilities that the insured voluntarily incurs in response to a PRP letter or administrative order, the policies incentivize the Insurers to investigate and settle those claims promptly to minimize their potential liabilities. But that presents a different question than whether the Insurers must provide a defense or reimburse the costs the insured incurs in responding to the EPA's demands.

According to the policies' language, the Insurers must "pay on behalf of [McGinnes] all sums which [McGinnes] shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies," and may elect to investigate and settle "any claim or suit it deems expedient." But we are asked in this case whether they must defend McGinnes against the EPA's demands and orders, and under the policies' language that duty applies only to a "suit" seeking such damages. The policies' use of the term "damages," even if construed to include pre-suit liabilities (an issue not presented here), is consistent with the common, ordinary meaning of the term "suit" to define the Insurers' duty to defend.

C. Everybody's Doing It.

The Court's third reason for construing the policies to require the Insurers to defend against CERCLA activities is that most other jurisdictions are doing it. *See ante* at _____ (following the majority position to "strive for uniformity as much as possible") (quoting *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 824 (Tex. 1997)). As the Court points out, its position is the majority position, and the

more recent opinions have followed the majority position.¹⁸ *See ante* at

Page 16

_____. But a number of courts in other jurisdictions have rejected that position, for the text-based reasons that Texas law has adhered to until today.¹⁹

While we desire to create uniformity when construing insurance forms used in multiple jurisdictions, the Court candidly admits that we cannot achieve uniformity here. *Ante* at _____ (recognizing that "[w]e cannot achieve uniformity with our decision; the courts have already

Page 17

split"). Under such circumstances, when the "tests already in use render uniformity impossible," we "adhere to the law of Texas" and refuse to "stretch[]" the "plain meaning" of a policy's terms. *U.S. Fid. & Guar. Co. v. Goudeau*, 272 S.W.3d 603, 608 (Tex. 2008). "Under Texas law, we are required to construe insurance policies according to their plain language," *id.* at 607, and we have never ignored a policy's plain language simply to achieve uniformity among the different jurisdictions. Even if we were to do so, we should not do it here, when "[w]e cannot achieve uniformity with our decision [because] the courts have already split." *Ante* at _____.

III. Conclusion

Less than four years ago, this Court explained that the circumstances surrounding the execution of a contract may shed light on the meaning of its words, but we must rely on the words themselves to determine the contract's effect:

Understanding the context in which an agreement was made is essential in determining the parties' intent *as expressed in the agreement*, but it is the parties' expressed intent that the

court must determine. Extrinsic evidence cannot be used to show that the parties probably meant, or could have meant, something other than what their agreement stated.

Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C., 352 S.W.3d 445, 451 (Tex. 2011). Today the author of that opinion agrees that the term "suit" means "an attempt through process in court," yet relies on extrinsic circumstances and other jurisdictions' holdings to conclude that the term "must also include CERCLA enforcement proceedings by the EPA," even though he agrees they are not "an attempt through process in court." *Ante* at _____. This is a disturbing decision, not because of its effect on these parties or the insurance policies at issue, but because of its effect on Texas law. I can only hope that today's decision will soon be seen as a fluke, an oversight, and a rare misstep by a Court that has otherwise been steadfastly committed to enforcing contracts as

Page 18

written, to refraining from rewriting parties' agreements, and to determining the parties' intent by relying on the ordinary meanings of the terms the parties choose.

For these reasons, I respectfully dissent.

/s/ _____
 Jeffrey S. Boyd
 Justice

Opinion delivered: June 26, 2015

Footnotes:

¹ *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003); *see also, e.g., FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*, 426 S.W.3d 59, 68 (Tex. 2014) (refusing to "selectively import terms" into a contract); *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 893 (Tex. 2009) (holding that appraisers cannot "rewrite the policy"); *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 600 (Tex.

2008) (rejecting dissenting view that "would essentially rewrite the parties' contract"); *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 50 (Tex. 2008) (declining to "rewrite the parties' contract [or] add to its language") (quoting *Schaefer*, 124 S.W.3d at 162); *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 191 (Tex. 2007) ("As allowing these affiliates to compel arbitration would effectively rewrite their contracts, we hold they cannot."); *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 (Tex. 2007) ("[W]e are loathe to judicially rewrite the parties' contract by engrafting extra-contractual standards[.]"); *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 753 (Tex. 2006) ("[C]ourts must enforce the contract as made by the parties, and cannot make a new contract for them[.]"); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 231 (Tex. 2003) (refusing to judicially "edit the document for comprehension, and then rewrite it to ensure its enforceability"); *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 888 (Tex. 1998) ("Our decisions have repeatedly emphasized that courts 'cannot make contracts for [the] parties.'") (quoting *Gulf Prod. Co. v. Kishi*, 103 S.W.2d 965, 968 (Tex. 1937), which in turn quotes *Freeport Sulphur Co. v. Am. Sulphur Royalty Co. of Tex.*, 6 S.W.2d 1039, 1040 (Tex. 1928)); *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996) ("We have long held that courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained."); *Lenape Res. Corp. v. Tenn. Gas Pipeline Co.*, 925 S.W.2d 565, 572-73 (Tex. 1996) (refusing to "rewrite the parties' bargained-for contract"); *Cherokee Water Co. v. Forderhause*, 741 S.W.2d 377, 379 (Tex. 1987) ("A court is without power to make a contract that the parties did not make[.]"); *Dall. Power & Light Co. v. Cleghorn*, 623 S.W.2d 310, 312 (Tex. 1981) ("[A] court does not have the power to place a different interpretation upon the contract on grounds of policy that it would be better for the lessor or landowners generally to have the contract different.") (quoting 2 W. SUMMERS, OIL AND GAS § 373 (1959)); *Transp. Ins. Co. v. Standard Oil Co. of Tex.*, 337 S.W.2d 284, 289 (Tex. 1960) ("Courts are without authority to rewrite contracts, even insurance contracts.") (quoting *Am. Auto. Ins. Co.*, 327 S.W.2d 519, 528 (Mo. Ct. App. 1959), which in turn quotes *Forir v. Toman*, 202 S.W.2d 32, 34 (Mo. 1947)), *overruled in part on other grounds by Commercial Standard Ins. Co. v. Am. Gen. Ins. Co.*, 455 S.W.2d 714 (Tex. 1970); *Provident Fire Ins. Co. v. Ashy*, 162 S.W.2d 684, 687 (Tex. 1942) ("Parties make their own

contracts, and it is not within the province of this court to vary their terms in order to protect them from the consequences of their own oversights and failures in nonobservance of obligations assumed." (quoting *Dorroh-Kelly Mercantile Co. v. Orient Ins. Co.*, 135 S.W. 1165, 1167 (Tex. 1911)); *E. Tex. Fire Ins. Co. v. Kempner*, 27 S.W. 122, 122 (Tex. 1894) ("[W]here the language is plain and unambiguous, courts must enforce the contract as made by the parties, and cannot make a new contract for them, nor change that which they have made under the guise of construction."); *Dalton v. Rust*, 22 Tex. 133, 146 (1858) ("[B]y what authority can the court assume to make a contract for the parties, to which neither have assented?").

² *In re Deepwater Horizon*, No. 13-0670, ___ S.W.3d ___, ___, 2015 WL 674744, at *9 (Tex. Feb. 13, 2015); see also, e.g., *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 451 (Tex. 2011) ("[A]n unambiguous contract will be enforced as written[.]") (quoting *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008) (per curiam)); *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008) ("If an insurance contract uses unambiguous language, we must enforce it as written."); *David J. Sacks*, 266 S.W.3d at 450 ("An unambiguous contract will be enforced as written[.]"); *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 862 (Tex. 2000) ("When a contract is unambiguous we will enforce it as written."); *State Farm Fire & Cas. Co. v. Reed*, 873 S.W.2d 698, 699 (Tex. 1993) ("If the policy is worded so that it can be given only one reasonable construction, it will be enforced as written."); *Sun Oil Co. (Del.) v. Madeley*, 626 S.W.2d 726, 732 (Tex. 1981) ("Since we agree the lease is unambiguous, we shall confine our review to the lease and enforce it as written."); *Life Ins. Co. of Sw. v. Overstreet*, 603 S.W.2d 780, 783 (Tex. 1980) ("[T]he contract is enforceable as written[.]"); *Royal Indem. Co. v. Marshall*, 388 S.W.2d 176, 181 (Tex. 1965) ("Courts cannot make new contracts between the parties, but must enforce the contracts as written."); *Universal C. I. T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 157 (Tex. 1951) (stating that an unambiguous "contract will be enforced as written").

³ *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 766 (Tex. 2014); see also, e.g., *U.S. Fid. & Guar. Co. v. Goudeau*, 272 S.W.3d 603, 607 (Tex. 2008) ("Under Texas law, we are required to construe insurance policies according to their plain language, using 'the ordinary, everyday meaning of the words to

the general public.") (quoting *Fiess*, 202 S.W.3d at 746); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 8 (Tex. 2007) ("Terms that are not defined in a policy are given their generally accepted or commonly understood meaning.").

⁴ *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010); see also, e.g., *Fiess*, 202 S.W.3d at 746 ("As with any other contract, the parties' intent is governed by what they said, not by what they *intended* to say but did not.").

⁵ See, e.g., *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 95-96 (Tex. 2011) (observing that freedom of contract is a fundamental Texas policy and "contracts when entered into freely and voluntarily shall be held sacred") (quoting *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664 (Tex. 2008)); *Fortis Benefits*, 234 S.W.3d at 648-49 ("Where a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy. This Court has 'long recognized a strong public policy in favor of preserving the freedom of contract.") (quoting *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 554 (Tex. 2001)); *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 912 (Tex. 2007) ("Freedom of contract allows parties to bargain for mutually agreeable terms and allocate risks as they see fit.").

⁶ See, e.g., *Sonat Exploration Co. v. Cudd Pressure Control, Inc.*, 271 S.W.3d 228, 235 (Tex. 2008) ("Enforcing contracts according to their own terms satisfies the relevant policies of the forum, enhances certainty, predictability, and uniformity of result, and facilitates commerce and relations with other states and nations."); *Frank's Casing*, 246 S.W.3d at 51 (observing that "rewrit[ing] the parties' contract" would "take[] a step back from predictability in the law relat[ing] to business transactions in Texas").

⁷ See, e.g., *Sonat Exploration*, 271 S.W.3d at 235; *Frank's Casing*, 246 S.W.3d at 51; *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163, 177 (Tex. App.—Houston [14th Dist.] 2002, no pet.) ("Industry and commerce cannot operate in a climate that allows a contracting party who makes a bad bargain to change the terms of a deal at its option.").

⁸ See, e.g., *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660, 676-78 (Tex.

2008) (Hecht, J., joined by Johnson, J., dissenting) ("A few days ago, . . . the Court 'proclaimed itself 'loathe to judicially rewrite the parties' contract by engrafting extra-contractual standards'. . . . Either the Court thinks that imposing additional duties on an insurer does not entail rewriting the policy, or else it does not find that effort quite as loathsome.") (quoting *Frank's Casing*, 246 S.W.3d at 45, which in turn quotes *Fortis Benefits*, 234 S.W.3d at 649); *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 208 (Tex. 2004) (Hecht, J., joined by Owen, J., dissenting) ("What the Justices in today's majority really meant by the assertion in *Schaefer* was that 'we may neither rewrite the parties' contract nor add to its language *unless we believe we should.*") (quoting *Schaefer*, 124 S.W.3d at 162); *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 745 (Tex. 1998) (Abbott, J., joined by Owen, J., dissenting) ("In essence, the Court rewrites [the contract] to require Kirby to assume control over dealer selection.").

⁹ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1287 (1969) ("[a]ny proceeding in court to recover a right or claim"); BLACK'S LAW DICTIONARY 1603 (rev. 4th ed. 1968) ("any proceeding by one person or persons against another or others in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or in equity"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1421 (unabridged ed. 1966) ("the act, the process, or an instance of suing in a court of law; legal prosecution; lawsuit"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2286 (1961) ("the attempt to gain an end by legal process: prosecution of a right before any tribunal; an action or process in a court for the recovery of a right or claim: a legal application to a court for justice"); WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 1822 (2d ed. 1964) ("action to secure justice in a court of law; attempt to recover a right or claim through legal action"); WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2522 (2d ed. 1954) ("the following or attending upon a court to obtain justice there; hence the attempt to gain an end by legal process; an action or process in a court for the recovery of a right or claim; legal application to a court for justice; prosecution of right before any tribunal; as a civil or criminal suit; a suit in chancery").

¹⁰ In 2006, the Supreme Court relied on this definition, in connection with its discussion of the term "action," to hold that a statute of limitations applied to judicial proceedings but not to administrative proceedings. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). The Court explained that "in 1966, . . . a commonly used legal dictionary defined the term 'right of action' as '[t]he right to bring suit; a legal right to maintain an action,' with 'suit' meaning 'any proceeding . . . in a court of justice.'" *Id.* (quoting BLACK'S LAW DICTIONARY 1488, 1603 (4th ed. 1951)). We have likewise recognized that "[t]he term 'action' is generally synonymous with 'suit,' which is a demand of one's rights in court." *Thomas v. Oldham*, 895 S.W.2d 352, 356 (Tex. 1995). Although the word "suit" can be "more general in its comprehension than the word 'action,'" both terms refer to a judicial proceeding in which parties assert claims for relief. *H.H. Watson*, 292 S.W. at 176. "Historically, 'action' referred to a judicial proceeding in a court of law, while 'suit' referred to a proceeding in a court of equity." *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 564 (Tex. 2014) (plurality op.) (citing BLACK'S LAW DICTIONARY 28-29 (7th ed. 1999)).

¹¹ McGinnes does not give up so easily. It relies on two of the dictionary definitions, which include the phrase "the attempt to gain an end by legal process," *see* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE at 2286; WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE at 2522, and argues that "suit" can include any effort to obtain something through a "legal process." McGinnes misrepresents the definitions, however, as neither of them uses the phrase as a complete, stand-alone definition of "suit." Webster's New International Dictionary of the English Language ties the phrase specifically to court proceedings: "the following or attending upon a court to obtain justice there; hence the attempt to gain an end by legal process; an action or process in a court for the recovery of a right or claim." WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE at 2522 (emphasis added). The word "hence" indicates that an "attempt to gain an end by legal process" is a "suit" *because* it is "the following or attending upon a court to obtain justice there." *See id.*; *see also* MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS 391 (2014) (defining "hence" to mean "because of a proceeding fact or premise"). Similarly, Webster's Third New International Dictionary does not use the phrase as an

independent definition of the word "suit," but instead uses it as part of a single sub-definition that directly associates it with a legal proceeding: "the attempt to gain an end by legal process : prosecution of right before any tribunal : LITIGATION." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE at 2286 (def. 3b). Thus, as the Court agrees, the common, ordinary meaning of "suit" is a legal proceeding in a court or tribunal.

¹² See *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.*, 959 P.2d 265, 280 (Cal. 1998) ("[T]he unambiguous language of the policies obligated the insurers to defend a 'suit' not . . . the 'substantive equivalent' of a 'suit.'"); *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 665 N.W.2d 257, 305 (Wis. 2003) (Wilcox, J., dissenting) (noting the insured "did not contract to be defended when it faced the 'functional equivalent of a suit'; it contracted to be defended from 'suits'").

¹³ Another significant problem with this argument is the difficulty of determining what is and is not the "functional equivalent" of a "suit." Federal and state courts adopting the functional-equivalent approach continue to face a myriad of disputes over this issue. See, e.g., *Gull Indus., Inc. v. State Farm Fire & Cas. Co.*, 326 P.3d 782 (Wash. Ct. App. 2014) (dispute over whether letter from Department of Energy is functional equivalent of suit); *Pac. Hide & Fur Depot v. Great Am. Ins. Co.*, 23 F. Supp. 3d 1208 (D. Mont. 2014) (dispute over whether PRP letter under CECRA is functional equivalent of suit); *Anderson Bros. v. St. Paul Fire & Marine Ins. Co.*, 729 F.3d 923 (9th Cir. 2013) (dispute over whether demand for information under CERCLA is functional equivalent of a suit); *Nucor Corp. v. Emp'rs Ins. Co. of Wausau*, 296 P.3d 74, 81-82 (Ariz. Ct. App. 2012) (dispute over whether letter from state department of environmental quality is functional equivalent of suit); *Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328 (Colo. App. 2012) (dispute over whether notice of claim under state statute governing construction defects is functional equivalent of suit).

¹⁴ See THE GUARDIAN: ORIGINS OF THE EPA, www2.epa.gov/aboutepa/origins-epa (last visited June 18, 2015). Private citizen actions were first authorized under federal law that same year. See Edward Lloyd, *Citizens Suits and Defenses Against Them*, 59 A.L.I. 781, 812 (2009) ("Citizen suit provisions in environmental statutes originated in the Clean Air Act in 1970.").

¹⁵ See A. Myrick Freeman III, *Environmental Policy Since Earth Day I: What Have We Gained?*, 16 J. OF ECON. PERSPECTIVES 125, 125 (2002) ("Earth Day I, which occurred on April 22, 1970, is an appropriate starting point for examination of the economic benefits and costs that have been realized through United States environmental policy. There were federal laws on the books dealing with air and water pollution prior to that date. But those laws placed primary responsibility for the implementation and enforcement of pollution control requirements on states, and by 1970, they had not accomplished very much.").

¹⁶ See BRITTON D. WEIMER ET AL., *CGL POLICY HANDBOOK* § 5.01[A] (2d ed. 2013).

¹⁷ The 1970 pollution exclusion contained an exception for "sudden and accidental" pollution, which was later eliminated, see *id.* § 5.01[A], but that exception does not appear to be implicated by the facts underlying this coverage dispute.

¹⁸ See, e.g., *Anderson Bros.*, 729 F.3d at 934 (treating all PRP letters, and even section 9604 requests for information, as "suits" under the functional-equivalent approach regardless of content); *Travelers Cas. & Sur. Co. v. Ala. Gas Corp.*, 117 So. 3d 695, 696 (Ala. 2012) ("Taking into account the various components of this PRP letter and its ramifications, we find that the legal proceeding initiated by the receipt of that notice is the functional equivalent of a suit brought in a court of law."); *R.T. Vanderbilt Co. v. Cont'l Cas. Co.*, 870 A.2d 1048, 1058 (Conn. 2005) ("[W]e find that '[t]he consequences of the receipt of the EPA letter [are] so substantially equivalent to the commencement of a lawsuit that a duty to defend [arises] immediately.") (citing *Hazen Paper Co. v. U.S. Fid. & Guar. Co.*, 555 N.E.2d 576, 581 (Mass. 1990)); *Mich. Millers Mut. Ins. Co. v. Bronson Plating Co.*, 519 N.W.2d 864, 866 (Mich. 1994) ("[T]he term 'suit,' as used in the insurance policies at issue, is ambiguous and capable of application to legal actions, other than court proceedings, that are the functional equivalent of a suit brought in a court of law."), *overruled in part on other grounds by Wilkie*, 664 N.W.2d 776.

¹⁹ See, e.g., *Ray Indus., Inc. v. Liberty Mut. Ins. Co.*, 974 F.2d 754, 761 (6th Cir. 1992) ("We believe that 'suit' has a plain and unambiguous meaning that excludes the PRP letter in this case. In common usage, a suit generally involves an adjudicatory proceeding in a court of law.") (analysis based on Sixth Circuit's interpretation of Michigan law, but

Michigan Supreme Court later concluded in *Mich. Millers Mutual*, 519 N.W.2d at 868-70, that word "suit" was ambiguous in this context); *Harleysville Mut. Ins. Co., Inc. v. Sussex Cnty., Del.*, 831 F. Supp. 1111, 1132 (D. Del. 1993) ("The Court is mindful of the serious nature of the letters from the EPA advising the County of its potential CERCLA liability. However, the insurance policies at issue in this case limit the insurers['] duty to defend to 'suits' and the Court will not deprive the insurers of the benefit of their bargain by forcing them to defend against an administrative proceeding, no matter how serious the consequences of that proceeding might be to the insured."), *aff'd*, 46 F.3d 1116 (3d Cir. 1994); *id.* ("Pursuant to [CERCLA], the EPA can file a lawsuit against a PRP . . . or it can contact the PRP and try to secure its voluntary cooperation as it did in this case. Recognizing the difference in these approaches provides a clear line of demarcation between situations that do and do not trigger the insurer's duty to defend."); *Foster-Gardner*, 959 P.2d at 280 ("The primary attribute of a 'suit,' as that term is *commonly* understood, is that parties to an action are involved in actual court proceedings initiated by the filing of a complaint."); *id.* at 279 ("[T]he policies do not treat the terms 'suit' and 'claim' as interchangeable, but consistently treat them separately. This careful separation indicates that the insurers' differing rights and obligations with respect

to 'suit[s]' and 'claim[s]' were deliberately and intentionally articulated in the policies.") (citation omitted); *id.* at 280 ("There is nothing in the policy language to support the interpretation that some pre-complaint notices are 'suits' and some are not. Rather, the unambiguous language of the policies obligated the insurers to defend a 'suit' not . . . the 'substantive equivalent' of a 'suit.'"); *id.* at 287 ("Our conclusion that a 'suit' is a court proceeding initiated by the filing of a complaint creates a 'bright-line rule that, by clearly delineating the scope of risk, *reduces* the need for future litigation."); *Lapham-Hickey Steel Corp. v. Prot. Mut. Ins. Co.*, 655 N.E.2d 842, 847 (Ill. 1995) (agreeing with the "group of courts that have found that the word 'suit' is unambiguous and have given the word its plain meaning, which requires the commencement of some action in a court of law before an insurer's duty to defend is triggered; thus, the issuance of a PRP letter does not invoke the duty to defend"), *as modified on denial of reh'g* (Oct. 2, 1995); *id.* at 847-48 ("If all of the policy's language is to be given effect, then the words 'suit' and 'claim' . . . must have different meanings. . . . If the word "suit" was broadened to include claims, in the face of policy language which distinguishes between the two, any distinction between these two words would become superfluous.").
