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A Matter of Interpretation: The Judicial Quagmire concerning the Sudden and Accidental Exception to the Pollution Exclusion Clause

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Comments

A MATTER OF INTERPRETATION: THE JUDICIAL QUAGMIRE CONCERNING THE SUDDEN AND ACCIDENTAL EXCEPTION TO THE POLLUTION EXCLUSION CLAUSE

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I. INTRODUCTION

On January 1, 1970, Congress took one of the first significant steps in addressing the growing concerns over the future of the environment by enacting The National Environmental Policy Act.¹ It was Congress' intention in drafting the act that the United States government should "use all practicable means . . .

1. National Environmental Policy Act of 1969 §§ 2-209, 42 U.S.C. §§ 4321-4361 (1988).

to create and maintain conditions in which man and nature can exist in productive harmony.”² Since the inception of this congressional mandate, legislation such as the Federal Water Pollution Control Act,³ the Resource Conservation and Recovery Act (RCRA),⁴ and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund)⁵ has been enacted in an effort to pursue sound environmental policies. However, with the increase in environmental legislation came an increase in litigation for violations of the federal regulations.⁶ Such litigation has given rise to a highly controversial question which has split judicial bodies across the nation: who is going to pay the price for environmental liability?

Prior to the enactment of the aforementioned legislation, much of what is today considered “pollution” remained unregulated and unaffected by either state or federal governments.⁷ In the absence of legislative parameters to qualify and quantify environmental standards, hazardous waste handlers had few financial incentives to limit polluting events. With the advent of environmentally related litigation and explicit statutory requirements imposing liability expenses upon polluters,⁸ companies dealing in hazardous wastes have felt the necessity to either eliminate their

2. BUREAU OF NATIONAL AFFAIRS EDITORIAL STAFF, BUREAU OF NATIONAL AFFAIRS, U.S. ENVIRONMENTAL LAWS 3 (1986).

3. Federal Water Pollution Control Act §§ 101-607, 33 U.S.C. §§ 1251-1387 (1988) (commonly referred to as the Clean Water Act).

4. Resource Conservation and Recovery Act §§ 1002-9010, 42 U.S.C. §§ 6901-6991 (1988) (RCRA was enacted in 1976 as amendment to Solid Waste Disposal Act of 1965, Pub. L. No. 98-272, 79 Stat. 992 (1965)).

5. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 §§ 101-308, 42 U.S.C. §§ 9601-9657 (1982) [hereinafter CERCLA].

6. “New cleanup standards are not only driving up the costs of remedial action, but are also delaying further the process of site cleanup by increasing the number of issues that are being litigated.” Cheek, Graham, & Wardzinski, *Insurance Coverage for Superfund Liability Defense and Cleanup Costs: The Need for a Nonlitigation Approach*, 19 *Envtl. L. Rep.* (Envtl. L. Inst.) 10203 (May 1989).

7. Greenberg, *Needed: A Fee on Commercial and Industrial Insurance to Finance Hazardous Waste Cleanup*, 19 *Envtl. L. Rep.* (Envtl. L. Inst.) 10254 (June 1989).

8. For example, CERCLA § 107 states the following:

[A]ny person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a state not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources,

“polluting occurrences” or purchasing liability insurance. More often than not, paying an annual premium rate to an insurance liability carrier proved more economical than implementing ways to control or eliminate polluting events, and thus, a disincentive to police one’s own polluting occurrences has been established through the use of insurer indemnification.⁹

Additionally, under RCRA, owners of hazardous waste treatment, storage, and disposal facilities are required to obtain insurance or to prove the ability to be self insured for third party claims stemming from “sudden and accidental” occurrences.¹⁰ As has become evident, there has been a marked increase in the tendency to look to the insurance industry as a convenient source of funds to finance cleanup expenses in the event of “polluting occurrences”.¹¹

The insurance industry has attempted to set limits on its indemnification liability arising from insured “polluting occurrences.” Through its experiences with a variety of accident and occurrence based coverage policies,¹² insurers ascertained the need to set explicit standards by which they would not be held accountable for the often careless, reckless, or at least controllable polluting events caused by policyholders. From this realiza-

including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

42 U.S.C. § 9607(a)(4).

Such financial responsibility was unheard of when many of the hazardous sites, now the subject of litigation, were being created. Financial responsibility has also been mandated in other federal environmental legislation. *See e.g.*, Federal Water Pollution Control Act and Amendments, 33 U.S.C. § 1321; Deepwater Port Act of 1974, 33 U.S.C. § 1651; Motor Carrier Act of 1980, 49 U.S.C. § 10927; Federal Aviation Act, 49 U.S.C. §§ 1310-1542.

9. Kunzman, *The Insurer as Surrogate Regulator of the Hazardous Waste Industry: Solution or Perversion?*, 20 FORUM 469, 471 (1985). According to the authors, federal regulations require that limits of liability are at least one million dollars per occurrence with an annual aggregate of two million dollars. *Id.* If the facility may potentially contaminate groundwater, coverage must be three million dollars per occurrence with a six million dollar annual aggregate. *Id.* These sums are exclusive of defense costs. However, environmental cleanup expenses and personal injury claims often cost many times more than limits, depending on the site. For example, personal injury and property claims arising out of Kepone contamination in and along the James River have estimated totals exceeding one hundred billion dollars. Hourihan, *Insurance Coverage for Environmental Damage Claims*, 15 FORUM 551, 552 (1980); *see also* Byers v. Baxter, 69 A.D.2d 343, 419 N.Y.S.2d 497 (1979).

10. Kunzman, *supra* note 9, at 471.

11. In fact, CERCLA provides for the direct assertion of claims against an insurer (guarantor) provided proof of financial responsibility can be established. CERCLA § 108(c), 42 U.S.C. § 9608(c).

12. *See infra* notes 14 & 16 and accompanying text.

tion came the pollution exclusion clause and its ancillary sudden and accidental exception into the body of Comprehensive General Liability policies (CGLs).¹³ The courts, however, have reached a variety of holdings in their attempts at setting parameters for liability through the exclusion and its exception. This Comment will address the judicial split with regard to interpreting both the pollution exclusion clause and the sudden and accidental exception.

This Comment will chronicle the historical antecedents of the exclusionary language to provide a framework of the insurance industry's intent in drafting the provision. This Comment will then explore the definitional dispute concerning the pertinent language of the coverage aspects of the policy, the exclusion, and the sudden and accidental exception. This will initially be done by reviewing the actual policy language itself. The divergence of judicial opinions will be explored in an extensive review of cases which elucidate some of the aspects of the arguments for and against imposing a duty to defend and indemnify insurance companies for the polluting events of their insureds. The main focus of the case review will be an examination of the ambiguity argument proffered by insureds in an effort to impose this duty upon insurers. The aim of this section will be to establish whether the pollution exclusion clause and the sudden and accidental exception are reconcilable with the occurrence definition in the coverage provision of CGL policies. Interpretations of the pollution exclusion clause and sudden and accidental exception as independent policy provisions will also be reviewed.

The ancillary issues raised by the threshold question of whether the exclusion clause and exception are reconcilable with the occurrence definition will also be explored through case review and commentary. These ancillary issues include the question of the meanings to be given to the contract language, whether knowledge and intent is a requisite for limiting liability to the insureds for polluting occurrences, and what implications repeated occurrences (or the potential for repeated occurrences) have on the assessment of liability.

This Comment will culminate with an analysis section which will outline the potential impact current judicial interpretation of the exclusion and exception may have on the future of CGL poli-

13. See generally Hourihan, *supra* note 9, at 552-53. For the wording of the pollution exclusion clause, see *infra* note 28 and accompanying text.

cies, handlers of hazardous wastes, and the environmental cleanup effort.

II. DEVELOPING THE POLLUTION EXCLUSION CLAUSE: A HISTORICAL PERSPECTIVE

The pollution exclusion clause is a product of insurers' experience with a variety of CGL forms dating back to the mid-1960s. Prior to 1966, insurance policies were based on an "accident" perspective which was intended to provide coverage only for sudden and accidental discharges of pollutants.¹⁴ However, judicial interpretation of the accident based coverage forms was split, with a majority of courts finding that a requirement of suddenness was unnecessary to impose an obligation upon insurers to indemnify their insureds.¹⁵ In 1966, insurance companies changed their CGLs from "accident" to "occurrence" based coverage. Occurrence based coverage had previously been employed only with preferred insureds.¹⁶ These policies provided broader coverage than accident based policies by providing coverage for "injurious exposure to conditions, which result, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."¹⁷

As insurance companies shifted from accident to occurrence based coverage, the primary issue in pollution claims likewise shifted. The issue of suddenness was superseded by the issue of foreseeability and intent of the insured.¹⁸ This shift in emphasis entailed broadening the scope of coverage which would result in indemnification. However, such broadening of coverage seemed safe from the industry's perspective as environmental claims had not posed a significant concern for insurers at this time.¹⁹

Judicial interpretation of occurrence based policies combined with the resulting economic liability from two notable environmental disasters in the late 1960's caused the insurance industry to reassess the viability of occurrence based coverage. In 1967,

14. Hourihan, *supra* note 9, at 552.

15. See Note, *The Pollution Exclusion in the Comprehensive General Liability Insurance Policy*, 1986 U. ILL. L. REV. 897, 904 (1986) (reviews historical antecedents of pre-exclusionary policy provisions).

16. *Id.*

17. Hourihan, *supra* note 9, at 552.

18. *Id.* at 553.

19. See generally MCGEOUGH, *INSURANCE COVERAGE OF ACTIONS FOR ENVIRONMENTAL DAMAGE IN ENVIRONMENTAL LAW—DEFENSE AND INSURANCE PROBLEMS* 26 (1977).

the oiltanker *Torrey Canyon* ran aground off the coast of England; in 1969, an oil platform ruptured off the coast of Santa Barbara, California.²⁰ These disasters caused insurers to incur considerable indemnification costs.²¹ Further, judicial interpretation of occurrence based policies provided additional incentive to redefine the CGLs.

In *Grand River Lime Co. v. Ohio Casualty Insurance Co.*,²² the court agreed with an insured's argument that the term "occurrence" has broad implications and therefore the duty of insurers who utilize such broad terminology in their CGLs is also broadened.²³ This case, arising from claims that the insured's quarrying operation produced emissions over a seven year period causing personal injury and property damage, was of further concern to the industry because of the court's opinion that it was "better not to interpret the word occurrence in a sudden or momentary sense."²⁴ Based on the language of the policy, the court found that the term occurrence should be interpreted as encompassing a period of time; therefore, the defendant insurer owed a duty to defend for damages occurring over a seven year period.²⁵ The court concluded that the occurrence based policy provided

20. Kunzman, *supra* note 9, at 475.

21. *Id.*

22. 32 Ohio App. 2d 178, 289 N.E.2d 360 (1972).

23. *Id.* at 183, 289 N.E.2d at 364. In adopting the plaintiff's contention that the term "occurrence" had broader implications than the term "accident," the court relied on the following language of the United States District Court for the Northern District of Mississippi:

To begin with, the word "occurrence," to the lay mind, as well as to the judicial mind, has a meaning much broader than the word "accident." . . . [A]ccident means something that must have come about or happened in a certain way, while occurrence means something that happened or came about in any way. Thus accident is a special type of occurrence, but occurrence goes beyond such special confines and, while including accident, it encompasses many other situations as well.

Id. at 184, 289 N.E.2d at 365 (quoting *Aerial Agricultural Serv. of Montana, Inc. v. Till*, 207 F. Supp. 50, 57 (N.D. Miss. 1962)). This interpretation set the foundation for the court's eventual conclusion that the term occurrence should not be viewed in a sudden or momentary sense. *See infra* note 25.

The *Grand River* case was decided prior to the addition of the pollution exclusion and sudden and accidental exception provisions in CGL policies. Had the case been heard after these provisions had been accepted, the fact that Grand River's operations produced emissions over a seven-year period may have precluded insurance coverage. *See infra* notes 98-109 and accompanying text.

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

25. *Id.* The appellate court concluded the interpretation of the term occurrence as extending over a period of time best comported with the phrase "including injurious exposure to conditions" contained in the policy. *Id.* The court also took note of a policy provision which read "all bodily injury and property

coverage for the insured who fully intended the release of pollutants, but neither expected nor intended the damage resulting from the polluting event.²⁶

In light of such judicial interpretation, and the growing awareness of potential environmental disasters (such as the *Torrey Canyon* and Santa Barbara oil rig disasters and their resulting indemnification costs), insurers sought to impose more restrictive parameters upon their CGL policies. The result of this re-evaluation was the "pollution exclusion" clause which has become a standard provision of insurance policies since 1973.²⁷

The pollution exclusion clause is a two part policy provision comprised of the exclusionary language and a brief, undefined exception. In total, the clause generally reads as follows:

This policy 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 watercourse or body of water; *but this exclusion shall not apply if such discharge, dispersal, release or escape is sudden and accidental.*²⁸

In drafting the exclusion language, the Mutual Insurance Rating Bureau (the Bureau) attempted to close the interpretive "loop-hole" in occurrence based coverage.

In addition to the inclusion of the pollution exclusion clause by the Bureau in 1973,²⁹ other revisions to the CGL policy were

damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." *Id.*

26. *Grand River*, 32 Ohio App. 2d at 185, 289 N.E.2d at 365. The *Grand River* decision illustrates how the insurance industry increased its potential financial burden as it eliminated the requirement that a polluting occurrence establishing coverage obligations be either sudden or temporal in nature. Tyler & Wilcox, *Pollution Exclusion Clauses: Problems in Application Under the Comprehensive General Liability Policy*, 17 IDAHO L. REV. 497, 503 (1981). Although insurers anticipated rectifying this development with the pollution exclusion clause, some courts continued to ignore the absence of sudden or temporal elements in polluting events when assessing insurer liability. See *infra* notes 59 & 71 and accompanying text.

27. Tyler & Wilcox, *supra* note 26, at 500. The language of the pollution exclusion clause was initially proposed in 1970 as a mandatory endorsement to the Comprehensive General Liability Policy but was not incorporated as a policy provision until 1973. *Id.* (citing DEFENSE RESEARCH INSTITUTE, GENERAL LIABILITY INSURANCE, 1973 REVISIONS, NO. 1 (1974)).

28. *Id.* (emphasis added).

29. See *supra* note 27.

made as well. Specifically, the Bureau revised the definition of an "occurrence" to read as follows: "[A]n accident, including continuous or repeated exposure to conditions which result in bodily injury or property damage neither expected or intended from the standpoint of the insured."³⁰ Occurrence based policies were not intended to provide coverage for polluting or contaminating events in most cases. According to the Bureau, this was due to the fact that in most cases, the resulting damage would be expected or intended, and thus excluded by the definition of occurrence.³¹ However, courts frequently found that the resulting damage was indeed unexpected from the insureds point of view.³² The pollution exclusion clause supposedly clarified the limits of policy coverage "so as to avoid any questions of intent."³³ Coverage for damages or injuries arising from polluting or contaminating events was to be limited to accidents, thereby eliminating coverage where the damaging event appeared to be expected or intended on the part of the insured.³⁴ Despite the industry's attempt at clarifying the limits of CGL policy coverage, courts still struggle with the construction of such policies.

III. THE DEFINITIONAL DISPUTE

A. Reconciling the Exclusion, Exception, and Definition

The root of the judicial quagmire involving CGL policies and the pollution exclusion clause is a problem of semantics. Key parts of the policy and the pollution exclusion clause raise interpretive issues which courts have settled in a variety of ways.³⁵ Ironically, it is from the attempts at clarification that many of the interpretive problems arise.

30. Rynearson, *Exclusion of Expected or Intended Personal Injury or Property Damage Under the Occurrence Definition of the Standard Comprehensive General Liability Policy*, 19 FORUM 513 (1983) (citing Fish, *An Overview of the 1973 Comprehensive General Liability Insurance Policy and Products Liability Coverage*, 34 J. Mo. B. 257, 258 (1978); *State v. Glens Falls Ins. Co.*, 404 A.2d 101 (Vt. 1979)).

31. Joest, *Will Insurance Companies Clean the Augean Stables—Insurance Coverage for the Landfill Operator*, 50 INS. COUNS. J. 258, 259 (1983). No explanation was proffered by the Mutual Insurance Rating Bureau for the basis of this presumption.

32. See generally, *Grand River Lime Co. v. Ohio Casualty Ins. Co.*, 32 Ohio App. 2d 178, 289 N.E.2d 360 (1972); *Aetna Casualty & Sur. Co. v. Martin Bros. Constr. & Timber Corp.*, 256 F. Supp. 145 (D. Or. 1966).

33. Joest, *supra* note 31, at 259 (quoting the Mutual Insurance Rating Bureau).

34. *Id.* (quoting 3 R. LONG, *THE LAW OF LIABILITY INSURANCE* APP. 68 (1976)).

35. For example, see cases cited *infra* notes 59, 65, 71, 79 & 120.

The occurrence definition extends coverage for accidents involving "continuous or repeated exposure to conditions."³⁶ However, the pollution exclusion clause and exception only provide coverage when polluting events are "sudden and accidental." These policy provisions seem to beg a critical question which has been the source of considerable litigation: can a polluting event which is continuous or repeated over time (i.e. a covered "accident" under the definition of occurrence) also be a "sudden and accidental" event under the exception?³⁷ Inherently, a contradiction appears to exist between the policy definition of occurrence and the exclusion due to the use of the "accident" concept in both the definition and the exclusion.

1. *The Insurance Industry Interpretation*

From the industry's standpoint in writing the exclusion and exception, liability coverage was to be excluded for "willful, intentional or expected" polluting violations.³⁸ As understood in the context of the policy, and from the insurers' point of view, an occurrence that is covered includes an accident which is an event that results in injury or damage "neither expected nor intended from the standpoint of the insured."³⁹ The exclusion clause excludes polluting occurrences, but excepts from exclusion (i.e. covers) polluting occurrences that are sudden and accidental. The issue then is whether accidental in this context means the same as accidental in "occurrence." The argument posited by the insurance industry in response to this issue is that where the insured intends to perform the activity which causes the damage, and pollution is a known by-product of such activity, the release of contaminants causing such damage cannot be said to be unexpected or unintended.⁴⁰ Therefore, the event is not sudden and accidental and raises no duty of defense or indemnification. A review of the judicial history of this issue, however, shows that the courts

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

37. See cases cited *supra* note 35.

38. Soderstrom, *The Role of Insurance in Environmental Litigation*, 11 FORUM 762, 767 (1976). By using the word "intentional," the insurance industry did not mean to limit exclusion from coverage to instances where the inception of pollutants into the surrounding area was the deliberate objective of the insured. The intent of the insured did not have to be criminal. The insured's actions could be intentional although their consequences were not foreseeable. The nature of the consequences of the insured's actions was the liability inhibiting factor. See generally Ryneerson, *supra* note 30, at 517.

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

40. *Id.*

do not always agree with this analysis. Courts have concluded that the requisite unexpectedness or unintentional character on the part of the insured pertains to the resulting damage and not to the activity which caused the damage.⁴¹

2. Court Interpretations

In answering the question of whether the pollution exclusion, sudden and accidental exception, and occurrence definitions are reconcilable, courts must struggle with the issue of ambiguity. A strong argument for ambiguity exists when the exclusionary and exception language is read against the policy definition of occurrence. The reasoning behind this argument was elucidated in *Fireman's Fund Insurance Companies v. Ex-Cell-O Corp.*⁴² The district court summarization of policyholder arguments concluded that because "sudden" is undefined in the policy, and "accident" is defined in the occurrence definition which holds an occurrence to be "an accident, including continuous or repeated exposure to conditions," an inherent conflict exists in the policy language.⁴³ The ambiguity is the result of the undefined exception being read in relation to the occurrence definition.⁴⁴ This inferred conflict permits an interpretation which transposes the definition of accident from the occurrence language upon the sudden and accidental exception. The result is an argument that the exclusion should be understood as follows: "This exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental, including continuous or repeated exposure to

41. See also *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 426 N.Y.S.2d 603 (1980), a case stemming from damages sustained when a gasoline storage tank, installed and maintained by the insured, leaked causing damage to nearby property. The Supreme Court of New York opined that "[i]f there was no intent to cause harm then any injury resulting from ordinary negligence is considered to be accidental. The 'accident' is simply the undesigned event and the natural and ordinary consequences of a negligent act are not precluded." *Id.* at 488, 426 N.Y.S.2d at 605.

42. 702 F. Supp. 1317 (E.D. Mich. 1988).

43. *Id.* at 1323.

44. The conflict argument is apparent when "sudden" is juxtaposed against the occurrence definition which refers to "continuous and repeated exposure." The terms do not seem to be reconcilable as "continuous and repeated" does not bear an inference of immediacy that would be found in the term "sudden." Hence, a conflict exists when the sudden and accidental exception is defined in relation to the occurrence definition because both the exception and the definition employ the word "accident."

The *Ex-Cell-O* court also stated that an argument of ambiguity existed which found the sudden and accidental exception ambiguous simply because it was undefined. *Id.* The court flatly rejected this argument stating that the absence of a definition does not in and of itself establish ambiguity. *Id.*

conditions.”⁴⁵

The district court found this argument to be a misinterpretation of the policy as the term “accident” is not defined in the CGL as “including continuous or repeated exposure to conditions.”⁴⁶ This language is actually from the definition of occurrence. The court concluded that to negate the possible inference from the term “accident” of being limited to conditions of short duration, the occurrence definition was written to include such repeated or ongoing polluting instances.⁴⁷ Therefore, the connotation from the term “accident” should not be ignored as the definition of occurrence was written to have a different interpretation from the term “accident”.

The argument proffered by insureds as stated above also produces an untenable result from the point of view of the insurance companies as it vitiates the limitations the insurance industry sought to establish through the exclusion. Repeated polluting incidents would still warrant coverage under the exception. When the individual provisions are read as separate and distinct entities, however, reconciling the apparent contradiction poses less of an interpretive dilemma. This interpretation was the basis of the Sixth Circuit Court of Appeals’ holding in *United States Fidelity & Guaranty Co. v. Star Fire Coal, Inc.*⁴⁸ This case arose out of an underlying suit initiated by a nearby resident of a coal tippie operated by the insured, who allegedly sustained personal bodily injury and property damage due to emissions of coal dust from the Star Fire operation.⁴⁹ The coal dust was generated and discharged as part of Star Fire’s normal business operation and was cited on a number of occasions by the Kentucky Division of Air Pollution Control for fugitive dust emissions.⁵⁰ Star Fire brought suit against its insurer when USF&G refused to provide coverage

45. *Id.* The *Ex-Cell-O* court stated a number of courts had accepted this understanding of the policy language. *Id.* (citing *New Castle County v. Hartford Acc. & Indem. Co.*, 673 F. Supp. 1359, 1363-65 (D. Del. 1987); *Jackson Twp. Mun. Util. Auth. v. Hartford Acc. & Indem. Co.*, 186 N.J. Super. 156, 164-65, 451 A.2d 990, 994 (1982); *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 488, 426 N.Y.S.2d 603, 605 (1980)).

46. *Id.* at 1324.

47. *Id.*

48. 856 F.2d 31 (6th Cir. 1988).

49. *Id.* at 32.

50. *Id.* The coal dust was emitted when crushed coal was dropped into a pile from a conveyor belt. Star Fire had attempted to correct this emission, through the use of water spray systems, but was unable to control the problem on a consistent basis. *Id.*

for the underlying damage and would not defend Star Fire in the injunction suit brought by the residential plaintiff.

Star Fire argued the use of forms of the word "accident" in both the occurrence definition and the exception to the pollution exclusion clause created a "latent ambiguity" in the contract, which as a matter of law, had to be construed in favor of the insured.⁵¹

The appellate court expressly rejected this argument, stating the following: "We believe the 'occurrence' definition results in . . . coverage for continuous or repeated exposure to conditions causing damage in all cases except those involving pollution, where coverage is limited to situations where the *discharge* was 'sudden and accidental.'" ⁵² The *Star Fire* court read the provisions as separate and distinct entities, refusing to find any ambiguity in the language. The court concluded that the contractual language was "'clear and plain, something only a lawyer's ingenuity could make ambiguous.'" ⁵³

When the occurrence provisions of the CGL policy is interposed upon the exclusion, the sudden and accidental exception becomes convoluted and ineffective. If courts do not read the occurrence definition as a separate and distinct entity from the exception to the pollution exclusion clause, a sudden and accidental release can easily become synonymous with unexpected and unintended damage. Such a reading causes a shift in emphasis from the nature of the release of pollutants to the nature of the damages caused by the release. Insureds have a considerably easier burden of proof for purposes of the exception in showing that the resulting damages were unexpected and unintended rather than proving the same for the release pollutants into the environment. Courts who accept the policyholder construction of the exception will find allocating indemnification costs on the insurer justifiable.⁵⁴

51. *Id.*

52. *Star Fire*, 856 F.2d at 34 (emphasis in original).

53. *Id.* at 34. (quoting *American Motorists Ins. Co. v. General Host Corp.*, 667 F. Supp. 1423 (D. Kan. 1987)).

54. See *supra* note 41 pertaining to *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 426 N.Y.S.2d 603 (1980); see also *Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co.*, 668 F. Supp. 1541 (S.D. Fla. 1987); *Jonesville Prods., Inc. v. Transamerica Ins. Group*, 156 Mich. App. 508, 402 N.W.2d 46 (1986); *Jackson Twp. Mun. Util. Auth. v. Hartford Acc. & Indem.*, 186 N.J. Super. 156, 451 A.2d 990 (1982).

The effect of such a construction of the term "sudden," has been noted by a variety of courts, including the Supreme Court of North Carolina, which stated: "Courts that have construed 'sudden' broadly, defining it in terms of the expect-

B. Interpreting the Exclusion and Exception

It is apparent from the above discussion that the individual policy provisions are quite capable, when read together, of generating judicially inconsistent opinions. Interpretation of the pollution exclusion clause by itself without reference to the occurrence definition has been the source of considerable litigation. The central issue of such litigation focuses on the undefined language used to express the exception parameters. Quite simply, the courts cannot agree on the definition of a "sudden and accidental" polluting event.

Black's Law Dictionary defines sudden as "happening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen; unprepared for."⁵⁵ Black's defines accidental as "happening by chance, or unexpectedly; taking place not according to usual course of things; casual; fortuitous."⁵⁶

Definitionally, and from common usage, the terms appear to connote something occurring unexpectedly and momentarily; that is, they appear to have temporal connotations. This was the connotation the insurance industry intended to foster in drafting the exclusion.⁵⁷ However, courts have been reluctant to infer such an intention in the absence of definitive contractual language. Instead, some courts have read the language of the exception as being ambiguous because it is undefined in the policy.⁵⁸

1. *Judicial Finding of Ambiguity*

In *New Castle County v. Hartford Accident & Indemnity Co.*,⁵⁹ the

tation element of accident rather than focusing on its temporal significance, have deemed polluting events excepted [from the exclusion] that otherwise appear to fit squarely within the exclusion." *Waste Management of the Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 699, 340 S.E.2d 374, 382 (1986). *See also* FL *Aerospace v. Aetna Casualty & Sur. Co.*, 897 F.2d 214 (6th Cir. 1990); *United States Fidelity & Guar. Co. v. Star Fire Coals, Inc.*, 856 F.2d 31 (6th Cir. 1988).

55. BLACK'S LAW DICTIONARY 1284 (5th ed. 1979).

56. *Id.* at 15.

57. *See supra* note 39 and accompanying text.

58. *See, e.g.*, *New Castle County v. Hartford Acc. & Indem. Co.*, 673 F.Supp. 1359 (D. Del. 1987); *Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co.*, 668 F.Supp. 1541 (S.D. Fla. 1987); *Jackson Twp. Mun. Util. Auth. v. Hartford Acc. & Indem. Co.*, 186 N.J. Super. 156, 451 A.2d 990, (1982); *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 426 N.Y.S.2d 603, (1980); *Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co.*, 17 Ohio App.3d 127, 477 N.E.2d 1227 (1984).

59. 673 F. Supp. 1359 (D. Del. 1987). The case stems from a series of lawsuits brought as a result of a county landfill leaching contaminants into groundwater used by both private individuals and a neighboring water company. The water company's suit sought injunctive relief as well as reimbursement pursuant

District Court of Delaware noted that the word sudden has a definition of "happening without previous notice" or "occurring unexpectedly."⁶⁰ However, the court also indicated that other definitions of the word give the connotation of brevity.⁶¹ As a result, more than one reasonable definition existed and the court found the term to be ambiguous.⁶² Under Delaware law, insurance policies are contracts of adhesion, and as such, are construed strictly against the drafter in the event of ambiguity.⁶³ Therefore, the court resolved the ambiguity in favor of the insured and held that Hartford had a duty to defend and indemnify the County in the underlying cases.⁶⁴

2. Judicial Interpretation of Temporal Meaning

In opposition to holdings such as those in *New Castle County* are decisions which find the term "sudden and accidental" to have a plain, everyday meaning that is not ambiguous. For example, in *FL Aerospace v. Aetna Casualty & Surety Co.*,⁶⁵ the Sixth Circuit Court of Appeals construed the sudden and accidental exception as entailing a temporal construction; therefore, Aetna was not liable for indemnification costs resulting from claims

to section 107 of CERCLA for the cost of responding to the contamination. *Id.* at 1361-62 (citing *Artesian Water Co. v. New Castle*, No. 83-854 (D. Del. 1983)). Additionally, the United States sought injunctive relief and reimbursement of response costs under section 107 of CERCLA and asserted county liability under the RCRA. *Id.* at 1362 (citing *United States v. New Castle County*, No. 80-489 (D. Del. 1984)).

60. *Id.* at 1362-63 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 22843 and BLACK'S LAW DICTIONARY (5th ed. 1979)).

61. *Id.* at 1363.

62. *Id.* The court took notice of the case law supporting the county's contention that the term is ambiguous (citing *Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co.*, 668 F. Supp. 1541 (D. Fla. 1987) and *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 426 N.Y.S.2d 603 (1980)), as well as the case law supporting Hartford's contention that the term is unambiguous (citing *Claussen v. Aetna Casualty & Sur. Co.*, 865 F.2d 1217 (11th Cir. 1989)). However, the court concluded that none of the cases were binding and that because such an authoritative split existed, the ambiguity could not be resolved by the existing case law. *Id.* at 1363.

63. *New Castle County*, 673 F. Supp. at 1362.

64. *Id.* at 1362-63 (citing *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925 (Del. 1982)). The court stated that an ambiguity is created when the contract terminology permits more than one reasonable interpretation. *Id.* As the term "sudden" was susceptible to multiple connotations, it was ambiguous and therefore had to be construed in favor of the insured. *Id.* at 1362. See generally *Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co.*, 668 F. Supp. 1541 (D. Fla. 1987); *Cohen v. Erie Indem. Co.*, 288 Pa. Super. 445, 432 A.2d 596 (1981); *Allstate Ins. Co. v. Klock Oil Co.* 73 A.D.2d 486, 426 N.Y.S.2d 603 (1980).

65. 897 F.2d 214 (6th Cir. 1990).

against the insured's successor in interest for contamination of surrounding property caused by the storage and removal of liquified industrial wastes.⁶⁶ In the court's analysis, the exception was not found to be ambiguous; rather, the court decided the terms "sudden" and "accidental" should be given their "plain, everyday meaning" which entailed the temporal construction.⁶⁷ "When the words are free from ambiguity the instrument is always to be construed according the strict, plain, common meanings of the words themselves."⁶⁸ A lay person would read the exclusionary language to deny coverage of the insured because the facts did not comport with the temporal construction inherent in the plain meaning of the words sudden and accidental.

The fact that different courts can read the exact same policy language and reach diametrically opposite conclusions seems to suggest that the pollution exclusion clause is at best, tenuously reliable in its application as a modification of CGL policies.

When read as unambiguous separate and distinct provisions of CGLs, the occurrence definition is compatible with the pollution exclusion clause and its exception. Insurance companies could have been spared the ambiguity argument altogether had the Bureau specifically defined the exception in its 1973 revision.⁶⁹ Considering the impact any language which broadens the scope of indemnification responsibility has on the policy (not to mention on the insurance companies), the language should have been explicitly drafted so as to clearly state the intentions of the drafter.

66. *Id.* at 216.

67. *Id.* at 219. The appeals court cited the dictionary definition of sudden, defining it as "happening, coming, made or done quickly, without warning or unexpectedly; abrupt" *Id.* (quoting AMERICAN COLLEGE DICTIONARY 1209 (1970)). The court also cited the definition of accidental, as "happening by chance; unintentional or fortuitous." *Id.* (quoting AMERICAN COLLEGE DICTIONARY 8 (1970)). The court stated, "[t]hese definitions comport with the common understanding of the terms as they are used in everyday parlance." *Id.* The court reasoned that in everyday parlance, the term sudden had a temporal component which barred the insured from claiming that the contamination which resulted from the long term storage of liquefied industrial wastes was sudden and accidental. *Id.* at 219-20.

68. *Id.* at 219 (footnote omitted).

69. For a review of a model defined exception, see *infra* notes 129-32 and accompanying text.

IV. ANCILLARY CONSIDERATIONS

A. Release Versus Damages

The language of the CGLs has raised related issues regarding the means by which a pollutant enters an area and causes contamination. Some courts focus on whether the pollutants which caused the contamination entered the environment unexpectedly, while others focus on whether the resulting damage could be expected as a result of the insured's activity or whether the insured regularly disposed of hazardous contaminants. Those courts which focus on the former consideration use an analysis similar to that in *Grand River*, which predated the widespread inception of the pollution exclusion clause.⁷⁰ This analysis was adopted by the United States District for the Southern District of Florida in *Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guaranty Co.*,⁷¹ a case arising from claims made against the insured by the EPA in response to PCB⁷² contamination around Pepper's property.⁷³ The court interpreted the sudden and accidental exception of the exclusion clause to include the situation where the release of PCBs into an aquifer was neither intended nor expected from the insured's point of view.⁷⁴ Absent a showing of knowledge or expectation of damage, the insured cannot be deemed to be an "active" polluter, or one who purposely or knowingly pollutes the environment.⁷⁵ To purposely or knowingly pollute connotes an inference of intent upon the insured. The interpretation of intent for courts adopting *Pepper's* reasoning for assessment of liability is limited to the consequences of the insured's actions. Intent to do harm would be a prerequisite for withholding coverage. Unintentional consequences of deliberate insured actions would retain coverage.⁷⁶ Therefore, the insured still falls under the purview of the sudden and accidental exception.⁷⁷

70. For a discussion of the *Grand River* analysis, see *supra* note 22 and accompanying text. The fact that judicial emphasis has often continued to fall on whether the pollutants entered the environment unexpectedly (thereby causing unexpected damage) rather than on the activity of the insured as contemplated by the industry (see *supra* text accompanying note 41) suggests that the pollution exclusion clause has not provided sufficient clarification of the industry's intent.

71. 668 F. Supp. 1541 (S.D. Fla. 1987).

72. PCB is the abbreviation for polychlorinated biphenyls.

73. *Pepper's Steel*, 668 F. Supp. at 1543.

74. *Id.* at 1549.

75. *Id.* at 1550.

76. See generally Rynearson, *supra* note 30 at 517-18.

77. The *Pepper's* court factually concluded that the insured did not know it was releasing PCB's into the environment. *Pepper's Steel*, 668 F. Supp. at 1549.

The *Pepper's* court made a distinction between intent to release pollutants and intent to pollute.⁷⁸ Such a distinction on the nature of the intent was considered irrelevant by the Supreme Court of North Carolina in *Waste Management of the Carolinas, Inc. v. Peerless Insurance Co.*⁷⁹ The case originated from claims alleging the contamination of well water from the leaching of waste materials disposed of in a landfill operated by Waste Industries.⁸⁰

The *Waste Management* court held that the focus of the pollution exclusion was not concerned with expectation or intention as was the case with the occurrence language of the policy.⁸¹

However, its opinion says nothing concerning the fact that the insured had been cited by the EPA for the same violation six years earlier. *Id.* at 1543. By ignoring this fact, the court leaves unanswered a compelling issue which may have caused doubt in *Pepper's* contention that it was unaware that it was releasing PCB's into the environment. A second question of fact was created which required consideration: Once you know you have caused a polluting occurrence and you take remedial action, are you liable when that remedial action fails? Other courts have concluded that recurring polluting events are sufficient to place the insured on notice that the potential for such contamination exists, and therefore these events do not come under the sudden and accidental exception to the pollution exclusion clause in the future. *See infra* note 98 and accompanying text.

78. *Id.* at 1549.

79. 315 N.C. 688, 340 S.E.2d 374 (1986).

80. *Id.* at 689, 340 S.E.2d at 376. When the United States filed suit against Waste Industries, it responded by filing third party complaints against Trash Removal Services, Inc. (TRS) seeking indemnification or contribution, as TRS had delivered quantities of the contaminating wastes to the landfill. TRS subsequently requested defense of the suit from its insurers, including Peerless. When the insurer denied a duty to defend or indemnify, this suit commenced. *Id.* at 690, 340 S.E.2d at 376.

It is interesting to note the *Waste Management* court's factual findings concerning the issue of ambiguity. According to the court's review of the policy language and facts at issue, the actions of the insured did not fall under the clear and unambiguous construction of the sudden and accidental exception to the exclusion. (The court employed the "comparison test" to determine if TRS's liability insurance provisions would require coverage when compared against the events being alleged. In the comparison test, pleadings are read side-by-side with the policy to ascertain if the alleged events are covered or excluded by the policy provisions. *Id.* at 693, 340 S.E.2d at 378.) The court concluded that the non-technical language of the exclusion should be read in light of the meanings the words receive in ordinary speech, and though the possibility exists to find ambiguity in the policy language, "it strains at logic to do so." *Id.* at 695, 340 S.E.2d at 379.

81. *Id.* at 696, 340 S.E.2d at 380-81. In a footnote, however, the court noted that according to R. LONG, *supra* note 34, at 58, the exclusion eliminated coverage for damage which appeared to be expected or intended on the part of the insured and therefore is excluded under the occurrence definition. The reference back to the occurrence language is the cause of misinterpretation for many courts which see the exclusion and exception as nothing more than a restatement of the occurrence provision of the policy. *Waste Management*, 315 N.C. at 696, 340 S.E.2d at 380. Rather than focusing on the nature of the damage, these courts focus on the accidental nature of the cause of the damage. In sup-

Rather, the focus of the exclusion was said to center more on the nature of the damages; that is, the fact that the discharge pollutes or contaminates. Only the sudden and accidental exception to the exclusion is concerned with the moment of release or dispersal.⁸² Courts that interpret the exclusion in reference to the release itself rather than in relation to the fact that the release pollutes or contaminates find it easy to bootstrap the sudden and accidental exception onto any situation where a gradual release of pollutants was not specifically alleged.⁸³ The court cited as an example the case of *Travelers Indemnity Co. v. Dingwell*⁸⁴ where just such an outcome was reached.⁸⁵ The *Dingwell* court found that the sudden and accidental exception may apply where an insured's negligence permitted wastes to seep into the ground over time and contaminate well water.⁸⁶ The court held that it was the release from the Dingwell facility, rather than the seepage or damage, that was the polluting occurrence.⁸⁷ Since, according to the insured, the release of pollutants was sudden, the *Dingwell* court found that the "behavior of the pollutants in the environ-

port of this contention, the court refers to an opinion in *Jackson Twp. Mun. Util. Auth. v. Hartford Acc. & Indem.*, 186 N.J. Super. 156, 164, 451 A.2d 990, 994 (1982), which held that "the clause can be interpreted as simply a restatement of the definition of 'occurrence'—that is, that the policy will cover claims where the injury was neither expected nor intended." *Waste Management*, 315 N.C. at 697, 340 S.E.2d at 380.

82. *Waste Management*, 315 N.C. at 697, 340 S.E.2d at 381.

83. *Id.* The court inferred a temporal interpretation of the sudden and accidental exception, evidenced by its conclusion that the exclusion "limits the insurer's liability for accidental events by excluding damage caused by the gradual release, escape, discharge, or dispersal of irritants, contaminants or pollutants." *Id.* Such an interpretation of the exception would effectively bar a considerable number of suits where damage was caused by gradual contamination such as in *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989) (insurer had duty to defend where insured's dump site caused personal injury and property damage due to pollutant emission over time as insured did not intentionally or knowingly pollute surrounding area), *reh'g denied*, 894 F.2d 498 (2d Cir. 1990) and *Travelers Indem. Co. v. Dingwell*, 414 A.2d 220 (Me. 1980) (appellate court found that where insured's negligence allowed contaminants to permeate ground and contaminate well water over time, releases could have been unexpected or unintended and therefore, outside of exclusion). By focusing on the damage rather than the accidental nature of the occurrence insureds would have less incentive to remain ignorant about the potential for contamination and therefore, would be forced to increase their vigilance so as to avoid potential polluting occurrences, which would be excluded from coverage. In this way, the public policy inherent in the exclusion would be enforced.

84. 414 A.2d 220 (Me. 1980).

85. *Waste Management*, 315 N.C. at 697, 340 S.E.2d at 381 (citing *Dingwell*, 414 A.2d at 225).

86. *Id.*

87. *Id.*

ment *after* release [to be] irrelevant.”⁸⁸ The *Waste Management* court, not surprisingly, considered this construction of the exclusion “to be so restrictive as to vitiate the ‘sudden and accidental’ exception.”⁸⁹

Such a construction as posited by the *Dingwell* court would also contravene the public policy goal of the pollution exclusion clause as it would encourage insureds to remain ignorant of the potential dangers posed by the wastes in their landfills. Coverage would still be afforded to the insured who intentionally dumps hazardous wastes as long as the resulting contamination was unexpected.⁹⁰ When the public policy is ignored, the likelihood that insureds will continue to pollute increases as the economic incentive to do so greatly exceeds the incentive to enact corrective or preventative measures to guard against polluting the environment.

B. The Problem of Ongoing Polluting Occurrences

The second ancillary issue centers on the question of whether a polluting event can be continuous or repeated and still be considered sudden by the insurer. The issue was the focal point of the Sixth Circuit Court of Appeals in *Grant-Southern Iron & Metal Co. v. CNA Insurance Co.*⁹¹ The facts of the underlying case against Grant-Southern alleged that the company’s iron briquetting plant emitted various pollutants “regularly and continuously” causing both personal injury and property damage.⁹²

The district court granted summary judgment for CNA on

88. *Id.* (emphasis in original).

89. *Id.* The interpretive difference between the *Waste Management* and *Dingwell* holdings is essentially one of timing. Under the *Waste Management* approach, the moment of release occurs when the contaminant permeates the environment and, for example, seeps into an aquifer; under the *Dingwell* analysis, release occurs when the pollutant actually leaves the controlled enclosure which held the substance. Ultimately, though the *Waste Management* court concluded that leaching of pollutants cannot be covered by the sudden and accidental exception, the wording of the pleadings determined the decision of the court. The court found no specific or implied allegation concerning the sudden release or escape of contaminants in the pleadings or deposition, and therefore concluded that the alleged occurrences fell outside the policy coverage. *Id.* at 700, 340 S.E.2d at 383.

90. *Id.* at 697-98, 340 S.E.2d at 381. The court stated that in such cases, “it pays the insured to keep his head in the sand,” because he would not be held liable for the contamination which would be “sudden” from his point of view. *Id.* at 698, 340 S.E.2d at 381.

91. 905 F.2d 954 (6th Cir. 1990), *rev’g* 669 F. Supp. 798 (E.D. Mich. 1986).

92. *Id.* at 955. The company had received no less than thirty-four violation notices between 1959 and 1981. *Id.* at 958.

the basis that Grant-Southern had received numerous violation notices concerning the emissions, and, therefore, it was guilty of continuous and ongoing pollution which could not have been "accidental".⁹³ The appeals court reversed the decision of the district court, observing that some of the Grant-Southern violations were stamped with the word "complied" or noted remedial steps taken to correct the violations.⁹⁴ The court stated that such facts suggested isolated or discrete polluting events that would fall under the purview of the exception.⁹⁵ However, several of the violations were dated within close chronological proximity of each other, which suggested ongoing or continuous polluting which would not be coverable under the exclusion.⁹⁶ Therefore, the court found a "genuine issue of fact" to exist as to whether the occurrences were, indeed, sudden and accidental which was sufficient to reverse the district court's grant of summary judgment.⁹⁷

Consideration of the sudden and accidental language in relation to "isolated and discrete" occurrences could potentially weaken the effectiveness of the exclusion if it is used to broaden the purview of the exception. Polluting events do not necessarily have to be continuous, ongoing, or even predictable to be expected, particularly when the occurrence is considered in light of the insured's normal business operation. An insured may not be aware that its activities will cause a certain type of damage, but it should be on notice once it has caused a polluting occurrence. Polluting occurrences that happen repeatedly for the same reasons are difficult to justify as "accidents". This was the finding of the court of appeals in *Barnet of Indiana, Inc. v. Security Insurance Group*,⁹⁸ a case stemming from an underlying suit against the insured alleging that the emissions from Barnet's operations

93. *Id.* at 956.

94. *Id.* at 958.

95. *Grant-Southern*, 905 F.2d at 958.

96. *Id.*

97. *Id.* In granting summary judgment, the district court found the public policy argument of prohibiting industries from seeking insurance coverage rather than stop polluting the environment persuasive in its decision to grant partial summary judgment in favor of the defendant insurance company. *Grant Southern*, 669 F. Supp. 798 at 800-01. The court stated that "insurance companies did not undertake to indemnify Grant-Southern against events which were within its control and the occurrence of which was known to the insured." *Id.* at 801. In reaching such a conclusion, the *Grant-Southern* court relied on the New York supreme court, appellate division decision in *Niagara County v. Utica Mut. Ins. Co.*, *infra* note 120 and accompanying text.

98. 425 N.E.2d 201 (Ind. App. 1981).

caused a fog which reduced visibility on a nearby highway. As a result of the decreased visibility, an automobile accident occurred which killed a motorist.⁹⁹ Barmet's aluminum recycling operation had caused gaseous emissions on a number of occasions due to malfunctions in the plant's pollution control system. Barmet argued that the ensuing damage (the death of the automobile driver) was neither expected nor intended as the emissions were unforeseeable and unpredictable.¹⁰⁰ The court found this argument unpersuasive, as Barmet was aware that its operation often produced the emissions and had, in fact, received numerous complaints as a result of these emissions.¹⁰¹ Therefore, the court found that the discharge could not be sudden and accidental within the meaning of the policy.¹⁰²

The court conceded the fact that Barmet may not have intended for the emissions to obstruct visibility and lead to the accident.¹⁰³ However, the insured was fully cognizant of the fact that its pollution control system occasionally malfunctioned¹⁰⁴ and produced emissions. Therefore, it concluded that "Barmet may have been unable to predict the exact time when the emissions would be discharged, but they certainly knew the emissions would continue as a part of their business operations."¹⁰⁵ For this reason, the accident could not be held to be unexpected or unforeseeable.¹⁰⁶

Without directly addressing the public policy interest inherent in the exclusion, the *Barmet* court alluded to the goal of plac-

99. *Id.* at 202.

100. *Id.* at 202-03. Barmet stated that there was no mechanism or procedure by which it could accurately predict when the emissions would escape. *Id.* at 202.

101. *Id.* at 203.

102. *Id.*

103. *Id.* at 203.

104. Testimony at trial revealed that the emissions occurred anywhere from occasionally to once or twice a week. *Id.* at 202.

105. *Id.* at 203. Similarly, in *City of Carter Lake v. Aetna Casualty & Sur. Co.*, 604 F.2d 1052 (8th Cir. 1979), the court agreed with an insurer that where an insured city had reason to expect that raw sewage which had backed up into residential housing on six occasions due to a shutdown of a city-run pump, would do so again, the insurer had no duty to defend or indemnify. The court stated that to interpret the word "accident" is to look at the question of whether a result is "expected as a matter of probability." Reasonable foreseeability is not a factor in this type of analysis. Rather, from an examination of the totality of circumstances, if the insured knew or should have known there was a substantial probability that pollution or contamination would occur as a result of his acts or omissions, then no accident or occurrence has taken place as defined in the policy. *Id.* at 1058-59.

106. *Barmet*, 425 N.E.2d at 203.

ing the liability for polluting events on the party most able to control their occurrence.¹⁰⁷ The court stated Barmet was aware of the incidence of emissions coming from their plant and, therefore, had the opportunity to correct the situation.¹⁰⁸ This inference is similar to the public policy argument put forth by the *Waste Management* court which stated that relegating the economic liability for polluting events occurring over time upon the insured "places the responsibility to guard against such occurrences upon the party with the most control over the circumstances most likely to cause the pollution."¹⁰⁹

V. A CRITICAL VIEW OF THE DISPUTE: THE UNDERLYING RATIONALES

A variety of explanations have been proffered to explain the inclination of some courts to interpret the provisions of the CGL policies so strictly against the insurance companies, despite the pollution exclusion language. These range from explanations which border on alleging judicial caprice¹¹⁰ to the opinion that the sudden and accidental terminology is inherently ambiguous.¹¹¹

A further argument put forth suggests that courts have ignored the underlying public policy¹¹² inherent in the pollution exclusion clause in favor of adherence to provisions of contract construction which evolved in the interpretation of such non-business related concerns as automobile insurance policies.¹¹³

107. The court found that Barmet was aware that its pollution control system failed on a regular basis. *Id.* Therefore, the responsibility for any polluting events occurring as a result of this repeated failure would logically fall on the party most able to control the situation—the insured.

108. *Id.*

109. *Waste Management*, 340 S.E.2d at 381.

110. An interesting footnote from a Georgetown Law Journal Note eloquently gave a potential explanation of why courts have often ignored or distorted the insurer's intent in drafting the sudden and accidental terminology. Favoritism toward the insured comports with the following general proposition: "[C]ourts really hate polluters but they hate insurers even more." Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L. J. 1237, 1240 (1986).

111. See *supra* note 62 and accompanying text; see also Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co., 668 F. Supp. 1541 (D. Fla. 1987); Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co. of New York, 218 N.J. Super. 516, 528 A.2d 76 (1987); Allstate Ins. Co. v. Klock Oil Co., 73 A.D.2d 486, 426 N.Y.S.2d 603 (1980).

112. For an explanation of the public policy considerations in the pollution exclusion clause, see *infra* note 120 and accompanying text.

113. Adler & Broiles, *The Pollution Exclusion: Implementing the Social Policy of*

When interpreting the CGL within the ambit of standard contractual maxims, the courts fail to recognize the difference in effect judicial interpretation has on business decisions as opposed to matters which are not business related. Therefore, when courts interpret CGLs with environmental implications in the same way they would interpret an automobile insurance policy, they ignore the fact that judicial interpretation of an automobile insurance policy will generally not effect automobile usage; conversely, judicial interpretation of matters relating to business will often affect corporate decision-making.¹¹⁴ The inference is clear: by applying a strict contractual reading of the pollution exclusion clause, as would be appropriate in non-business related matters such as automobile insurance policies, the courts have failed to challenge corporate decision-makers who may find that it is more cost effective to rely on insurance indemnification for polluting events rather than bear the expense of responsibility for contaminating the environment or implementing preventative or corrective measures.

Perhaps the most short-sighted explanation of why courts have construed the exclusion clause so liberally in favor of insureds is a "deep pocket" scapegoat approach whereby courts have found a convenient source of cleanup funds in the insurance carriers.¹¹⁵ According to this explanation, the disincentive to pollute, which is the inferred focus of the pollution exclusion clause, has been ignored by courts in need of a "deep pocket" to finance environmental cleanup.¹¹⁶ In the typical scenarios involving such an explanation, the operator of a landfill and/or the operator's assets have disappeared, or the insured either does not have sufficient assets, or the insured is in bankruptcy and, therefore, cannot cover the cost of cleanup. In light of often-limited state or federal cleanup resources, insurance carriers provide a convenient source

Preventing Pollution Through the Insurance Policy, 19 LOYOLA L. R. 1251, 1261 (1986).

114. *Id.* at 1262. Adler and Broiles argue that in failing to distinguish the inherent differences between the interpretation of business related and non-business related insurance policies, the courts have ignored the business sophistication of the insureds in dealing with the pollution exclusion issue. *Id.* The social policy relevance of the pollution exclusion is not addressed because the issue "has been obscured by judicial platitudes such as 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.'" *Id.* at 1261 (quoting *Buckeye Union Ins. v. Liberty Solvent & Chem. Co.*, 477 N.E.2d 1227, 1232 (Ohio Ct. App. 1984)).

115. *Id.* at 1261.

116. *Id.*

of funds to finance cleanup costs.¹¹⁷ The justification courts have employed for the assessment of indemnification costs on the insurers is by “finding some ‘doubt’ or ‘ambiguity’ in the [pollution exclusion] clause which must be resolved in favor of the insured.”¹¹⁸

An often cited reason for refusing to impute liability for an insured’s polluting event upon the insurance companies has been the public policy consideration. Many courts have adopted an activist approach in effectually concluding that the best way to reduce the number of polluting incidents is by forcing polluters to assume financial responsibility for their contaminating events.¹¹⁹ For example, in *Niagara County v. Utica Mutual Insurance Co.*,¹²⁰ a case originating from claims against Niagara County, New York, involving the infamous Love Canal site, the court was adamant about enforcing the underlying public policy inherent in the exclusion.¹²¹ Under New York law, the pollution exclusion clause is required to be included in insurance policies so as to avoid the potential for commercial enterprises to hide behind insurance indemnification rather than stop polluting the environment.¹²² “A polluting corporation might continue to pollute the environment if it could buy protection from potential liability for only the small cost of an annual insurance premium, whereas, it might stop pol-

117. Joest, *supra* note 31, at 261.

118. Adler & Broiles, *supra* note 113, at 1261 (footnote omitted). The result of assessing damages to the “deep pocket” is a tenuous short-term solution. There are instances when insurance indemnification is a proper source of cleanup funds. However, if courts continue to “draw from the well” without regard for the liability parameters established in the pollution exclusion clause, the availability of future cleanup funds could be adversely affected. The response of the insurance industry to increased liability costs from the use of occurrence based policies was the attempt to restrict the parameters of coverage in the pollution exclusion clause. Insurance companies will undoubtedly be forced to respond to increased liability costs despite the pollution exclusion if courts continue to seek a deep pocket solution. Such a response may be in the form of higher premiums (which could price many businesses which require such insurance out of existence) or a flat refusal to provide coverage for potential environmental polluters. See generally, Cheek, Graham & Wardzinski, *supra* note 6, at 21.

119. See e.g., *Waste Management*, *supra* note 79 and accompanying text.

120. 80 A.D.2d 415, 439 N.Y.S.2d 538 (1981).

121. *Id.* at 540. The “Love Canal” litigation stemmed from complaints on behalf of some sixty-five claimants which alleged that various defendants recklessly dumped and abandoned waste products, debris, and chemicals which were, or eventually became, poisonous and inherently dangerous. *Id.* The contaminated property was subsequently sold to the plaintiffs (or their predecessors in title) for residential use without notification of the dangerous condition existing on the land. *Id.* at 416, 439 N.Y.S.2d at 539.

122. *Id.* at 418, 439 N.Y.S.2d at 540 (the exclusion is statutorily mandated under “Insurance Law, § 46, subds. 13, 14”).

luting, if it has to risk bearing itself the full penalty for violating the law."¹²³

If the public policy inherent in the exclusion is considered by a court interpreting the pollution exclusion clause, the potential to read ambiguity into the exception may be decreased. When one considers that the underlying goal of the exclusion is to force economic responsibility upon the polluting insureds (so as to reduce the incidence of polluting occurrences), the argument that the exception is ambiguous seems less compelling. As used in ordinary speech, the temporal component of the terms is evident and unambiguous.¹²⁴

123. *Id.* (citing N.Y. Legis. Ann. 1971, 353-54). The court expressed the public policy inherent in the exclusion in clear and uncompromising language, but still arrived at the conclusion that Utica Mutual did have a duty to defend Niagara County in the underlying Love Canal litigation. The court stated that there was no serious contention that Niagara County actually took part in any polluting. The complaints in reference to the county alleged that Niagara County had, among other things, failed to warn and safeguard its citizens, remove the contaminants, and had wrongly conveyed property in the area without warning about its dangers. *Id.* at 420, 439 N.Y.S.2d at 541. However, such allegations fall outside of the purview of the pollution exclusion clause. Utica Mutual had failed to show a nexus between the allegations of the complaint and the exclusionary language. *Id.* at 420, 439 N.Y.S.2d at 542. Rather, the basis of Utica Mutual's defense was that there was no language in either the New York statute or the pollution exclusion which limited the exclusion to acts by the insured. *Id.* at 419, 439 N.Y.S.2d at 540-41. The court found this to be irrelevant, as "to hold otherwise would require that we disregard the unqualified public policy intentment of the statute to prohibit polluters from spreading the risk of loss through the instrument of liability insurance." *Id.* at 419, 439 N.Y.S.2d at 541.

Factually, the *Utica Mutual* case poses a unique situation not clarified by the exclusion. Niagara County is a governmental entity which did not actually handle the contaminating wastes. The exclusion does not differentiate between the owners of the land and the operators of the waste sites. The county, as an insured, has coverage for its acts and in this situation, can argue that it did not act with respect to the placement of pollutants in the environment.

The court's dismissal of Utica Mutual's argument, however, could pose a potential dilemma in other similar scenarios. While it is true that Niagara County was not "actively" involved in the disposal of the contaminants, it was aware of their presence and the potential for injury or damage. Despite this knowledge, the court focused on the active or actual act of polluting in deciding on whether the exclusion was applicable. Such reasoning would necessarily permit the owner of land renting to a landfill operator to be indemnified for contamination which resulted from the leaching of wastes as long as he was not physically involved in the dumping of the pollutants. Potentially, those who merely have hazardous wastes stored on their property could be safe from the pollution exclusion clause under this scenario. *Id.* at 418-19, 439 N.Y.S.2d at 541; see also Note, *supra* note 110, at 1271.

124. See generally cases cited in *supra* notes 48, 65 & 79.

VI. EXITING THE QUAGMIRE?

A. A More Adequately Defined Exception Clause

A myriad of issues pertaining to the exclusion exist irrespective of the apparent contradiction between the occurrence language and the sudden and accidental exception. Interpretive differences focusing on the exception, public policy considerations, and contractual constructions provide ample fodder for judicial deliberation of the liability expectations of both insurers and insureds arising from CGL policies. The apparent contradiction in the contract language, however, presents the critical issue for resolution. The issue could have been avoided by including a defined sudden and accidental exception to the pollution exclusion clause. In its current form, some courts have defined the sudden and accidental exception based on the language found in the occurrence definition.¹²⁵ If the exception was defined according to the terms which the insurance industry intended it to be understood, the ability to convolute the limitations of coverage would be removed.¹²⁶

A possible defined exception, proceeding from the original pollution exclusion language,¹²⁷ could read as follows:

[B]ut this exclusion shall not apply if the discharge, dispersal, release, or escape is caused by a sudden and accidental event. Sudden and accidental events do not include wilful, negligent, or reckless acts or omissions of the insured. These wilful, negligent, or reckless acts or omissions include, but are not limited to, failure to properly inspect, replace, repair, maintain, or employ equipment and facilities so as to conform with applicable state and federal laws and regulations governing the handling, storage, transportation, dispersal, or release of waste materials.

Such a definition would provide coverage when the polluting release itself was caused by a sudden and accidental event. This considers the temporal component inherent in the insurance industry's interpretive argument. Coverage would be omitted, however, where a polluting release was precipitated by the in-

125. See generally cases cited *supra* note 45.

126. For a reading of this understanding, see *supra* note 52 and accompanying text.

127. For the pollution exclusion language, see *supra* note 28 and accompanying text.

sured's own negligence or failure to properly correct a defective condition in his machinery or his failure to properly maintain waste storage facilities.¹²⁸

Compliance with legislative standards on the handling of hazardous wastes imposes an obligation on the insured to actively maintain waste storage or producing facilities and equipment. When the machinery or facilities employed to store or transport wastes are incapable of being used reliably, the legislative standards cannot be met. When an insured fails to diligently maintain equipment or facilities, a polluting event which occurs as a result of the use of those items cannot be said to be sudden and accidental.¹²⁹

B. Overcoming The Ramifications of Liability Assessment

The split among jurisdictions as to the interpretive construction of the sudden and accidental exception to the pollution exclusion clause in relation to the coverage provisions of CGL policies is just one manifestation of the environmental cleanup problem. The true genesis of the problem is the fact that in prior periods, neither insurers nor insureds considered the issue as particularly pressing. Prior to the enactment of environmental legislation in the 1970's and 80's, which raised both public awareness of the problem and polluter responsibility standards, there were few, if any definitive laws regarding pollution or polluting violations.¹³⁰ Environmentally related liabilities assessed to insureds today were often not considered "pollution" according to any legislative standard at the time when the wastes were generated or disposed of by plant operators. In the advent of CERCLA legislation mandating a "Superfund" to finance environmental

128. The use of this definitional language would clarify the reasoning employed in such cases as *Barnet*. See *supra* note 98 and accompanying text for a discussion of the case. Repeated polluting occurrences, indicative of an insured's knowledge of equipment or facility defect, would not warrant coverage as the operator would be on notice of the probability of subsequent polluting events.

The temporal understanding of the word "accident," so important in such cases as *FL Aerospace* (see *supra* note 65 and accompanying text for a discussion of the case), would also be clearly recognizable. An insured who, through wilful neglect, allows the deterioration of his pollution storage, transportation, or handling assets, would be unable to claim that the eventual release of contaminants (precipitated by his negligence) was sudden and accidental as the moment of release would not be the controlling factor in assessing liability. The sudden and accidental nature of the occurrence precipitating the release would be the primary consideration for liability assessment.

129. See *supra* note 128.

130. Greenberg, *supra* note 7, at 26.

clean-up, and supplemental legislation such as the Superfund Amendments and Reauthorization Act of 1986 (SARA),¹³¹ an immediate onus was placed on polluters to come up with funds to pay the cost of repairing the damage they had caused to the environment. Estimates as to the cost of cleaning up the sites requiring correction generally range from 150 to 700 billion dollars.¹³²

Part of the problem from the insurers' point of view is that insurance premiums are set based on past experience, not future speculation. Insurers turn profits when premiums exceed the value of the risk assessed to each policyholder.¹³³ When Superfund liabilities were placed upon the insurers through indemnification for policies written prior to CERCLA's enactment, insurance companies had no reserves set aside for such expenses.¹³⁴ In effect, the actual value of risk assessed upon insureds and the costs incurred by insurers exceeded premium revenues.

Insurers and insureds, therefore, face a dilemma. Obviously, insurers will not continue to issue policies which generate losses. Carriers cannot simply raise premium rates to cover the estimated costs of future environmental cleanup as both competitive realities and insurance rate regulatory statutes prohibit such actions.¹³⁵ Insureds cannot be expected to make up for past shortfalls resulting from the miscalculations of the industry and carriers cannot seek retroactive reimbursement for actual risk values which have exceeded premium revenues due to Superfund and litigation requirements.¹³⁶ The ultimate question resulting from the problem of environmental cleanup remains: who pays?

In the short term, that question will continue to be answered by divided courts which cannot agree on the interpretive construction of the sudden and accidental exception to the pollution exclusion clause. As more cases related to the problem are heard,

131. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-9675 (1988)).

132. Greenburg, *supra* note 7, at 26. It is also estimated that cleaning up the one thousand sites in the nation requiring urgent attention will cost at least twenty-five billion dollars. *Id.*

133. Cheek, Graham & Wardzinski, *supra* note 6, at 21.

134. *Id.* As a result, to pay for indemnification costs, insurance companies have had to use surplus funds, which has an effect on all insurance policy (homeowner, automobile, life, etc.) commitments. See generally Note, *supra* note 110, at 1278.

135. Cheek, Graham & Wardzinski, *supra* note 6, at 21.

136. *Id.* Realized indemnification costs resulting from Superfund and litigation requirements therefore are paid out from the profits from other policies.

and individual courts reach some consistency in their holdings, forum shopping may result as insureds and insurers both look to see where they can attain the most satisfactory decisions.¹³⁷ Insurers, unwilling and unable to sustain the potential costs of coverage for environmentally suspect insureds, will refuse to issue policies as premium revenues fall short of risk assessments. This in turn could force operators and facilities which handle hazardous wastes and cannot obtain insurance coverage to cease being able to operate as they will be unable to meet the financial responsibility requirements mandated by the RCRA.¹³⁸ In the event that their operation had caused contamination or a polluting occurrence, the responsible party is no longer a viable source of cleanup funds.¹³⁹ Such a situation will further strain the environmental cleanup effort as the EPA uses Superfund resources to correct hazardous sites and seeks subsequent indemnification from the site operators. If the operators are bankrupt, the Superfund is depleted without corresponding reimbursement.¹⁴⁰ Fewer Superfund dollars translates into fewer hazardous waste sites being remediated.

The "bitter pill" the courts and the hazardous waste causing industries may have to swallow is the fact that to ensure long-run availability of insurance coverage and pollution cleanup funds, a high short-run price may have to be paid. This price may take the

137. *Id.* at 22.

138. *See supra* note 4. The RCRA requires owners and operators of facilities which treat, store or dispose of hazardous wastes to maintain a variety of standards, including that of financial responsibility for corrective action in the event of a polluting occurrence. 42 U.S.C. § 6924(a)(6). Often, the only way to meet this criteria is through the use of liability insurance as permitted under CERCLA. ("Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section." CERCLA § 107(e)(1), 42 U.S.C. § 9607(e)(1)). If a facility cannot acquire coverage it will not be licensed to operate by the EPA.

139. To preclude the potential for facility operators going bankrupt, it has been suggested that courts may sometimes look to insurance carriers to in effect "bail out" the insureds. Cheek, Graham & Wardzinski, *supra* note 6, at 22. The insurance industry in turn attempted to limit its potential for liability by suggesting legislation which would have (if it were passed) negated coverage for CGL policies written prior to the 1980's that have triggered Superfund obligations. Such legislation has never been enacted. *Id.*

140. Superfund resources are further depleted simply by the litigation expenses involved in environmental cases. In fact, evidence from early Superfund cases shows that it sometimes costs as much, if not more, to litigate liability issues and remedial procedures as it will to do the actual cleanup. *Id.* at 21. For example, litigation expenses stemming from the Ottati Goss site in New Hampshire have ranged between six million dollars and twenty million dollars. The costs of implementing remedial action was estimated to be fifteen million dollars. *Id.*

form of higher operating costs or the potential closing of some hazardous waste handling companies. However, the most cost-effective way to lower pollution clean-up costs is to prevent the event in the first place. Passing the bill to the insurance industry may be a convenient short-run answer, but ultimately, if insurance becomes too costly (or ceases to be available) the effect will be felt on all handlers of hazardous wastes, not just those who have caused contaminating events through their own negligence. Therefore, the financial incentive to relax vigilance with regards to potential environmental hazards or to allow foreseeable repeated polluting events to occur must be eliminated.

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