# NOTES

## Ohio's View of the Pollution Exclusion Clause: Is There Still Ambiguity?

### I. The Pollution Exclusion Clause—History

In 1973 the pollution exclusion clause became a standard part of comprehensive general liability policies.[1] The clause was included in insurance policies of potential pollution producers and was intended to deny coverage unless the resulting pollution damage was "sudden and accidental."[2] A typical pollution exclusion clause provides that the insurance coverage does not apply to

> bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.[3]

Currently there is a split of opinion on the proper interpretation of the pollution exclusion clause.[4] Court decisions have depended upon the meaning applied to "sudden and accidental." A slight majority of courts have found "sudden and accidental" to be an ambiguous term and have determined their own varying definitions.[5] The remaining courts, on the other hand, focusing more on the intent of the parties to the insurance contract, have found no ambiguity and have denied coverage under the policy.[6]

One court explained what it believed to be the policy behind the pollution exclusion clause:

> [I]f an insured knows that liability incurred by all manner of negligent or careless spills and releases is covered by his liability policy, he is tempted to diminish his precautions and relax his vigilance. Relaxed vigilance is even more likely where the insured knows that the intentional deposit of toxic material in his dumpsters, so long as it is unexpected, affords him coverage. In this case, it pays the insured to keep his head in the sand.[7]

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1. Insurance policy language is typically decided by an industry-wide organization rather than by individual insurance companies. Thus, changes in policy language usually go into effect for all insurance companies at about the same time. The various time periods given for industry-wide policy provisions are indicated merely for the purpose of simplicity. In each specific case, the actual language of the particular insurance policy involved must be examined, not the year of the policy. *See* Goldberg, Warin, White-Mahaffey & Raby, *Insurance Coverage Issues in Hazardous Waste Cases*, in ALI-ABA Course of Study—Hazardous Wastes, Superfund, and Toxic Substances 381, 385–86 (1987).

2. *See infra* notes 11–38 and accompanying text for a brief discussion of the insurance industry prior to the "sudden and accidental" requirement.

3. This exact clause or one nearly identical in form was a standard part of all insurance contracts containing a pollution exclusion clause which are discussed in this Note. *See supra* note 1.

4. Although court decisions continue to adjust any list of various state approaches, an estimated 12 states have found the clause to be ambiguous (Alabama, Colorado, Delaware, District of Columbia, Georgia, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Jersey and Washington), nine have found no ambiguity (Illinois, Indiana, Kansas, Kentucky, North Carolina, Oregon, Pennsylvania, Tennessee and Wisconsin), and three have conflicting opinions (Florida, New York and Ohio). *See infra* notes 39–40 for a list of the various decisions on each side.

5. *See infra* notes 41–62 and accompanying text.

6. *See infra* notes 63–83 and accompanying text.

7. Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 697–98, 340 S.E.2d 374, 381 (1986). In 1971, New York required liability insurance carriers to insert a pollution exclusion clause in all policies:

Ohio has two court opinions which adopt these opposing views. *Buckeye Union Insurance Co. v. Liberty Solvents and Chemical Co.*,[8] decided by a county court of appeals in 1984, found the clause to be ambiguous; it is one of the decisions often cited by those courts finding coverage.[9] In 1987, however, a federal district court applying Ohio law expressly declined to follow *Buckeye Union* and upheld the validity of the pollution exclusion clause in *Borden, Inc. v. Affiliated FM Insurance Co.*[10] The Ohio Supreme Court has yet to consider the question, but in light of this direct conflict and the inevitability of future litigation involving the clause, the time has come for the court to settle the issue.

This Note will examine these two Ohio cases in conjunction with the trends in the law and outline what I believe is the best approach for Ohio and other states to follow when interpreting the pollution exclusion clause. However, before considering some of the court opinions in detail, it will be useful to take a brief look at insurance coverage in similar situations prior to the pollution exclusion clause.

### A. *Prior to 1966: Was it an "Accident"?*

Before 1966 the issue of coverage turned on the question of whether the damage or injury was caused by accident.[11] Many courts looked to the dictionary for the definition of accident.[12] An accident is "'[a]n event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event, chance, contingency.'"[13]

Courts had to consider the foreseeability of damage or injury to decide if the result was accidental.[14] Typically, coverage was denied only if the damage was found to have been reasonably certain to occur. This usually depended on whether the facts indicated the pollutants were emitted as a natural consequence of the business of the insured party.[15]

In *American Casualty Co. v. Minnesota Farm Bureau Services Co.*,[16] the court could not find an "accident" for the damage to surrounding properties that was

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> The purpose of the bill is to prohibit commercial or industrial enterprises from buying insurance to protect themselves against liabilities arising out of their pollution of the environment . . . .
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> The bill will help to assure that corporate polluters bear the full burden of their own actions spoiling the environment, and would preclude any insurance company from undermining public policy by offering this type of insurance protection.

Technicon Elec. Corp. v. American Home Assur. Co., 141 A.D.2d 124, 141–42, 533 N.Y.S.2d 91, 102 (1988), *aff'd*, 74 N.Y.2d 66, 544 N.Y.S.2d 531, 542 N.E.2d 1048 (1989) (quoting 1971 N.Y. LEGIS. ANN. at 353–54).

8. 17 Ohio App. 3d 127, 477 N.E.2d 1227 (Ohio Ct. App. 1984).

9. *Id.* at 132–33, 477 N.E.2d at 1234.

10. 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir.), *cert. denied*, 58 U.S.L.W. 3213 (U.S. 1989). Both *Buckeye Union* and *Borden* are discussed in detail *infra* notes 85–122 and accompanying text.

11. *See supra* note 1.

12. *See, e.g.*, American Casualty Co. of Reading, Pa. v. Minnesota Farm Bureau Serv. Co., 270 F.2d 686, 691 (8th Cir. 1959); Aetna Casualty & Sur. Co. v. Martin Bros. Container & Timber Prods. Corp., 256 F. Supp. 145, 150 (D. Or. 1966).

13. United States Fidelity & Guar. Co. v. Briscoe, 205 Okla. 618, 621, 239 P.2d 754, 757 (1951) (quoting WEBSTER'S INTERNATIONAL DICTIONARY).

14. *See, e.g., Minnesota Farm Bureau*, 270 F.2d at 686.

15. *Id.* at 691.

16. 270 F.2d 686 (8th Cir. 1959).

caused by explosives used in manufacturing fertilizer.[17] The court ruled that the release of fumes and dust from the plant for more than six years "could not result in the absence of design, consent and voluntary cooperation of the perpetrator thereof. Acts which are done with knowledge and which continue over a long period of time and which continuously cause damage cannot be termed accidents."[18]

However, that did not mean continuing discharges could not be "accidental." In *Aetna Casualty and Surety Co. v. Martin Bros. Container and Timber Products Corp.*,[19] a new steam generating plant was installed which caused the emission of flyash, a residue of the process, from the exhaust stacks.[20] Repeated major changes made to the system in an attempt to eliminate the problem proved unsuccessful.[21] The court, however, found an "accident" under the policy because the emission damage was unexpected, both initially and after each adjustment was made to the system.[22]

Insurance companies were unhappy with these court interpretations because the divergence of opinions made predictability of results difficult. In addition, the insured parties were not pleased with the requirement of an "accident" for coverage because they would usually not have insurance protection for damage which occurred over time.[23] The insurance industry attempted to solve both these concerns with a change in the form of the insurance policy.

### B. *1966–73: The "Occurrence" Question*

The standard liability policy was revised in 1966 to base coverage on the happening of an "occurrence."[24] An "occurrence" was typically defined in the policy as an accident, including injurious exposure to conditions, which resulted in bodily injury or property damage neither expected nor intended from the standpoint of the insured party.[25]

As expected, courts often defined an "occurrence" more broadly than an "accident" and found coverage for injuries resulting from long-term exposure to pollutants.[26] In Ohio, this approach was clearly established by *Grand River Lime Co. v. Ohio Casualty Insurance Co.*[27] Grand River Lime was sued for allegedly polluting property surrounding its manufacturing plant. Grand River Lime sought a declaratory judgment that its insurance company, Ohio Casualty, had a duty to defend.[28]

Grand River Lime argued successfully that the definition of "occurrence"[29] was

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17. *Id.* at 690.
18. *Id.* at 691 (citation omitted).
19. 256 F. Supp. 145 (D. Or. 1966).
20. *Id.* at 147.
21. *Id.* at 149–50.
22. *Id.*; *see also* Moffat v. Metropolitan Ins. Co., 238 F. Supp. 165 (M.D. Pa. 1964).
23. See the discussion in Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co. of N.Y., 218 N.J. Super. 516, 532–33, 528 A.2d 76, 84 (N.J. Super. Ct. App. Div. 1987).
24. *See supra* note 1.
25. For an example of this policy language, see Grand River Lime Co. v. Ohio Casualty Ins. Co., 32 Ohio App. 2d 178, 181, 289 N.E.2d 360, 363 (1972).
26. *See id.*; City of Carter Lake v. Aetna Casualty & Sur. Co., 604 F.2d 1052 (8th Cir. 1979).
27. 32 Ohio App. 2d 178, 289 N.E.2d 360 (1972).
28. *Id.* at 180, 289 N.E.2d at 361–62.
29. *See supra* note 25 and accompanying text.

broader than that of "accident,"[30] and that as a result, the insurer's duty to defend was similarly broadened.[31] In addition, the plaintiff contended that "the purpose of the broader language [was] to make clear that coverage under the policy is for '*injury or damage*' and not the '*event or act*' producing such injury or damage."[32]

The insurance company, on the other hand, argued that the change in the policy from the use of "accident" to "occurrence" to determine coverage "was intended to clarify the coverage provided by liability policies, and to avoid the confusion resulting from courts attempting to distinguish between accidental means and accidental results."[33] Therefore, if the damage was either expected or intended by the insured party, there would be no coverage under the policy. In *Grand River Lime*, Ohio Casualty argued that a business which emitted pollutants for seven years would have expected damage to surrounding properties.[34] The court disagreed.[35]

Finding for the plaintiff, the court said "that while the activity which produced the alleged damage may be fully intended, and the residual results fully known, the damage itself may be completely unexpected and unintended."[36] The court added that Ohio Casualty issued the policy to Grand River Lime with full knowledge of the nature of that company's operations, and if the insurance company intended to exclude any portion of Grand River Lime's operations from coverage, it could have done so within the contract.[37] Interpretations such as this prompted the adoption of the pollution exclusion clause by insurance companies in 1973.[38]

## II. Differing Views of "Sudden and Accidental"

Courts have taken different views of the pollution exclusion clause. Slightly more than half have held the clause to be ambiguous and therefore have interpreted "sudden and accidental" in a way that provided insurance coverage.[39] The remaining

30. *See supra* note 13 and accompanying text.

31. *Grand River Lime*, 32 Ohio App. 2d at 184, 289 N.E.2d at 364.

32. *Id.* at 183, 289 N.E.2d at 364.

33. *Id.* at 183–84, 289 N.E.2d at 364.

34. *Id.* at 184, 289 N.E.2d at 365.

35. *Id.* at 185, 289 N.E.2d at 365.

36. *Id.*

37. *Id.*

38. For a brief discussion of the history of liability insurance prior to the pollution exclusion clause, see Goulka, *The Pollution Exclusion*, For the Defense, Sept. 1983, at 22, 23–25; *see also* Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co. of N.Y., 218 N.J. Super. 516, 533, 528 A.2d 76, 84–85 (1987).

39. *See* New Castle County v. Hartford Accident and Indem. Co., 673 F. Supp. 1359 (D. Del. 1987) ("sudden" considered an ambiguous term); Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co., 668 F. Supp. 1541 (S.D. Fla. 1987) (release of chemicals neither expected nor intended by insured was "sudden and accidental"); Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 685 F. Supp. 621 (E.D. Mich. 1987) (focused on whether the discharge of pollutants was unexpected and unintended); United States v. Conservation Chem. Co., 653 F. Supp. 152 (W.D. Mo. 1986) (question of fact whether damage from hazardous waste facility was "sudden and accidental," but court found clause to be ambiguous); City of Northglenn v. Chevron U.S.A., Inc., 634 F. Supp. 217 (D. Colo. 1986) (after finding clause to be ambiguous, court focused on the intent of the parties because Colorado law did not strictly construe ambiguities against the insurer); Independent Petrochem. Corp. v. Aetna Casualty and Sur. Co., 654 F. Supp. 1334 (D. D.C. 1986) (followed line of cases equating "sudden and accidental" with "neither expected nor intended"); Payne v. United States Fidelity & Guar. Co., 625 F. Supp. 1189 (S.D. Fla. 1985) (followed reasoning of Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co., 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984), in finding coverage); Claussen v. Aetna Casualty & Sur. Co., 259 Ga. 333, 380 S.E.2d 686 (1989) (after the federal district court found no ambiguity in the pollution exclusion clause, Claussen v. Aetna Casualty & Sur. Co., 676 F. Supp. 1571 (S.D. Ga. 1987), *question certified* 865 F.2d 1217

courts have upheld the exclusion, refusing to find any ambiguity and looking instead at the intent of the parties to the insurance contract.[40] The following sections will consider some of the current interpretations of the pollution exclusion clause.

### A. *Favoring Coverage—"Sudden and Accidental" Ambiguity*

Although many approaches have been taken by courts nationwide, three New Jersey cases are typical of the trend. In *Lansco, Inc. v. Department of Environmental*

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(11th Cir. 1989) ("The gradual leaching of hazardous wastes into the ground water and soil . . . cannot honestly be characterized as sudden." *Id.* at 1573.), the Georgia Supreme Court, in answer to the question certified to it by the Eleventh Circuit, found ambiguity and construed the policy against the insurer); United States Fidelity & Guar. Co. v. Armstrong, 479 So. 2d 1164 (Ala. 1985) (following Moulton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So. 2d 95 (Ala. 1977), which found clause to be ambiguous when applied to non-active polluters, the *Armstrong* court found pollution exclusion clause to be ambiguous); Travelers Indem. Co. v. Dingwell, 414 A.2d 220 (Me. 1980) (pollution exclusion focused on release of pollutants, not damage); Shapiro v. Public Serv. Mut. Ins. Co., 19 Mass. App. 648, 477 N.E.2d 146 (1985) (court equated meaning of "accident" with "sudden and accidental"); Jonesville Prods., Inc. v. Transamerica Ins. Group, 156 Mich. App. 508, 402 N.W.2d 46 (1986) (reversing lower court, the appellate court held that continuous discharge of waste could be "sudden and accidental"); Summit Assoc., Inc. v. Liberty Mut. Fire Ins. Co., 229 N.J. Super. 56, 550 A.2d 1235 (N.J. Super. Ct. App. Div. 1988) (followed earlier state cases; *see infra* notes 41–61 and accompanying text); Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co. of N.Y., 218 N.J. Super. 516, 528 A.2d 76 (N.J. Super. Ct. App. Div. 1987) (*see infra* notes 53–61 and accompanying text); Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co., 186 N.J. Super. 156, 451 A.2d 990 (N.J. Super. Ct. Law Div. 1982) (*see infra* notes 46–52 and accompanying text); Autotronic Sys., Inc. v. Aetna Life & Casualty, 89 A.D.2d 401, 456 N.Y.S.2d 504 (N.Y. App. Div. 1982) (court held pollution exclusion did not apply because plaintiff not involved in the commercial activity which caused pollution); Niagara County v. Utica Mut. Ins. Co., 80 A.D.2d 415, 439 N.Y.S.2d 538 (1981) (pollution exclusion applied to active polluters, but not to county); Allstate Ins. Co. v. Klock Oil Co., 73 A.D.2d 486, 426 N.Y.S.2d 603 (1980) (leak could be "sudden and accidental" even if not detected for a substantial period of time); United Pac. Ins. Co. v. Van's Westlake Union, Inc., 34 Wash. App. 708, 664 P.2d 1262 (1983) (pollution exclusion is restatement of "occurrence" and applies only to "active polluters"). *Cf.* Grinnell Mut. Reins. Co. v. Wasmuth, 432 N.W.2d 495 (Minn. Ct. App. 1988) (court found "sudden" to be ambiguous under the facts when considering damage from formaldehyde release following installation of foam insulation).

40. *See* United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988) (applying Kentucky law; *see infra* notes 66–75 and accompanying text); Becker Elec. Mfg. Corp. v. Granite State Ins., 1989 U.S. Dist. LEXIS 6559 (N.D.N.Y.) (continuous disposal of waste solvents for 20 years could not be "sudden and accidental"); New York v. Amro Realty Corp., 697 F. Supp. 99 (N.D.N.Y. 1988) (release of chemicals for more than 20 years could not be "sudden and accidental"); United States Fidelity & Guar. Co. v. Korman Corp., 693 F. Supp. 253 (E.D. Pa. 1988) (continuous illegal dumping for nearly 30 years not "sudden"); United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co., 693 F. Supp. 617 (M.D. Tenn. 1988), *aff'd*, 875 F.2d 868 (6th Cir. 1989) (insurer met burden of proving pollution exclusion clause not ambiguous); Hayes v. Maryland Casualty Co., 688 F. Supp. 1513 (N.D. Fla. 1988) (purposeful deposit of waste material over a period of time neither sudden nor accidental); Centennial Ins. Co. v. Lumbermens Mut. Casualty Co., 677 F. Supp. 342 (E.D. Pa. 1987) (continuous activity of dumping toxic waste cannot be viewed as "sudden"); American Motorists Ins. Co. v. General Host Corp., 667 F. Supp. 1423 (D. Kan. 1987) ("[S]udden" could not be "consistent with an event which happened gradually or over an extended time, nor could it be consistent with an event which was anticipated or predictable." *Id.* at 1428.); American Mut. Liab. Ins. Co. v. Neville Chem. Co., 650 F. Supp. 929 (W.D. Pa. 1987) (contamination of water by chemicals neither sudden nor accidental because company had received complaint from state several years earlier); Fischer & Porter Co. v. Liberty Mut. Ins. Co., 656 F. Supp. 132 (E.D. Pa. 1986) (contamination from continuous dumping of toxic chemicals into drains not "sudden"); International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co., 168 Ill. App. 3d 361, 522 N.E.2d 758, *appeal denied*, 125 Ill. Dec. 218, 530 N.E.2d 246 (1988) (declining to follow earlier decision, and citing Borden, Inc. v. Affiliated FM Ins. Co., 682 F. Supp. 927 (S.D. Ohio 1987); *see infra* notes 112–22 and accompanying text. "[W]e decline to ignore these temporal-focused definitions or hold that because the word might also have other contextual uses, it is ambiguous and thus must be interpreted to provide coverage where the policy language read as a whole clearly intends to exclude such coverage." 168 Ill. App. 3d at 378, 522 N.E.2d at 769.); Barmet of Indiana, Inc. v. Security Ins. Group, 425 N.E.2d 201 (Ind. Ct. App. 1981) (in the earliest decision denying coverage, the insured was found to be aware of regular emissions from malfunctioning pollution control system); Powers Chemco, Inc. v. Federal Ins. Co., 144 A.D.2d 445, 533 N.Y.S.2d 1010 (N.Y. App. Div. 1988), *appeal granted*, 74 N.Y.2d 602, 541 N.Y.S.2d 985 (1989) (pollution exclusion

*Protection*,[41] pollution damage resulted from an oil spill caused by vandals opening the valves on two oil storage tanks.[42] Because the policy did not contain definitions of "sudden" or "accidental" the court looked to the commonly understood definitions of the terms.[43] The court held that although the damage may have resulted from the intentional acts of third parties, the spill was neither expected nor intended from the point of view of the insured party.[44] Therefore, the damage was "sudden and accidental," and coverage was provided.[45]

In light of the acts of the vandals in *Lansco*, the decision by the court can be defended strongly. Much more troublesome was the New Jersey court's subsequent decision in *Jackson Township Municipal Utilities Authority v. Hartford Accident and Indemnity Co.*[46] A municipal utility deposited liquid waste in town landfills over a long period of time. The waste seeped into the water supply and caused injury and property damage.[47]

In its opinion, the court equated the prior interpretation of an "occurrence" with that of "sudden and accidental."[48] Therefore, the exclusion did not apply, and coverage was provided, if the damage or injury caused was not intended, even though the release of pollutants, or in this case the burying of pollutants, was intended: "It is a reaffirmation of the principle that coverage will not be provided for intended results of intentional acts but will be provided for the unintended results of an intentional act."[49]

This opinion had the effect of finding coverage in all but those instances involving "active polluters," *e.g.*, commercial chemical manufacturers and large industries, that have been put on notice that certain actions can result in damages.[50] *Jackson Township* considered the issue of the "suddenness" of the pollution damage

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still applied when discharge of hazardous materials was performed by former property owner without knowledge or consent of the insured); Technicon Elec. Corp. v. American Home Assur. Co., 141 A.D.2d 124, 533 N.Y.S.2d 91 (N.Y. App. Div. 1988), *aff'd*, 74 N.Y.2d 66, 544 N.Y.S.2d 531, 542 N.E.2d 1048 (1989) (following *Borden*, 682 F. Supp. 927; *see infra* notes 112–22 and accompanying text); Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374 (1986) (*see infra* notes 76–82 and accompanying text); Transamerica Ins. Co. v. Sunnes, 77 Or. App. 136, 711 P.2d 212 (Or. Ct. App. 1985) (unintentional nature of damage had "nothing to do with whether the discharge was 'sudden and accidental . . . .'" *Id.* at 140, 711 P.2d at 214.); Wagner v. Milwaukee Mut. Ins. Co., 145 Wis. 2d 609, 427 N.W.2d 854 (Wis. Ct. App. 1988) (pollution exclusion not ambiguous, but court applied broad definition of "sudden" to leak discovered several years later); State v. Mauthe, 142 Wis. 2d 620, 419 N.W.2d 279 (Wis. Ct. App. 1987) (relying on City of Milwaukee v. Allied Smelting Corp., 117 Wis. 2d 377, 344 N.W.2d 523 (Wis. Ct. App. 1983), long-term pollution damage not "sudden and accidental").

41. 138 N.J. Super. 275, 350 A.2d 520 (N.J. Super. Ct. Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977).

42. *Id.* at 278, 350 A.2d at 521.

43. *Id.* at 282, 350 A.2d at 524.

44. *Id.*

45. *Id.* However, the court did not consider the question of Lansco's duty to attempt to prevent the vandalism.

46. 186 N.J. Super. 156, 451 A.2d 990 (N.J. Super. Ct. Law Div. 1982).

47. *Id.* at 159, 451 A.2d at 991.

48. *Id.* at 164, 451 A.2d at 994.

49. *Id.* at 164, 451 A.2d at 994 (quoting Lyons v. Hartford Ins. Group, 125 N.J. Super. 239, 310 A.2d 485 (N.J. Super. Ct. App. Div. 1973), *cert. denied* 64 N.J. 322, 315 A.2d 411 (1974)).

50. *Jackson Township* 186 N.J. Super. at 164, 451 A.2d at 994. Several courts have considered whether the entity seeking coverage is an "active polluter." *See, e.g.*, Moulton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So. 2d 95 (Ala. 1977); Grinnell Mut. Reins. Co. v. Wasmuth, 432 N.W.2d 495 (Minn. Ct. App. 1988); Niagara County v. Utica Mut. Ins. Co., 80 A.D.2d 415, 439 N.Y.S.2d 538 (1981); United Pac. Ins. Co. v. Van's Westlake Union, Inc., 34 Wash. App. 708, 664 P.2d 1262 (1983).

but said that "sudden" was not limited to an instantaneous happening.[51] "Thus, regardless of the initial intent or lack thereof as it related to causation, or the period of time involved, if the resulting damage could be viewed as unintended by the factfinder, the total situation could be found to constitute an accident . . . ."[52]

Finally, in *Broadwell Realty Services, Inc. v. Fidelity and Casualty Co. of New York*,[53] a New Jersey court again examined the pollution exclusion clause and found coverage.[54] Gasoline leaked from underground tanks on the insured's property and onto adjacent lands, causing damage.[55] As expected, Fidelity denied coverage because of the pollution exclusion clause.[56]

The court first explained that its role was to interpret the language of the contract and not to decide the best public policy approach.[57] The court then disagreed with the argument that the term "sudden" in "sudden and accidental" had a temporal meaning. The court followed prior state decisions in holding that "sudden" was consistent with the common everyday meanings of the term such as "unexpected," "unforeseen," or "fortuitous."[58] Because "accidental" was also defined in terms of an unexpected event, this interpretation served to treat "sudden and accidental" as a single element. The court stated: "[T]he pollution exclusion focuses upon the intention, expectation and foresight of the insured."[59]

The court favored the nontemporal definition because it avoided "the question whether the focus of the exclusion [was] upon the release of the contaminant or the resulting permeation and damage to the environment."[60] Also, according to the court, its interpretation better advanced the reasonable expectations of the insured party.[61]

The important element of the cases finding coverage is the interpretation that the pollution exclusion clause was "ambiguous." Because courts have traditionally resolved ambiguities in favor of the insured,[62] this determination has tended to result in coverage being upheld.

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51. Jackson Twp. Mun. Util. Auth. v. Hartford Acctdent & Indem. Co., 186 N.J. Super. 156, 165, 451 A.2d 990, 995 (N.J. Super. Ct. Law Div. 1982).

52. *Id.* at 165, 451 A.2d at 995 (quoting Allstate Ins. v. Klock Oil Co., 73 A.D.2d 486, 488–89, 426 N.Y.S.2d 603, 605 (1980) (also holding that injury was accidental if there was no intent to cause harm)).

53. 218 N.J. Super. 516, 528 A.2d 76 (N.J. Super. Ct. App. Div. 1987).

54. *Id.*

55. *Id.* at 519, 528 A.2d at 77.

56. *Id.* at 521–22, 528 A.2d at 79.

57. *Id.* at 523, 528 A.2d at 80.

58. *Id.* at 530–31, 528 A.2d at 83.

59. *Id.* at 535, 528 A.2d at 85.

60. *Id.*, 528 A.2d at 86.

61. *Id.* at 536, 528 A.2d at 86.

62. *See, e.g.*, Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co., 276 N.C. 348, 172 S.E.2d 518 (1970); Mazzilli v. Accident & Casualty Ins. Co. of Winterthur, 35 N.J. 1, 170 A.2d 800 (1961); Bobier v. National Casualty Co., 143 Ohio St. 215, 54 N.E.2d 798 (1944). *Cf.* City of Northglenn v. Chevron U.S.A., Inc., 634 F. Supp. 217 (D. Colo. 1986) (court found language of pollution exclusion clause to be ambiguous, but looked to the intent of the parties under Colorado law rather than construing against the insurer).

B. *Upholding Exclusion—Intent and Plain Meaning*

Other courts have denied insurance coverage by focusing on the intent of the parties and the courts' perception of the plain meaning of the pollution exclusion language. Recently one court, refusing to find any ambiguity in the pollution exclusion clause, stated: "The language is clear and plain, something only a lawyer's ingenuity could make ambiguous."[63] That court, unlike those in New Jersey, refused to define "sudden" as something occurring over a long period of time.[64] The court also found that to be covered under the pollution exclusion clause, the occurrence had to be both "sudden" *and* "accidental," and not just one of the two.[65] This approach appears to be gaining approval, as an examination of several recent decisions indicates.

In *United States Fidelity and Guaranty Co. v. Star Fire Coals, Inc.*,[66] Star Fire Coals was sued by a neighbor of its coal plant who claimed personal injury and property damage as a result of the plant's emission of coal dust over many years.[67] Star Fire Coals was aware of the emission problem and had taken various unsuccessful steps to control the discharge.[68] The insurer denied coverage, citing the pollution exclusion clause.[69] Star Fire Coals argued that it was entitled to coverage under the policy because use of the term "accident" in both the definition of "occurrence" and in the pollution exclusion clause created a "circle of ambiguity."[70]

The court prefaced its opinion with the legal principle that under Kentucky law, ambiguous language in an insurance policy would be construed in favor of the insured, but added that it would not use "tortured logic to find ambiguity where in fact none exists."[71] In reversing the decision of the district court, the court held that the occurrence requirement and the pollution exclusion clause were not interchangeable: "We believe the 'occurrence' definition results in a policy that provides coverage for continuous or repeated exposure to conditions causing damages in all cases except those involving pollution, where coverage is limited to those situations where the discharge was 'sudden and accidental.' "[72]

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63. American Motorists Ins. v. General Host Corp., 667 F. Supp. 1423, 1429 (D. Kan. 1987).

64. *Id.* at 1428. After a thorough review of the case law, one writer believes the courts have "gone astray" by ignoring the "sudden" requirement. Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237, 1296 (1986). The focus of the insurance policy in these cases is on three parameters—activeness, directness and suddenness:

> Activeness corresponds roughly to intent or degree of fault. Directness corresponds roughly to the concept of proximate cause. The suddenness parameter measures the time that elapses between the beginning and the end of the pollution sequence in question. The degrees of activeness, directness and suddenness in any given situation will describe a pollution event. The event that the three parameters fix will fall within or without the area of coverage as defined by the insurance policy.

*Id.* at 1281–82 (citations omitted).

65. *American Motorists*, 667 F. Supp. at 1429.

66. 856 F.2d 31 (6th Cir. 1988).

67. *Id.* at 32.

68. *Id.*

69. *Id.*

70. *Id.* at 34.

71. *Id.* at 33.

72. *Id.* at 34.

The court also held that the definition of "sudden" included a temporal element which combined "the immediate and the unexpected. It must also be emphasized that the focus of this 'sudden and accidental' exception to the general pollution exclusion clause is on the nature of the discharge of the pollution itself, not on the nature of the damages caused."[73]

Additionally, the court said that the "sudden and accidental" requirement was not synonymous with "unexpected and unintended," and that the term "should not be defined by reference to whether the accident or damages were expected."[74] "The ultimate question," the court said, "is whether the *discharges* of coal dust were sudden and accidental; they clearly were not."[75]

A similar result was reached by the Supreme Court of North Carolina in *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*[76] Waste Management sought a finding of coverage after being sued by the United States for allegedly dumping waste materials into a landfill for a number of years, leading to contamination of the groundwater underneath the landfill.[77]

Like the court in *Star Fire Coals*, the court said it would not create an ambiguity where it did not believe one existed:

> No ambiguity . . . exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend. If it is not, the court must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policy holder did not pay.[78]

The court said determining if events are "accidental" and constitute an "occurrence" is dependent upon whether the events were expected or intended from the insured party's viewpoint.[79] However, the court believed "the exclusion clause is concerned less with the accidental nature of the occurrence than with the nature of the damage."[80]

Disagreeing with the *Lansco* court, the *Waste Management* court also held that "sudden" should not be held synonymous with "accidental" because to do so would make the exclusion requirements redundant.[81] Therefore, the definition of "sudden" included a temporal element that required the polluting event to have happened "instantaneously or precipitantly."[82]

Reviewing these recent decisions, one court said that a clear pattern has emerged from consideration of the pollution exclusion clause:

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73. *Id.*
74. *Id.*
75. *Id.* at 35.
76. 315 N.C. 688, 340 S.E.2d 374 (1986).
77. *Id.* at 689, 340 S.E.2d at 376.
78. Wachovia Bank & Trust Co. v. Westchester Fire Ins., 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970) (*quoted in Waste Management*, 315 N.C. at 694, 340 S.E.2d at 379).
79. *Waste Management*, 315 N.C. at 696, 340 S.E.2d at 379.
80. *Id.* at 696–97, 340 S.E.2d at 380–81.
81. *Id.* at 698–99, 340 S.E.2d at 381–82.
82. *Id.* at 699, 340 S.E.2d at 382.

> Without exception, the cases which construe the pollution exclusion clause to preclude coverage involve (1) deliberate disposition of potentially hazardous waste or produced substances, (2) widespread pollution, (3) multiple claimants, (4) damaging actions over an extended period of time, usually in the regular course of business, and (5) discovery of the damage years after polluting conduct.[83]

Courts interpreting the pollution exclusion clause consistent with the courts in *Star Fire Coals* and *Waste Management* represent the current trend, but many states, like New Jersey, still find the clause to be ambiguous.[84] Each of these approaches is currently represented in Ohio and it will be up to the Ohio Supreme Court to resolve this inconsistency. The next section will examine these two Ohio cases in detail.

### C. *The Ohio View*

Current Ohio law interpreting the pollution exclusion clause is unsettled. In 1984, the Court of Appeals for Summit County in *Buckeye Union Insurance Co. v. Liberty Solvents and Chemical Co.*[85] found the pollution exclusion clause to be ambiguous and ruled for the insured party.[86] However, in 1987, a federal district court applied Ohio law in *Borden, Inc. v. Affiliated FM Insurance Co.*;[87] the court determined that the clause was not ambiguous and ruled for the insurer.[88] The following examination of the two cases will demonstrate the irreconcilability of the approaches and the necessity for a settlement of the conflict.

#### 1. Buckeye Union Insurance Co. v. Liberty Solvents and Chemical Co.[89]

The facts in *Buckeye Union* are similar to those in the cases discussed previously. Liberty Solvents had been named along with thirty-seven other entities in a complaint which alleged, *inter alia*, that hazardous waste, of which Liberty Solvents was a generator, had been released from drums that were improperly disposed of by Chem-Dyne Corporation, a waste removal company.[90] The hazardous wastes polluted the surface waters, soil, and groundwater near the disposal site. Buckeye Union brought a declaratory judgment action to determine if coverage was provided under the insurance policy.[91] The trial court granted summary judgment for

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83. Grinnell Mut. Reins. Co. v. Wasmuth, 432 N.W.2d 495, 498 (Minn. Ct. App. 1988).

84. *See supra* note 39 for cases finding clause to be ambiguous and note 40 for cases denying coverage because of the pollution exclusion clause. These conflicting interpretations have caused problems for both the insurance industry and the environment; the insurance industry suffers due to the difficulty in predicting when coverage must be provided, while the environment suffers due to the potential for delays in cleanup operations. *See* Note, *supra* note 64, at 1278–81.

85. 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984).

86. *Id.* at 132–34, 477 N.E.2d at 1234–35.

87. 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir.), *cert. denied*, 58 U.S.L.W. 3213 (U.S. 1989).

88. *Id.* at 930–31.

89. 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984).

90. *Buckeye Union*, 17 Ohio App. 3d at 128, 477 N.E.2d at 1230.

91. *Id.* at 127–28, 477 N.E.2d at 1229–30.

Buckeye Union and ruled that the insurance company did not have a duty to defend or indemnify Liberty Solvents. Liberty Solvents appealed.[92]

According to the court, construction of the pollution exclusion clause was a question of first impression in Ohio.[93] Although the court said it was only considering the duty of the insurance company to defend and not the question of indemnification,[94] its opinion had the effect of determining the interpretation that the lower court should apply to the pollution exclusion clause; this interpretation was likely to be determinative of the case below. The court determined that the theories of liability of the complaints of Ohio and the United States against Liberty Solvents fell under the federal Superfund Act,[95] which was designed to facilitate the cleanup of hazardous waste sites.[96] The potential liability under the Superfund Act triggered Buckeye Union's duty to defend unless coverage was excluded by the policy.[97] Buckeye Union argued that the pollution exclusion clause provided the necessary exclusion to deny coverage.[98]

The court began its analysis by noting that in Ohio "'[a] contract of insurance prepared and phrased by the insurer is to be construed liberally in favor of the insured and strictly against the insurer, where the meaning of the language used is doubtful, uncertain or ambiguous.'"[99] The court then followed *Grand River Lime*[100] and decided that the meaning of "occurrence" was broader than that of "accident," and that an "occurrence" may encompass a period of time.[101] Therefore, the complaint which alleged the release of hazardous wastes by Liberty Solvents stated an "occurrence" under the policy.[102]

Next, the court considered the implications of the pollution exclusion clause on the duty of Buckeye Union. The court said any provisions that served to exclude coverage were to be strictly construed against the insurer.[103] "Where exceptions, qualifications or exemptions are introduced into an insurance contract, a general presumption arises to the effect that that which is not *clearly excluded* from the operation of such contract is included in the operation thereof."[104]

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92. *Id.* at 128, 477 N.E.2d at 1230.

93. *Id.* at 132, 477 N.E.2d at 1234.

94. Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co., 17 Ohio App. 3d 127, 129, 477 N.E.2d 1227, 1230 (1984).

95. Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 6911a, 9601–09, 9611–14, 9616–26, 9631–33, 9641, 9651, 9653, 9656–62, 9671–75 (1983 & Supp. 1988) (Superfund Act).

96. *Buckeye Union*, 17 Ohio App. 3d at 130, 477 N.E.2d at 1232. The Superfund Act created a $1.8 billion fund to finance cleanup operations following environmental damage. *Id.* at 129, 477 N.E.2d at 1231. The Act holds polluters strictly liable for the cost of cleanup. 42 U.S.C. § 9607 (1983 & Supp. 1988). Following suit under the Superfund Act, polluters usually turn to their insurers for indemnification as Liberty Solvents did here. *Buckeye Union*, 17 Ohio App. 3d at 129–30, 477 N.E.2d at 1231–32.

97. *Id.* at 130, 477 N.E.2d at 1232.

98. *Id.*

99. Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co., 17 Ohio App. 3d 127, 131, 477 N.E.2d 1227, 1232 (1984) (quoting Munchick v. Fidelity & Casualty Co., 2 Ohio St. 2d 303, 209 N.E.2d 167, 168 (1965) (citation omitted)).

100. *See supra* notes 27–37 and accompanying text.

101. *Buckeye Union*, 17 Ohio App. 3d at 131–32, 477 N.E.2d at 1232–33.

102. *Id.* at 132, 477 N.E.2d at 1233.

103. *Id.*, citing *Munchick*, 2 Ohio St. 2d 303, 305, 209 N.E.2d 167.

104. Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co., 17 Ohio App. 3d 127, 132, 477 N.E.2d 1227, 1234

The court then noted that "sudden and accidental" were not defined in the contract and that alone could be a sufficient ground for finding ambiguity within the pollution exclusion clause.[105] The court cited with approval the interpretations of the New Jersey Superior Court in *Lansco*[106] and *Jackson Township*[107] in finding the pollution exclusion clause to be ambiguous.[108] This interpretation viewed the pollution exclusion clause as merely a restatement of the "occurrence" definition and did not consider the definition of "sudden" to include a temporal element.[109]

Applying this approach to the facts of the case, the court said:

> There are no allegations in the complaint that compel the conclusion that Liberty Solvents intended or expected the releases of hazardous waste substances by Chem-Dyne or the damages that such releases would cause. Construing the words "sudden and accidental" most favorably to the insured and in accordance with the interpretation afforded to the polluters exclusion clause by other jurisdictions, we conclude that the release and resultant property damages could be found to be "sudden and accidental" from the standpoint of Liberty Solvents.[110]

The decision was not reviewed by the Supreme Court of Ohio. Nevertheless, the opinion of the court in *Buckeye Union* has been cited with approval on several occasions by courts of other states.[111] Until 1987 this approach appeared to be the law in Ohio, but the decision in *Borden* puts the current state of the law in doubt.

### 2. Borden, Inc. v. Affiliated FM Insurance Co.[112]

Borden, Inc. sought defense and indemnification from its insurer after Amoco Oil Company filed a complaint against Borden alleging that Borden had fraudulently concealed the existence of hazardous wastes on land sold to Amoco.[113] Affiliated Insurance argued that the pollution exclusion clause precluded coverage, but Borden, relying on *Buckeye Union*, contended the release of pollutants fell within the "sudden and accidental" definition.[114]

The court first determined that Ohio law applied to the case.[115] After considering *Buckeye Union* and the cases it relied upon, the court said it was "not persuaded" by

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(1984) (quoting syllabus of Home Indem. Co. v. Plymouth, 146 Ohio St. 96, 64 N.E.2d 248 (1945)) (emphasis added by *Buckeye Union* court).

105. *Buckeye Union*, 17 Ohio App. 3d at 132, 477 N.E.2d at 1234.

106. *See supra* notes 41–45 and accompanying text.

107. *See supra* notes 46–52 and accompanying text.

108. *Buckeye Union*, 17 Ohio App. 3d at 132–34, 477 N.E.2d at 1234–35.

109. *Id.* at 134, 477 N.E.2d at 1235.

110. *Id.*

111. *See, e.g.*, Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co., 668 F. Supp. 1541, 1548 (S.D. Fla. 1987); Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co. of N.Y., 218 N.J. Super. 516, 531, 528 A.2d 76, 84 (N.J. Super. Ct. App. Div. 1987).

112. 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir.), *cert. denied*, 58 U.S.L.W. 3213 (U.S. 1989).

113. *Id.* at 928.

114. *Id.* at 929.

115. *Id.* Borden, Inc. had its principal place of business in Ohio, while Affiliated Insurance was located in Rhode Island. The court determined that under Ohio conflict of laws rules, Ohio had a more significant relationship with the insurance contract because the contract was negotiated and entered into in Ohio, and the policy was to be applicable in all states including Ohio.

the approaches taken by these courts.[116] The court said that although deference was given to *Buckeye Union*, that decision was not binding upon the court: "This Court is convinced that the Ohio Supreme Court would not adopt the construction of the pollution exclusion set forth in *Buckeye*."[117] The court noted that Ohio law required insurance policies to be enforced in accordance with their terms and that policy provisions which were clear and unambiguous could not be enlarged to achieve some other objective of the court.[118]

In granting the summary judgment motion of Affiliated Insurance, the court held that the pollution exclusion clause was not ambiguous:

> The "sudden and accidental" exception expressly applies to the "discharge, dispersal, release or escape" of the pollutants, rather than to the harm caused by the pollutants. "Sudden," in its common usage, means "happening without previous notice or with very brief notice," while "accidental" means "occurring sometimes with unfortunate results by chance alone." . . . The meaning of these terms is clear and should not be twisted simply to provide insurance coverage when the courts deem it desirable.[119]

The court said that Borden regularly deposited hazardous wastes on the property purchased by Amoco for several years.[120] "Clearly, this is not an allegation of a 'sudden and accidental' event. Rather, it is precisely the type of activity which the pollution exclusion was drafted to preclude. The Court must give effect to the intent of both parties."[121] The Court of Appeals for the Sixth Circuit affirmed the decision.[122]

The clear rejection of *Buckeye Union* by the *Borden* court has created a conflict in the law that cannot be settled without the guidance of the Ohio Supreme Court. The following sections of this Note will consider the efforts of the insurance industry to avoid similar problems in the future and a suggestion for courts interpreting the pollution exclusion clause.

## III. The View to the Future

Every year more cases will be considered that turn on the interpretation of a pollution exclusion clause. Each time damages are alleged from long-term exposure to pollutants, insurance policies in effect over many years are implicated.[123] Courts

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116. *Id.*

117. *Id.*

118. *Id.*, relying on Rhoades v. Equitable Life Assur. Soc'y, 54 Ohio St. 2d 45, 374 N.E.2d 643 (1978).

119. Borden, Inc. v. Affiliated FM Ins. Co., 682 F. Supp. 927, 930 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir.), *cert. denied*, 58 U.S.L.W. 3213 (U.S. 1989) (quoting Webster's Third New International Dictionary (1986)).

120. The company deposited phosphogypsum, a radioactive component from production of phosphoric acid, on the property from 1964–70. The pile of the substance was 35 feet high and covered 30–40 acres. *Id.* at 930.

121. *Id.* (citation omitted).

122. Borden, Inc. v. Affiliated FM Ins. Co., 865 F.2d 1267 (6th Cir.), *cert. denied*, 58 U.S.L.W. 3213 (U.S. 1989).

123. An issue beyond the scope of this Note is the question of which insurance policies are triggered. Since damage often occurs over a long period of time, there are usually several policies, possibly with different contract terms, implicated by the pollution event. Courts have developed three basic approaches to this problem: 1) the exposure theory implicates the policies in effect when the injured person was exposed to the injury-causing substance, *e.g.*, Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1217, 1226 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981) (unfair to hold present insurer liable for injuries caused before that company chose to provide coverage); 2)

will have plenty of opportunities to rule on the coverage issue and decide whether to look at the intent of the parties or assign the risk of loss to the insurance companies. In response, insurance companies have attempted again to limit their liability.

### A. *Modern Version of the Pollution Exclusion Clause*

The current version of the pollution exclusion clause has deleted the term "sudden and accidental." For example, one policy now excludes coverage of claims relating

> (1) [T]o bodily injury or property damage arising out of the actual, or alleged or threatened, discharge, dispersal, release or escape of pollutants:
> (a) at or from premises owned, rented or occupied by the name insured;
> (b) at or from any site or location used by or for the named insured or others for the handling, storage, disposal, processing or treatment of waste.[124]

The courts have yet to determine the scope of this new exclusion clause.

However, this new clause will not eliminate interpretations of the pollution exclusion clause. Each claim for coverage will implicate the policies in effect during the time contamination occurred.[125] Because long-term exposure is often involved, it is likely that courts will face interpretations of the pollution exclusion clause into the distant future. In addition, the courts' opinions of the validity of the exclusion will likely influence any subsequent determinations of the validity of new attempts to deny coverage to polluters.

### B. *Suggested Approach for Ohio*

After examination of the opinions of *Buckeye Union*, and *Borden*, and the many other cases on each side of the argument, it is clear that the *Borden* decision denying coverage is more defensible and should be adopted by all Ohio courts. In addition, the approach in *Borden* reflects the current trend of the law:

> A review of the most recent cases reveals that there is an emerging nationwide judicial consensus that the "pollution exclusion" clause is unambiguous and that an insured who is accused of causing injury or property damage by the intentional discharge of pollutants over an extended period of time is bound by the terms of the exclusion and is not entitled to be defended or indemnified by its insurer.[126]

In spite of the many detailed discussions by courts facing the question of the validity of the pollution exclusion clause, the single important issue is whether the

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the manifestation theory implicates the policies in effect when the injury became known to the injured person, *e.g.*, Eagle-Picher Indus., Inc. v. Liberty Mut. Ins., 682 F.2d 12, 16, 23 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983) (court also may have considered that defendant had no insurance coverage at the time of exposure); and 3) the triple trigger theory implicates all policies during the period of exposure, exposure in residence, and when the injury manifests itself, *e.g.*, Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034, 1042, 1045–46 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (court seems to have decided that this approach is better at spreading the risk among insurers). For a more detailed discussion, see Bauer & Lakind, *Toward Resolution of Insurance Coverage Questions in Toxic Tort Litigation*, 38 RUTGERS L. REV. 677, 708–15 (1986).

124. N.Y.L.J., March 16, 1988, at 1, col. 1.

125. *See supra* note 123.

126. Technicon Elec. Corp. v. American Home Assur. Co., 141 A.D.2d 124, 131, 533 N.Y.S.2d 91, 96 (1988), *aff'd*, 74 N.Y.2d 66, 544 N.Y.S.2d 531, 542 N.E.2d 1048 (1989).

pollution exclusion clause is ambiguous. A finding of ambiguity allows the court to discount the "sudden and accidental" coverage requirement and require indemnification by the insurer, while a ruling that no ambiguity exists in the clause virtually assures no liability for the insurer.

The courts that have found coverage have done so by equating "sudden and accidental" with the "occurrence" requirement in the policy. This results in interpretation of the policies without regard to the "sudden" requirement. Because most of the cases litigated have involved damages occurring after long-term exposure to pollutants, the courts' definitions of "sudden" are often determinative.

Although most courts have attempted to define "sudden" with a dictionary meaning, no definition can be complete without considering the term within its context. The pollution exclusion clause requires that damage be *both* "sudden" *and* "accidental" for coverage to be provided. Courts that interpret "sudden" without a temporal meaning are creating a redundancy in the policy with "sudden and accidental" being the same as an "occurrence." Because it is illogical to argue that the pollution exclusion clause, with its "sudden and accidental" requirement, was added to all policies without some intention on the part of the insurance companies, then any interpretation of the clause should result in a change from the previous "occurrence-only" requirement. This can be accomplished only by assigning a temporal element to "sudden."

It is possible that some insured parties may be unaware of the existence and meaning of the pollution exclusion clause; the court therefore has a duty to try to determine the intent of the contracting parties. If it is found that the insured party was unaware of the clause and in an unequal bargaining position, then the court can find the clause to be unconscionable. This recognizes that those parties in the best bargaining position should be bound by all the terms of the policies purchased.

A party that generates pollution is or should be aware of the purpose of the pollution exclusion clause. It is only when facing a damage action that the waste producer claims an ambiguity. The waste producer has not paid for coverage for pollution damage unless the polluting event was "sudden and accidental;" to decide that the polluting event need not be both sudden *and* accidental is to provide coverage to which the alleged polluter is not entitled.

Finally, as the North Carolina Supreme Court pointed out in *Waste Management*,[127] there is a strong public policy reason for finding against the waste producer. Allowing insurance coverage creates a "moral hazard"[128] that may discourage the waste producer from taking adequate precautions to avoid damage to the environment. This problem, of course, exists with all insurance coverage, but

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127. *See supra* note 7 and accompanying text.

128. Black's Law Dictionary defines "moral hazard" as:

> [T]he risk or danger of the destruction of the insured property . . . , as measured by the character and interest of the insured owner, his habits as a prudent and careful man or the reverse, his known integrity or his bad reputation, and the amount of loss he would suffer by the destruction of the property or the gain he would make by . . . collecting the insurance.

BLACK'S LAW DICTIONARY 647 (5th ed. 1979).

pollution insurance appears to be distinguishable, for example, from auto insurance and malpractice insurance.

With auto insurance and malpractice insurance, the covered party has a *personal* stake in avoiding claims. Auto accidents and malpractice claims involve trips to court, increased premiums, and the stigma associated with being known as an "unsafe driver" or a "careless" doctor or lawyer. In addition, a severe violator may lose his or her license or be barred from professional practice. Because the individuals who control the conduct of potential polluters are removed from the stigma associated with pollution and do not face the same *personal* risks, it would seem that potential polluters are much less likely to consider safety a priority.

Denying coverage for pollution damage that is not sudden and accidental will best encourage sufficient precautions to avoid damage, because the polluter knows that it will be held responsible. Cleanup costs will simply represent another cost of doing business, with the more responsible entities passing on their lower costs to the consumer and the worst polluters forced to clean up or risk being uncompetitive. In the long run this approach will best serve the environment.

## IV. Conclusion

Courts in Ohio should adopt the view in *Borden* and focus on the intent of the contracting parties, rather than doing whatever is necessary to find coverage. Samuel Williston believed the inquiry into intent was a "cardinal principle" of contract law: "In the case of contracts, the avowed purpose and primary function of the court is the ascertainment of the intention of the parties."[129] Although insurance companies may be somewhat better able to spread the risk, the waste producer is not entitled to coverage it neither paid for nor expected. Courts create a fiction when they argue that the term "sudden and accidental" is ambiguous. Courts finding coverage could be honest and find the clause void as violating public policy, but they would not be able to explain this result without severe criticism. Therefore, courts creatively interpret policy to gain the desired result. Most companies that produce and use potential pollutants knew the meaning of the pollution exclusion clause when the insurance contract was purchased and those companies should not now be able to avoid financial responsibility by shouting "ambiguity."

*Robert E. Henke*

129. 4 S. Williston, Williston on Contracts § 601, at 303–04 (1961) (citation omitted).