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INTERPRETING THE POLLUTION EXCLUSION CLAUSE IN THE COMPREHENSIVE GENERAL LIABILITY POLICY - OHIO'S NEXT STEP

by

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INTRODUCTION

The 1970's and 1980's have been witness to the discovery and identification of countless hazardous waste sites throughout Ohio and elsewhere. Disputes over responsibility are pending in virtually all our courts.¹ Before the first sites were remediated other battles began - the inevitable claims related to insurance coverage. Courts across the country have been called upon to resolve the disputes. Some well reasoned decisions have been written; however, others have only added confusion and inconsistency in attempting to address the varied issues of insurance coverage for environmental claims. There is a growing realization that we have only seen the proverbial tip of the iceberg. The number of hazardous waste sites which require immediate attention is increasing markedly² and costs are escalating at an uncontrolled rate.

The issue of insurance coverage for environmental claims is one of the most significant and controversial issues with which our courts will be faced in the 1990's. The average remediation cost of a site is nearly \$9 million.³ This figure may quad-

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¹ Liability for the operation of or connection with a hazardous waste site can be grounded in statute or the common law of torts. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) imposes strict liability for the past handling, transportation, storage, treatment and disposal of hazardous waste upon the site owners and operators, and on the waste generators and transporters. 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987). Liability may also be based upon other statutes, such as the Federal Water Pollution Control Act (33 U.S.C. § 1251-1387 (1982 & Supp. V 1987)), the Resource Conservation and Recovery Act (42 U.S.C. § 6901-6992 (1982 & Supp. V 1987)), and the Safe Drinking Water Act (42 U.S.C. §§ 300f-300j-26 (1982 & Supp. V 1987)). Additionally, legal responsibility may take the form of common law tort claims of nuisance, negligence, trespass or strict liability for ultra-hazardous activities.

² As of March, 1989 the Superfund National Priority List (NPL) contained 849 sites. By comparison, in 1983 the NPL contained 406 sites. Twenty-seven Ohio sites were listed in the 1989 NPL. The NPL, according to the Environmental Protection Agency (EPA), serves primarily informational purposes, identifying for the states and the public those facilities and sites or other releases which appear to warrant remedial action. National Priorities List for Uncontrolled Hazardous Waste Sites, 52 Fed. Reg. 27,621 (1987).

³ According to the EPA, the cost of a site in 1986 dollars, is as follows:

Remedial investigation/feasibility study \$875,000.00

rupture, or more, under the 1986 amendments to Superfund.⁴ Larger sites have been estimated in the hundreds of millions. Nonetheless, sites will be remediated and response and litigation costs will be paid. Insurers and potentially responsible parties need to know at the earliest possible time whether or not insurance coverage will exist. Our courts must address and resolve these insurance coverage issues correctly, and with finality.

While there are numerous intriguing insurance coverage issues in the environmental claims area,⁵ the focus of this article will be on the much litigated issue of the "pollution exclusion" clause. This clause became integrated into the standard form Comprehensive General Liability (CGL) policy in 1973.⁶ The standard clause was included in most, though not all, insurance policies from 1973⁷ through 1986. The clause excludes coverage for pollution unless it is sudden and accidental. It provides:

It is agreed that the insurance 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 land, the atmosphere, or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

This clause has been the subject of litigation in both state and federal courts, and has probably received more inconsistent treatment than any other clause in a policy.⁸ Most courts which have addressed this subject recently have acknowledged that the pollution exclusion clause does exclude coverage for pollution related

Remedial design	\$850,000.00
Remedial action	\$8,600,000.00

Id. at 27,632. Litigation costs have historically been approximately 55% of the total clean-up costs. *Insurance Issues and Superfund: Hearing Before the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 118 (1985) (testimony of John C. Butler, III); Murphy & Caron, *Insurance Coverage and Environmental Liability*, 38 FICC Q. 353, 358 (1988).

⁴ The Superfund Amendments and Reauthorization Act of 1986 (SARA) has imposed stricter clean-up standards. Consequently, costs have escalated. EPA estimates place cleanup costs between \$30 million and \$50 million per site. 17 *Env't Rep.* 779 (1986).

⁵ Some of the most litigated issues include whether pollution constitutes an occurrence, the trigger of coverage, the owned property exclusion, and whether cleanup costs are equitable or legal damages.

⁶ Proposed by the Insurance Rating Board (IRB) in 1970, the clause was added to the comprehensive general liability (CGL) standard form policy in 1973. The IRB form exclusion was developed, partly, in response to decisions adverse to insurers, such as *Grand River Lime Co. v. Ohio Casualty Ins. Co.*, 32 Ohio App. 2d 178, 289 N.E.2d 360 (1972) (coverage for intentional emission of air pollutants over seven year period because the damage was completely unexpected and unintended). Soderstrom, *The Role of Insurance in Environmental Litigation*, 11 *FORUM* 762, 766-68 (1976).

⁷ Chesler, Rodburg & Smith, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 *RUTGERS L.J.* 9, 16 (1986).

⁸ Murphy & Caron, *supra* note 3, at 369. The situation in Ohio, where the state and federal courts have taken conflicting positions, is but one example.

claims, but for the "sudden and accidental" exception to the exclusion. Simply stated, if the release of the pollution was "sudden and accidental" the policy would provide coverage. If it was not, there would be no coverage. Accordingly, coverage in any given case depends upon not only a factual finding, but the judicial interpretation of "sudden and accidental."

The particular philosophies related to insurance held by the members of the judiciary who have decided these cases are, all too often, mirrored in their decisions. Result-oriented courts which have sought to impose coverage have found ambiguities with "sudden and accidental."⁹ Other courts have attempted to apply the plain meaning of the words "sudden and accidental," as used in the policy, which would preclude coverage for any non "sudden and accidental" pollution such as gradual, expected or intended pollution.¹⁰ This kind of inconsistency in the law mandates rational resolution. We believe the proper resolution lies in the latter analysis of the insurance policy.

To date, two Ohio appellate courts have reached the conclusion that the pollution exclusion is ambiguous.¹¹ A federal court,¹² applying Ohio law, has reached a contrary conclusion. The Ohio Supreme Court has not yet ruled on this issue. As a consequence the law in Ohio is unsettled.

Our purpose here is to analyze the courts' treatment of the pollution exclusion clause. From the context of insurance policy interpretation, decisions regarding the exclusion will be reviewed and placed in a national perspective. The Ohio decisions will be examined against the backdrop of current trends and the national consensus.

We conclude, for the reasons which follow, that the Ohio Supreme Court, when presented with the issue, should not adopt the findings of the Ohio appellate courts in interpreting the pollution exclusion clause, but should recognize that those decisions were wrong and follow the law which finds sudden and accidental not ambiguous. That is, the standard pollution exclusion clause is not ambiguous as drafted and the wording "sudden and accidental" should be accorded its literal and common meaning. These insurance coverage disputes should not be determined on the basis of the judicial canons of construction for insurance policies but on factual determinations in relation to these policies.

⁹ *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359 (D. Del. 1987) (case involving duty to defend and indemnify in connection with liability from pollution leaching from landfill; "sudden" within pollution exclusion clause held ambiguous; coverage existed).

¹⁰ *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374 (1986) (nearly identical facts; pollution exclusion clause held unambiguous: It strains logic to perceive ambiguity; no coverage).

¹¹ *Buckeye Union Ins. Co. v. Liberty Solvents & Chemicals Co.*, 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984); *Kipin Indus. v. American Universal Ins. Co.*, 41 Ohio App. 3d 228, 535 N.E.2d 334 (1987). These decisions are discussed, in detail, *infra*.

¹² *Borden, Inc. v. Affiliated F.M. Ins. Co.*, 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir. 1987), *cert. denied*, 110 S. Ct. 68 (1989). This decision is discussed, in detail, *infra*.

HISTORICAL ORIGINS OF THE POLLUTION EXCLUSION CLAUSE

The pollution exclusion clause is best understood in the context of the development of the standard insurance policy. It is axiomatic that the primary purpose of CGL insurance is to protect insureds against liability for third party damages which they are legally obligated to pay.¹³ Standardized liability insurance policies were first developed during the 1930's. The policies covered risks that were "caused by accident."¹⁴ In the mid-1940's this language was broadened to include gradual happenings and the term "occurrence" replaced accident.¹⁵ The policies defined "occurrence" as "an accident including [injurious] exposure to conditions, which results [during the policy period] in bodily injury or property damage neither expected nor intended from the standpoint of the insured."¹⁶ Generally, this language was broad enough to fit most pollution claims.

In the late 1960's and the early 1970's, the attention of the nation began to focus on environmental matters within our own land. A new awareness of our environment made it evident that past and present policies related to the use of toxic chemicals, waste generation and waste disposal were inadequate and that conditions were being created which had the potential of causing very serious harm.¹⁷ These concerns became reality in later years as evidenced by, for example, Love Canal, Times Beach, and other sites and incidents across the country.¹⁸

It became clear to the insurance industry in the early years of pollution and environmental concern that the scope of the risk could not be computed and the costs of correcting conditions could not be calculated. Insurance underwriters, in analyzing the role which insurance would play in the future, realized that environmental claims of immeasurable magnitude would be presented against industry for ongoing practices which would take decades to change.

¹³ See *Gray v. State*, 191 So. 2d 802 (La. Ct. App. 1966), *aff'd*, 250 La. 1054, 202 So. 2d 24 (1967); *Kissel v. Aetna Casualty & Surety Co.*, 380 S.W.2d 497 (Mo. Ct. App. 1964); Note, *The Applicability of General Liability Insurance to Hazardous Waste Disposal*, 57 S. CAL. L. REV. 745, 757 (1984).

¹⁴ Bean, *The Accident Versus the Occurrence Concept*, 1959 INS. L.J. 550. The phrase "caused by accident" was carefully selected to link coverage to an identifiable sudden event and eliminate coverage for intentional damage. *Id.* at 551.

¹⁵ Some policies of the 1940's, referred to as comprehensive personal liability policies (CPL), were drafted without the accident limitation. These policies contained an intentional acts exclusion to retain the "inadvertancy aspect" of the accident phraseology. Bean, *supra* note 14, at 552.

¹⁶ Comment, *The Pollution Exclusion in the Comprehensive General Liability Insurance Policy*, 1986 ILL. L. REV. 897, 904.

¹⁷ Chapter one of F.P. Grad's TREATISE ON ENVIRONMENTAL LAW presents an enlightening review of the beginnings of modern environmental law. Rachel Carson's book "*Silent Spring*," which was published in 1962, brought home to many the environmental issues of the day.

¹⁸ The Love Canal site, covered extensively by the media, involved the disposal of 22,000 tons of chemicals under a school yard. Times Beach involved 150,000 tons of earth contaminated with Dioxin at a riverside site in Missouri. Some of the earlier environmental incidents included the 1967 Torrey Canyon Oil Tanker incident off the coast of England, the 1968 Ocean Eagle Tanker incident off the coast of Puerto Rico and the 1969 offshore oil drilling operation explosion near California. The possible toxic effects of DDT, as chronicled by Carson, also attracted media and popular attention.

Predicting (correctly) the barrage of claims for damages from pollution, insurance carriers added a special exclusion in 1973 - the pollution exclusion clause. The purpose of this exclusion was to prohibit companies from following a course of action of polluting and then falling back on their insurance companies for restitution. Pollution clearly constituted an occurrence as defined within the policy as long as it was not expected or intended from the standpoint of the insured.¹⁹ The pollution exclusion of 1973, however, states unqualifiedly that there would be no coverage for pollution unless the pollution was "sudden and accidental." Although the drafters of this language may have thought that "sudden and accidental" had a clear meaning, the interpretations which this language has received by some courts has demonstrated the issue that exists. As the policies did not define the exception to the exclusion, interpretation was left to the courts.

RULES OF INSURANCE POLICY INTERPRETATION

Before the varied interpretations by the courts are addressed, a brief review of the principles of judicial construction of insurance policies might be helpful.²⁰ Since the relationship between the insured and the insurer is a contractual one, the rules governing construction and interpretation of contracts generally apply in construing insurance policies. As a consequence, ambiguities in the policies will be construed against the drafters, the insurers. The first question asked is whether the contract needs to be interpreted. The Ohio Supreme Court has stated, "when words used in a policy of insurance have a plain and ordinary meaning, it is neither necessary nor permissible to resort to construction unless the plain meaning would lead to an absurd result."²¹

It is important to note that the determination of ambiguity is merely a threshold leading to the true issue of ascertaining the policy's meaning. It is over this threshold that result-oriented courts have stepped. In other words, a holding in favor of the insured can be easily justified if (or when) the insurance policy is found to be ambiguous.

Whether the policy language is ambiguous can itself be an issue. It is a question of fact, and such a conclusion requires a factual finding of ambiguity. Merely questioning the ambiguity of a policy does not in itself create an ambiguity.

¹⁹ It is imperative to note a finding that the pollution at issue falls within the definition of occurrence does not resolve all the insurance coverage issues. Of paramount importance is whether the liability incurred constitutes compensable damages under the insurance policy. See Pendency, Plews, Clark & Wright, *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 IND. L.R. 117 (1988); *CGL Coverage for Hazardous Substances Clean-Up*, FOR THE DEF., Mar. 1988, at 21. Even the applicability of an exclusion does not remove this coverage issue.

²⁰ For the purposes of this article, Ohio law will be discussed. Nevertheless, the general principles are virtually standard in all jurisdictions.

²¹ *Blohm v. Cincinnati Ins. Co.*, 39 Ohio St. 3d 63, 529 N.E.2d 433 (1988) (underinsured motorist coverage at issue); see also *Travelers Indem. Co. v. Reddick*, 37 Ohio St. 2d 119, 308 N.E.2d 454 (1974); *Olmstead v. Lumbermens Mutual Ins. Co.*, 22 Ohio St. 2d 212, 259 N.E.2d 123 (1970).

It would indeed be absurd reasoning if asking the question supplied the answer. Nonetheless, insured in cases have proposed no less in arguments to the courts, and prevailed.

The principles of judicial construction do favor the insured, but they are by no means a guarantee of success for the insured. The goal is to obtain a reasonable construction of the contract in conformity with the intentions of the parties as gathered from the ordinary and commonly understood meaning of the language employed.²²

It is a cardinal rule in the interpretation and construction of insurance policies that any ambiguous term or provision be construed liberally in favor of the insured and strictly against the insurer.²³ According to the Ohio Court of Appeals for Summit County, any reasonable construction which results in coverage must be adopted by the trial court. Uncertain contract language must be strictly construed against the insurer.²⁴ Nevertheless, common words appearing in the policy are to be given their ordinary meaning unless a manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall content of the instrument.²⁵

OVERVIEW OF THE PRESENT STATUS OF THE LAW

Two discernible lines of case law interpreting the pollution exclusion clause exist throughout the country. The older, and at one point predominant, view holds that the clause is marked by ambiguity. This ambiguity in an insurance contract resulted, and invariably results, in a finding of coverage for the insured. This line of case law originated in New Jersey and, for our purposes, will be referred to as the New Jersey approach. The early New Jersey cases significantly impacted the then emerging area of law dealing with insurance coverage for environmental harms.

Subsequent to the first New Jersey case on point, courts in other jurisdictions began to employ a different analysis. These courts rejected the insureds' arguments that the clause was ambiguous, and addressed the factual issues of whether the pollution was "sudden and accidental." This line of case law actually developed simultaneously in several jurisdictions but for the purpose of this article, will be referred to as the North Carolina approach since North Carolina presented a strong early view on this issue. Today, the North Carolina approach, holding that the pollution exclusion clause is unambiguous, represents the growing national trend.

²² *King v. Nationwide Ins. Co.*, 35 Ohio St. 3d 208, 211, 519 N.E.2d 1380, 1383 (1988) (declaratory judgment action to determine insureds); *see also Dealers Dairy Products Co. v. Royal Ins. Co.*, 170 Ohio St. 336, 164 N.E.2d 745 (1960); *Ohio Farmers Ins. Co. v. Wright*, 17 Ohio St. 2d 73, 246 N.E.2d 552 (1969).

²³ *Sterling Merchandise Co. v. Hartford Ins. Co.*, 30 Ohio App. 3d 131, 137, 506 N.E.2d 1192, 1198 (1986) (dispute involving "safe burglary" insurance coverage).

²⁴ *Blohm*, 39 Ohio St. 3d at 66, 529 N.E.2d at 436.

²⁵ *Id.*

Ohio does not clearly follow either of the approaches. Our Supreme Court has not addressed the issue. A split exists between the Ohio appellate courts and the Sixth Circuit's application of Ohio law. The Ohio appellate courts in *Buckeye Union*²⁶ and *Kipin*²⁷ concluded the clause was ambiguous; the Sixth Circuit in *Borden* concluded it was not and that the Ohio Supreme Court, when faced with the issue, would not adopt the reasoning of the appellate courts.²⁸ The following chronological review of the case law across the country demonstrates that the latter view represents the better reasoned view.²⁹

THE EVOLUTION OF THE LAW

Foundations: A Trilogy Of Important Cases Impacting Ohio Law.

In 1973 insurance companies began, almost uniformly, to issue CGL policies containing the pollution exclusion clause. In late 1974, 14,000 gallons of asphalt oil leaked from storage tanks on the property of Lansco, Inc. in Bogota, New Jersey.³⁰ By 1975, Lansco and its insurance carriers were before the New Jersey courts³¹ arguing the effect of a provision that before had caused little controversy. The result was New Jersey's and apparently the nation's first judicial decision interpreting the pollution exclusion clause.

Setting the standard for subsequent, and even some modern cases, the *Lansco* court set forth its interpretation of "sudden and accidental."³² The court noted that there was no specific definition in the policy of the terms "sudden and accidental."³³ In such a case, the words must be interpreted, according to the court, in accordance with their plain, ordinary and commonly understood meaning.³⁴ Citing Webster's New International Dictionary and Black's Law Dictionary, the court determined that "sudden" meant happening without previous notice or on very brief notice; unprepared for, unforeseen; or unexpected.³⁵ "Accidental" was defined as happen-

²⁶ *Buckeye Union Ins. Co. v. Liberty Solvents & Chemicals Co.*, 17 Ohio App. 3d 127, 477 N.E.2d 1227.

²⁷ *Kipin Indus. v. American Universal Ins. Co.*, 41 Ohio App. 3d 228, 535 N.E.2d 334.

²⁸ *Borden, Inc. v. Affiliated F.M. Ins. Co.*, 682 F. Supp. 927.

²⁹ This review is limited to the most pertinent cases on point as they apply to the issue of the pollution exclusion clause.

³⁰ *Lansco, Inc. v. Dept. of Env'tl. Protection*, 138 N.J. Super. 275, 278, 350 A.2d 520, 521 (1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977) (apparently vandals had opened the valves on the large storage tanks).

³¹ *Lansco* contracted with a company for the cleanup of the oil spill. *Id.* at 280, 350 A.2d at 523. *Lansco's* insurance carrier declined coverage for the damages as a result of the oil spill on the grounds that, *inter alia*, the occurrence was neither sudden nor accidental within the exclusion clause. *Lansco* then filed suit against its carrier seeking a declaratory judgment that coverage did exist. The policy at issue contained the standard pollution exclusion clause. The court held coverage existed.

³² *Id.* The *Lansco* court's definitional finding has been a consistent strand found in cases following the New Jersey approach up to the present day. Courts following the North Carolina approach nonetheless consistently refute this finding.

³³ *Id.* at 281-82, 350 A.2d at 523.

³⁴ *Id.*

³⁵ *Id.* at 282, 350 A.2d at 524.

ing unexpectedly or by chance; taking place not according to usual course.³⁶ Whether an occurrence was accidental was to be determined from the standpoint of the insured.³⁷ The oil spill was neither expected nor intended by Lansco; thus, the spill was sudden and accidental under the exclusion clause even if caused by the deliberate act of a third party.³⁸ The exclusion clause was found to be inapplicable, and the carrier was held to owe coverage.³⁹

Lansco was the first of three important cases that had a major impact on the development of Ohio law regarding the pollution exclusion clause issue. In fact, these cases form the foundation of the New Jersey approach. It will be shown that recent cases have, metaphorically, shaken this foundation. Nonetheless, the Lansco court's initial definition of "sudden" and "accidental" directly influenced the development of Ohio law. No other court offered a definition of "sudden" or of "accidental" until 1980.⁴⁰

The next important case, and the second in the trilogy, came from New York. The court in *Allstate Insurance Co. v. Klock Oil Co.*,⁴¹ interpreting the pollution exclusion clause, held that the insurer had a duty to defend in an action for damages sustained when the insured's underground gasoline storage tank leaked.⁴² This case is significant for its dramatically broad definition of "sudden." According to the court, "the word 'sudden' as used in liability insurance need not be limited to an instantaneous happening."⁴³ In other words, even a gradual happening could be "sudden." The exclusion clause then could not operate to preclude coverage for pollution occurring over a period of time. This is precisely the consequence the insurance companies apparently hoped to avoid by including the pollution exclusion in their occurrence-based policies. "Sudden" was no longer defined as it is by a standard dictionary, or given its ordinary meaning. In order to assure coverage the definition was expanded to include pollution over a period of time. *Klock Oil* became an oft cited case by insureds and courts following the New Jersey approach.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ In the interim, several courts addressed the issue of the pollution exclusion clause. In *Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co.*, 347 So.2d 95 (Ala. 1977) the Alabama Supreme Court found that the pollution exclusion clause was ambiguous. The clause was interpreted such that it would cover only industrial pollution and contamination. The pollution in the case, sand and water runoff from construction, did not invoke the exclusion to coverage.

In *Niagara County v. Utica Mutual Ins. Co.*, 103 Misc.2d 814, 427 N.Y.S.2d 171 (N.Y. Sup. Ct. 1980), *aff'd*, 80 A.D.2d 415, 439 N.Y.S.2d 538 (N.Y. App. Div. 1981), a New York trial court found that the insurance carrier did owe a duty to defend Niagara County against allegations that chemical waste dumping took place within the county with its acquiescence. Much of the opinion was devoted to the public policy ramifications if the county were to be deprived of coverage for those claims.

⁴¹ 73 A.D.2d 486, 426 N.Y.S.2d 603 (N.Y. App. Div. 1980).

⁴² *Id.*

⁴³ *Id.* at 488, 426 N.Y.S.2d at 605.

Klock Oil notwithstanding, that regular and frequent discharges of gas were not sudden or accidental was clear without discussion to an Indiana appellate court in *Barmet of Indiana, Inc. v. Security Insurance Group*.⁴⁴ The "regular" malfunction of a pollution control system on a once or twice-a-week basis was not sudden and accidental.⁴⁵ Hence, the insurer did not owe coverage.

Citing for support *Lansco* and *Klock*, and distinguishing *Barmet*, New Jersey wrote the final chapter of the trilogy affecting Ohio law. In *Jackson Township Municipal Utilities Authority v. Hartford Accident and Indemnity Co.*,⁴⁶ the court expanded *Lansco*, and, effectively, wrote the pollution exclusion clause out of the CGL policy. Under *Jackson Township*, pollution can be sudden and accidental if either the discharge was unexpected or if the result was unexpected or unintended. There would be no coverage for the intended results of intentional acts but coverage would exist for "unintended results of an intentional act."⁴⁷ According to the court, "the clause can be interpreted as simply a restatement of the definition of 'occurrence'."⁴⁸ In other words, the CGL was back to its early 1970's position. *Jackson Township*, like *Klock Oil*'s interpretation of "sudden", exposed insurers to potential liability situations which the exclusion clause was designed to eliminate.⁴⁹ Detrimental to insurers and insureds alike, however, was the uncertainty cast into the law.

The Ohio Decisions and Other Important Contemporaneous Decisions

With the early cases - *Lansco*, *Klock Oil*, and *Jackson Township* - in place,

⁴⁴ 425 N.E.2d 201, 203 (Ind. Ct. App. 1981). This case contained an atypical fact scenario in which the insurer initiated a declaratory judgment action to determine coverage for a wrongful death claim. The decedent had died in an automobile accident apparently caused by obstruction of its vision by gas emissions from insured's aluminum recycling plant. These emissions constituted the pollution at issue.

⁴⁵ *Id.*

⁴⁶ 186 N.J. Super. 156, 162-64, 451 A.2d 990, 993-94 (1982) (citing *Molten, Allen & Williams, Inc. v. St. Paul Fire and Marine Ins. Co.*, 347 So. 2d 95 (clause exempts only industrial pollution); *Farm Family Mutual Ins. Co. v. Bagley*, 64 A.D.2d 1014, 409 N.Y.S.2d 294 (1978) (exclusion clause inapplicable where insured was crop spraying); *Allstate Ins. Co. v. Klock Oil Co.* 73 A.D.2d 486, 426 N.Y.S.2d 603; *Niagara County v. Utica Mutual Ins. Co.*, 103 Misc. 2d 814, 427 N.Y.S.2d 171 (clause exempts only active polluters).

⁴⁷ *Jackson Township*, 186 N.J. Super. at 164, 451 A.2d at 994.

⁴⁸ This finding was cited and followed in several cases including *United Pacific Ins. Co. v. Van's Westlake Union Inc.*, 34 Wash. App. 708, 664 P.2d 1262 (1983). This court held the exclusion clause did not apply where gasoline had leaked for several months from a hole in an underground line. Neither the leak nor the resulting damage was expected or intended. This, according to the court, brought the situation into the exception to the exclusion. In contrast, see *National Standard Ins. Co. v. Continental Ins. Co.*, No. CA-3-81-1015-D, (N.D. Tex. Oct. 4, 1983) (LEXIS, Genfed Library, Dist file) (chemical discharges occurring over a period of years not sudden and accidental) and *Milwaukee v. Allied Smelting Corp.*, 117 Wis. 2d 377, 344 N.W.2d 523 (Wis. Ct. App. 1983) (discharge of acid into sewers over a period of two to ten years not sudden or accident).

⁴⁹ See *Techalloy Co. v. Reliance Ins. Co.*, 335 Pa. Super. 1, 487 A.2d 820 (1984) (no coverage where discharge of chemical TCE occurred on a regular or sporadic basis over 25 years; *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30 (5th Cir. 1984) (no coverage for intentional ground contamination at drum reconditioning plant). Of course, cases following the New Jersey approach all hinge on the initial determination that the clause is ambiguous, requiring judicial interpretation. If a court finds the clause is not ambiguous then it is to apply the literal meaning of the language without any construction favoring the insurer or the insured.

Ohio handed down its first judicial interpretation of the pollution exclusion clause. Ohio first interpreted the clause in *Buckeye Union Insurance Co. v. Liberty Solvents and Chemicals Co.*⁵⁰ The case was heard by the court on appeal of an award of summary judgment in favor of Buckeye Union Insurance Company (“Buckeye”). In 1982, the State of Ohio sued Liberty Solvents and Chemicals Co. (“Liberty Solvents”) and 37 other entities in federal court, seeking damages and injunctive and declaratory relief in connection with a hazardous waste site operated by Chem-Dyne in Hamilton, Ohio.⁵¹ The State of Ohio alleged that Liberty Solvents was liable as a generator which had contracted with Chem-Dyne for the disposal of hazardous waste.⁵² The waste was spilled, leaked, and released when drums were dropped and ruptured or punctured by Chem-Dyne.⁵³ The resulting pollution affected surface waters, soil, and groundwater around the disposal site.⁵⁴ The United States filed a similar complaint. The lawsuits were subsequently consolidated for trial.

Liberty Solvents placed its carrier, Buckeye Union, on notice. Buckeye Union responded by filing a declaratory judgment action in state court. Liberty Solvents filed a counter-claim. Cross-motions for summary judgment were then filed; Liberty Solvents seeking a declaration that Buckeye Union had a duty to defend, and Buckeye Union seeking a declaration that it had no duty to defend or indemnify Liberty Solvents. The trial court granted Buckeye Union’s motion.⁵⁵ Liberty Solvents subsequently appealed to the state appellate court. The appellate court was presented with the issue of whether the allegations of the complaint stated a claim for which coverage is or may be afforded by the policy of the insured. The appellate court held that there was a possible claim for coverage and reversed the trial court decision.⁵⁶

The court first noted that CERCLA imposes liability on Liberty Solvents which would give rise to a duty to defend unless there was “a provision in the policy which clearly and unambiguously excludes coverage.”⁵⁷ The court turned to the pollution exclusion clause which it termed the “polluters exclusion clause.”⁵⁸ The court conceded that the construction of the clause was a question of first impression in Ohio. However, it noted that the overwhelming authority from other jurisdictions indicated that the trial court had erred in saying the pollution could not have been sudden and accidental.⁵⁹ The court grounded its decision on three points.

⁵⁰ 17 Ohio App. 3d 127, 477 N.E.2d 1227.

⁵¹ *Id.* at 127-128, 477 N.E.2d at 1229.

⁵² *Id.* at 128, 477 N.E.2d at 1229.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 128, 477 N.E.2d at 1230.

⁵⁶ *Id.* at 135-36, 477 N.E.2d at 1237.

⁵⁷ *Id.* at 130, 477 N.E.2d at 1232.

⁵⁸ *Id.* at 132, 477 N.E.2d at 1234.

⁵⁹ *Id.*

First, the phrase “sudden and accidental” was not defined in the policy.⁶⁰ This, on its face, indicated ambiguity. The court relied on *Lansco* for support.⁶¹ Under *Lansco*, “sudden” was defined as happening on brief notice or that which was unexpected.⁶² “Accidental” was defined as an event happening unexpectedly or by chance.⁶³ This was to be determined from the viewpoint of the insured because that would be consistent with the concept of an occurrence.⁶⁴

Second, the pollution exclusion clause was said to be a restatement of the definition of “occurrence.”⁶⁵ The policy would cover claims when the injury was neither expected nor intended.⁶⁶ That is, there would be no coverage for the intended results of intentional acts, but there would be coverage for unintended results of intentional acts.⁶⁷ This view was derived entirely from *Jackson Township*.⁶⁸ The court also cited *Lansco* for support.⁶⁹

Third, the court quoted *Allstate* for the proposition that sudden need not be limited to an instantaneous happening.⁷⁰ The court concluded that so long as the resulting damage was unintended by the insured, then the total situation could be considered an accident.⁷¹ Because there were no allegations in the complaint that Liberty Solvents intended or expected the releases of hazardous wastes or the damages, then both could be found sudden and accidental from the standpoint of Liberty Solvents.

The *Buckeye Union* court observed that the “overwhelming authority” from other jurisdictions directed its decision.⁷² While the New Jersey approach was the most popular at the time *Buckeye Union* was decided, it was not universally adopted. For example, some courts prior to and shortly after *Buckeye Union* had found the clause not to be ambiguous at all.⁷³

In 1986, two years after *Buckeye Union*, the North Carolina Supreme Court

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 133.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* The court also cited with approval: *Niagara County v. Utica Mutual Ins. Co.*, 103 Misc. 2d 814, 427 N.Y.S.2d 171; *United Pacific Ins. Co. v. Van's Westlake Union Inc.*, 34 Wash. App. 708, 664 P.2d 1262; *Traveler's Indemnity Co. v. Dingwell*, 414 A.2d 220 (Me. 1980).

⁷⁰ *Buckeye Union*, 17 Ohio App. 3d at 134, 477 N.E.2d at 1235.

⁷¹ *Id.*

⁷² *Id.* at 132, 477 N.E.2d at 1234.

⁷³ An Oregon appellate court in *Transamerica Ins. Co. v. Sunnes*, 77 Or. App. 136, 711 P.2d 212 (1985) (discharge of wastes into sewer lines) held the pollution exclusion clause was not ambiguous. Also, a Pennsylvania court in *Techalloy Co. v. Reliance Ins. Co.*, 338 Pa. Super. 1, 487 A.2d 820 (1984) (chemical dumping) applied the exclusion clause as if unambiguous.

took the first step toward a new analysis of the pollution exclusion clause issue. In *Waste Management of Carolinas v. Peerless Insurance Co.*, the state supreme court reversed the appellate court and held there was no duty to defend claims arising from the six year long intentional disposal of solid waste at a landfill.⁷⁴ The clause, according to the court, was not ambiguous; in fact, “it strains at logic” to perceive ambiguity.⁷⁵ The court criticized both New Jersey and New York for their semantic gymnastics with the interpretation of “sudden and accidental.”⁷⁶ Specifically, the court found fault with decisions, such as *Jackson Township* that held gradual seepage or pollution from a site could be sudden and accidental events.⁷⁷ *Waste Management* is an important case, aside from its strong reversal and criticism of a lower North Carolina court, in that it represented a new voice on the insurer’s side.⁷⁸ While the previously discussed trilogy of cases effectively removed the pollution exclusion clause from the CGL policy, this case clearly reflects a step toward returning the clause to the policy and reinstating it as a device purposely selected by insurance companies to appropriately limit coverage for certain pollution events.

An equally significant decision was handed down by a district court applying Pennsylvania law. The court in *Fischer & Porter Co. v. Liberty Mutual Insurance Co.* held the pollution exclusion clause unambiguous and granted summary judgment for the insurance company.⁷⁹ Company practices of disposing of TCE in floor drains which leaked into groundwater were not sudden and accidental occurrences.⁸⁰ “Sudden,” according to the court, signifies an event that occurs abruptly, without warning.⁸¹ This decision was consistent with prior Pennsylvania law.⁸²

Ohio addressed the pollution exclusion clause again the following year in *Kipin Industries, Inc. v. American Universal Insurance Co.*⁸³ Like *Buckeye Union*, which had been decided three years earlier, this case also arose from the operation of the waste disposal site in Hamilton, Ohio. The plaintiffs in this action were insured seeking a declaratory judgment that their carrier, American Universal, had a duty to defend them in suits filed by the State of Ohio and the United States. Cross-motions

⁷⁴ 315 N.C. 688, 340 S.E.2d 374, *reh’g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986).

⁷⁵ *Id.* at 695, 340 S.E.2d at 379. “A common sense reading of [the clause] reveals that the exclusion narrows a virtually limitless class of events termed ‘occurrence’ which can occur suddenly or over the course of time, to non-polluting events or to polluting events that occur ‘suddenly and accidentally.’” *Id.*

⁷⁶ *Id.* at 697-99, 340 S.E.2d at 381-82. “The gloss on the pollution exclusion has led more than one court astray.” *Id.* at 696 n.4, 340 S.E.2d at 380 n.4, referring to *Jackson Township* and *Van’s Westlake*.

⁷⁷ *Id.*

⁷⁸ Thus, we will refer to subsequent consistent cases as following the North Carolina approach.

⁷⁹ 656 F. Supp. 132, 140 (E.D. Pa. 1986).

⁸⁰ *Id.*

⁸¹ *Id.* Several cases, however, decided at the same time as *Fischer & Porter* still reached results reminiscent of *Klock Oil* and *Jonesville Products, Inc. v. Transamerica Ins. Group*, 156 Mich. App. 508, 402 N.W.2d 46 (1986) (continuous releases could be sudden so long as unintended); *State v. INA Underwriters Ins. Co.*, 507 N.Y.S.2d 112 (N.Y. Sup. Ct. 1986) (leakage of gasoline over five year period could be sudden). *Fischer & Porter* is diametrically opposite to these cases and indicative of the split in authority that began to develop in 1986.

⁸² See *Techalloy Co. v. Reliance Ins. Co.*, 335 Pa. Super. 1, 487 A.2d 820.

⁸³ 41 Ohio App. 3d 228, 535 N.E.2d 334 (1987).

for summary judgment were filed. The trial court held in favor of the plaintiffs.⁸⁴ On appeal, the appellate court affirmed, finding that American Universal did have a duty to defend.⁸⁵

American Universal's decision to decline coverage was based in part on the pollution exclusion clause.⁸⁶ The appellate court expressly followed *Buckeye Union* as to its interpretation of the sudden and accidental exception to the exclusion.⁸⁷ The court concluded that an event is "sudden and accidental" and thus not excluded from comprehensive coverage if the damaging result is neither expected nor intended by the insured.⁸⁸ The clause was strictly construed because of its ambiguity, according to the court.⁸⁹

The Sixth Circuit, applying Ohio law came to a contrary result. In *Borden, Inc. v. Affiliated F. M. Insurance Co.*,⁹⁰ the United States District Court for the Southern District of Ohio held that the pollution exclusion clause was not ambiguous and awarded summary judgment to the defendant insurer in a declaratory judgment action brought by the insured Borden, Inc.⁹¹ In 1982 Amoco sued Borden alleging that Borden had fraudulently concealed the presence of hazardous waste on land it sold to Amoco.⁹² The complaint also sought response costs under CERCLA.⁹³ Borden put its carrier, Affiliated F.M. Insurance Company ("Affiliated"), on notice.⁹⁴ However, Affiliated refused to defend, citing lack of an occurrence and the applicability of the pollution exclusion.⁹⁵ As a consequence, Borden sued Affiliated seeking a declaratory judgment that Affiliated had the duty to defend and indemnify it in the Amoco suit.⁹⁶ The suit was heard in federal court under diversity jurisdiction.⁹⁷

Borden based its arguments on the Ohio decision of *Buckeye Union*.⁹⁸ The

⁸⁴ *Id.* at 228, 535 N.E.2d at 335.

⁸⁵ *Id.* at 232, 535 N.E.2d at 339.

⁸⁶ *Id.* at 229-30, 535 N.E.2d at 336. It was also based on the argument that the damages alleged did not constitute an occurrence.

⁸⁷ *Id.* at 231, 535 N.E.2d at 338.

⁸⁸ *Id.*

⁸⁹ *Id.* In accord is a New Jersey appellate court decision, *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76 (1987), reaffirming the New Jersey view and noting that "sudden" means fortuitous. *See also* *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359 (D. Del. 1987) (split of authority regarding ambiguity of clause makes it ambiguous).

⁹⁰ 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir.), *cert. denied*, 110 S. Ct. 68 (1989).

⁹¹ *Id.* at 931.

⁹² *Id.* at 928.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* Affiliated also declined to defend on the basis of a nuclear exclusion in the policy.

⁹⁶ *Id.*

⁹⁷ The federal court applied Ohio law. A federal court in diversity must apply the law of the state in which it sits. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁹⁸ *Borden*, 682 F. Supp. at 929.

court noted that cases from other jurisdictions also supported this position.⁹⁹ The court admitted that *Buckeye* is entitled to some deference as the precedent from the state appellate court, but pointed out it was not bound by that decision.¹⁰⁰ The court determined that the Ohio Supreme Court would not adopt the construction of the pollution exclusion that was set forth in *Buckeye*.¹⁰¹ According to the court, the clause was not ambiguous.¹⁰² “Sudden” meant happening without previous notice or on brief notice.¹⁰³ “Accidental” meant occurring sometimes with unfortunate results by chance.¹⁰⁴ The meanings of these terms, according to the court, were clear and the terms “should not be twisted simply to provide coverage when courts deem it desirable.”¹⁰⁵

The Amoco complaint against Borden alleged that Borden regularly deposited radioactive wastes on its property as a part of its production of phosphoric acid.¹⁰⁶ (It was admitted that this occurred at least from 1964 through 1970). The allegation, according to the court, was not one of a “sudden and accidental” event.¹⁰⁷ “Rather, [the event was] . . . precisely the type of activity which the pollution exclusion was drafted to preclude.”¹⁰⁸ Thus, Affiliated owed no duty to defend or indemnify Borden.¹⁰⁹

The Sixth Circuit Court of Appeals, in a per curiam opinion, affirmed, stating that it found no error.¹¹⁰ Borden has since petitioned the United States Supreme Court for review. This however was denied.¹¹¹

⁹⁹ The court cited and briefly discussed *Jackson Township Mun. Util. Auth. v. Hartford Accident and Indemnity Co.*, 186 N.J. Super. 156, 451 A.2d 990; *Niagara County v. Utica Mutual Ins. Co.*, 103 Misc. 2d 814, 427 N.Y.S.2d 171; and *United Pacific Ins. Co. v. Van’s Westlake Union Inc.*, 34 Wash. App. 708, 664 P.2d 1262.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 930.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ The court cited with approval the decision of the North Carolina Supreme Court in *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374. Other decisions decided contemporaneously were in accord, holding that the clause excluded coverage for the release of waste on a regular basis or as a part of normal business. *Techalloy Co. v. Reliance Ins. Co.*, 335 Pa. Super. 1, 487 A.2d 820; *Fischer & Porter Co. v. Liberty Mutual Ins. Co.* 656 F. Supp. 132; *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984) (New Hampshire law) (discharge of pollutants from a barrel reconditioning plant); *Transamerica Ins. Co. v. Sunnes*, 77 Or. App. 136, 711 P.2d 212.

¹⁰⁶ *Borden*, 682 F. Supp. at 928.

¹⁰⁷ *Id.* at 930.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Borden, Inc. v. Affiliated F.M. Ins. Co.*, 865 F.2d 1267 (6th Cir. 1989). In accord with this view are *Centennial Ins. Co. v. Lumberman’s Mutual Casualty Co.*, 677 F. Supp. 342 (E.D. Pa. 1987) (reaffirmed the Pennsylvania view; continuous activity cannot be sudden: dumping of industrial wastes), *American Motorists Ins. Co. v. General Host Corp.*, 667 F. Supp. 1423 (D. Kan. 1987) (although accidental is a subjective term, sudden is objective meaning either instantaneous or on brief notice and unexpected), and *State v. Mauthe*, 412 Wis. 2d 620, 419 N.W.2d 279 (Wis. Ct. App. 1987) (long term pollution not sudden and accidental).

¹¹¹ *Borden, Inc. v. Affiliated F.M. Ins. Co.*, 110 S. Ct. 68 (1989).

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Borden, we believe, foreshadows a necessary change in Ohio law. *Buckeye* and *Kipin* both relied extensively on the aforementioned trilogy of earlier cases. While this may have been appropriate action in 1984 and 1987, continued adherence to these decisions is unwarranted. Time has passed and new, and in our view more logical, decisions have been rendered. The Sixth Circuit in *Borden* recognized the development of the law through 1987. In 1988, we witnessed further development as several jurisdictions switched approaches. Significantly, the courts adopted the North Carolina approach.

1988: The Transitional Period

One such court was the Illinois appellate court in *International Minerals & Chemical Corp. v. Liberty Mutual Insurance*.¹¹² The court recognized the split in authority regarding the pollution exclusion clause,¹¹³ and then, disregarding Illinois precedent, held the clause unambiguous. The court proceeded cautiously, embarking on a "word-by-word analysis" of the clause.¹¹⁴ It concluded "accidental" referred to an unintended and unexpected discharge of pollutants and that "sudden" had a temporal significance.¹¹⁵ Summary judgment was affirmed for the insurers.

The most important transition case, however, was *Diamond Shamrock Chemical Co. v. Aetna*¹¹⁶ in which a New Jersey Superior Court sharply criticized the prior New Jersey cases.¹¹⁷ The court, although acknowledging it was bound by New Jersey appellate court decisions, insisted that sudden have a temporal element. Any other definition of the term would be "an intellectually unacceptable distortion of the fair meaning of the word."¹¹⁸ The trial judge succeeded in evading the precedent by narrowing his decision to hinge on the peculiar knowledge or expectation by the insured of the pollution in this case.

A split still existed among the states regarding interpretation of the pollution exclusion clause. In fact, another New Jersey appellate court cited with approval *Jackson Township* and *Broadwell Realty*, holding that insurance coverage was only excluded by the clause where the damages were expected or intended by the in-

¹¹² 168 Ill. App. 3d 361, 522 N.E.2d 758 (1988) (discharge of wastes at barrel reconditioning facility).

¹¹³ "The singular point of agreement in this case seems to be that the two lines of cases supporting the parties' respective positions are irreconcilable." *Id.* at 374, 522 N.E.2d at 766.

¹¹⁴ *Id.* at 376, 522 N.E.2d at 767.

¹¹⁵ *Id.* at 376-77, 522 N.E.2d at 768.

¹¹⁶ No. C-3939-84 (N.J. Super. Ct. Apr. 12, 1989).

¹¹⁷ "Unfortunately, a number of reported decisions . . . have, in my opinion, flatly misread the plain language of the pollution exclusion and have fundamentally misunderstood the way in which the exclusion and its exception are designed to function." *Id.* The court took specific issue with the New Jersey case of *Broadwell*: "*Broadwell* was decided by the appellate division which is our intermediate appellate court. Reported decisions of the appellate decision are binding upon me as a trial judge. If I think that the appellate division made a mistake in deciding *Broadwell* (as I do), then I can (as I have) point out the mistake in the hope that it will hereafter be corrected by the appellate division or by the supreme court."

¹¹⁸ *Id.*

sured.¹¹⁹ Also, a Washington superior court in *Queen City Farms, Inc. v. Aetna Casualty & Surety Co.*¹²⁰ issued an opinion which limited the applicability of the exclusion to active polluters. That is, the exclusion clause would only preclude coverage if the pollution were caused by active polluters.¹²¹

The majority of cases decided in 1988, however, followed the North Carolina approach. Receiving the most attention by the courts was the term "sudden" which earlier courts, following the New Jersey lead, had concluded simply meant unexpected. These courts held that "sudden" must have some temporal significance and that long-term exposure or pollution could not constitute "sudden and accidental" pollution.¹²² Additionally, several courts concluded that the pollution exclusion clause was not ambiguous.¹²³

1989: The Recent Cases

The strongest recent decision was handed down by a Pennsylvania Superior Court in *Lower Paxton Township v. United States Fidelity & Guaranty Co.* in which the court held no coverage arose from the emission of methane gas from a landfill.¹²⁴ The court noted that numerous decisions regarding the pollution exclusion clause had been rendered in the past decade.¹²⁵ Pennsylvania precedent also supported the view that the pollution exclusion clause is not ambiguous.¹²⁶ The facts of *Lower Paxton* may be the most appropriate to illustrate the pollution event to which the

¹¹⁹ *Summit Assoc., Inc. v. Liberty Mutual Fire Ins. Co.*, 229 N.J. Super. 56, 550 A.2d 1235 (1988) (sludge pit).

¹²⁰ No. 86-2-06236-0 (Wash. Super. Ct. Jan. 15, 1988) (disposal of industrial wastes into pits).

¹²¹ *Id.*

¹²² *Sharon Steel Corp. v. Aetna Casualty & Surety Co.*, No. C-87-2306 (D. Utah 1988). (sudden means instantaneous and abrupt); *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) (court denied coverage for hazardous waste disposal which took place over a period of six years. The release of pollutants must occur quickly in time); *Shell Oil Co. v. Accident & Casualty Ins. Co.*, No. 278953 (Ca. Super. Ct. 1988); *United States Fidelity & Guar. Co. v. Star Fire Coals, Inc.*, 856 F.2d 31 (6th Cir. 1988).

¹²³ *Sharon Steel Corp. v. Aetna*, No. C-87-2306 (D. Utah 1988); *United States Fidelity & Guar. Co. v. Korman Corp.*, 693 F. Supp. 253 (E.D. Pa. 1988) (the event must be both sudden and accidental. No coverage was allowed for pollution from a landfill which occurred over a 30 year period); *Powers Chemco Inc. v. Federal Ins. Co.*, 144 A.D.2d 445, 533 N.Y.S.2d 1010 (1988), *aff'd*, 74 N.Y.2d 910 (1989) (pollution exclusion clause clear and unambiguous); *Technicon Elec. Corp. v. American Home Assurance Co.*, 141 A.D.2d 124, 533 N.Y.S.2d 91 (1988) (the emerging nationwide judicial consensus was that the clause was unambiguous); *Hayes v. Maryland Casualty Co.*, 688 F. Supp. 1513 (N.D. Fla. 1988).

¹²⁴ 383 Pa. Super. 558, 557 A.2d 393 (1989).

¹²⁵ "An ever-increasing number of courts have rejected the insured's ambiguity argument and have found that sudden and accidental has a clear plain meaning that excludes coverage not only for intentional pollution but also for any unintentional release or dispersal of pollution that occurs gradually over time." *Id.* at 569, 557 A.2d at 398. The court also cited the recent cases of *United States Fidelity & Guar. Co. v. Star Fire Coals, Inc.*, 856 F.2d 31 (6th Cir. 1988) and *United States Fidelity & Guar. Co. v. The Murray Ohio Mfg. Co.*, 693 F. Supp. 617 (M.D. Tenn. 1988). Further, the court quoted *Technicon*, "there is an emerging nationwide judicial consensus that the 'pollution exclusion' clause is unambiguous." *Lower Paxton*, 141 A.D.2d at 569, 557 A.2d at 398.

¹²⁶ *Lower Paxton*, 141 A.D.2d at 569, 557 A.2d at 398 (citing *Techalloy Co. v. Reliance Ins. Co.*, 335 Pa. Super. 1, 487 A.2d 820).

pollution exclusion clause was intended to apply. The pollution was the emission of methane gas from a landfill. This gas is produced and emanates from buried waste material only gradually leaching into the surrounding soil and atmosphere.¹²⁷ Gradual polluting events are precisely those to which the exclusion clause was to apply. Any reading of the "sudden and accidental" exception to the exclusion to allow coverage in such a situation would clearly contravene the purpose and clear meaning of the clause.

Several courts concurred with *Lower Paxon's* reasoning that the pollution exclusion clause was not ambiguous. In *C. L. Hawthaway & Sons Corp. v. American Motorists Insurance Co.*,¹²⁸ the district court for the district of Massachusetts declined to follow an earlier Massachusetts appellate court case¹²⁹ and held the pollution exclusion clause unambiguous.¹³⁰ Agreeing that "sudden" connotes unanticipated and unforeseen, the court nonetheless disagreed that such definition was exclusive.¹³¹ "Sudden" must refer to more than the individual's subjective state of mind to differentiate it from "accident."¹³² Thus, it must have some temporal significance.¹³³

In the Sixth Circuit, the Court of Appeals in *United States Fidelity & Guaranty Co. v. The Murray Ohio Manufacturing Co.* affirmed the district court decision finding the pollution exclusion clause unambiguous.¹³⁴ Consequently, the court applied the literal meaning of the pollution exclusion clause to claims arising from a chemical the historical background of the exclusionary clause mandated that the ambiguities within the clause be construed against the insurance company. The court found coverage for claims arising from the disposal of hazardous waste.¹³⁵

TWO VIEWS

To summarize, two approaches have been developed by the courts. One approach, the New Jersey approach, holds that the pollution exclusion clause is ambiguous in nature and must be construed strictly against the insurer. Once the

¹²⁷ *Id.* at 578, 557 A.2d at 403.

¹²⁸ 712 F. Supp. 265 (D. Mass. 1989).

¹²⁹ *Shapiro v. Public Serv. Mutual Ins. Co.*, 19 Mass. App. Ct. 648, 477 N.E.2d 146 (1985) (finding the clause ambiguous, the court held that coverage existed for damages from oil leakage from an underground fuel tank).

¹³⁰ This decision is analagous to the Sixth Circuit decision in *Borden, Inc. v. Affiliated F.M. Ins. Co.*, 865 F.2d 1267, in which the federal court opined that the Ohio Supreme Court would not follow the Ohio intermediate appellate courts. Like Ohio, the Massachusetts Supreme Judicial Court had not, and has not, ruled on the issue of the pollution exclusion clause.

¹³¹ *Hawthaway*, 712 F. Supp. at 267-68.

¹³² *Id.* at 268.

¹³³ *Id. But see* to the contrary, *Allstate Ins. Co. v. Quinn Constr. Co.*, 713 F. Supp. 35 (D. Mass. 1989) where the court followed *Shapiro*. Gasoline contamination from an underground tank could be sudden and accidental, according to the *Quinn* court. See also *C.K. Smith & Co. v. American Empire Surplus Lines Ins. Co.*, No. 85-32950 (Super. Ct. Mass. 1988) (trial court following *Shapiro*).

¹³⁴ 875 F.2d 868 (6th Cir. 1989) (applying Tennessee law), *affirming* 693 F. Supp. 617 (N.D. Tenn. 1988).

¹³⁵ *United States Fidelity & Guar. Co. v. Specialty Coating*, 180 Ill. App. 3d 378, 535 N.E.2d 1071 (1989).

decision is made that the clause is ambiguous then it is rare, if at all, that the exception to the exclusion does not come into play. That is, coverage will be found.

The other approach, the North Carolina approach, holds that the pollution exclusion clause is not ambiguous. If it is found to be unambiguous, then the terms "sudden" and "accidental" must be defined. Sudden is defined, by these courts, to have some temporal meaning. Thus, any discharge of pollution occurring gradually or over a period of time would not be covered. The discharge must also be accidental. This is held to mean unexpected or unintended. Again, the focus is on the discharge and not the damage. The fact that the insured may not have expected the resulting damage is irrelevant if the insured expected or intended the discharge.

IMPLICATIONS FOR OHIO

Only two Ohio courts have addressed the issue of the pollution exclusion clause - *Buckeye Union* and *Kipin*. At the time the Court of Appeals for Summit County decided *Buckeye Union*, the New Jersey interpretation of the clause was the established approach. The definitions of "sudden" and "accidental" set forth in *Lansco* and *Jackson Township* were recognized in Alabama, Maine, New York, and Washington. *Klock Oil* added support with its removal of the temporal significance from "sudden." And the *Buckeye Union* court followed in step with the case law as it had evolved to that point. Acknowledging construction of the pollution exclusion clause to be a question of first impression in Ohio, the court relied greatly on the decisions of other jurisdictions, quoting in each paragraph of its discussion of the clause.

In turn, the decision of the court of Appeals for Hamilton County relied greatly on *Buckeye Union*. The *Kipin* court's interpretation of the pollution exclusion clause encompasses but one paragraph in which it quotes *Buckeye Union*. No reconsideration of the issue or independent interpretation of the pollution exclusion clause is evident from the face of the opinion. Whereas the *Buckeye Union* court turned to the decisions of other jurisdictions for instruction, the *Kipin* court confined itself to *Buckeye Union*. It is certainly understandable for one appellate court to look to a sister court for interpretative assistance. Nonetheless, it would be quite different for a court today to rely on a 1984 or 1987 decision given the developments in this area of the law.

In *Borden*, however, the United States District Court for the Southern District of Ohio, applying Ohio law, did discuss pertinent decisions from other jurisdictions. Rejecting *Buckeye Union* as non-persuasive of the future direction of the Ohio Supreme Court, the *Borden* court relied upon North Carolina, Pennsylvania and Indiana case law.¹³⁶ While it cannot be imagined that judicial opinions memorialize

¹³⁶ Among others, the court considered *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374; *Techalloy Co. v. Reliance Ins. Co.*, 335 Pa. Super. 1, 487 A.2d 820; *Fischer & Porter*

the thought processes of the judge or judicial panel, they evidence the sources considered in rendering the decision.

The Ohio case law, as developed by our state courts, is based solely upon the status of the law in 1984 when *Buckeye Union* was decided and based primarily upon the early New Jersey cases. Certainly, the law has evolved and changed since *Lansco* in 1974 and even since *Buckeye Union* itself in 1984. The issues have become clearer and the increased judicial scrutiny of these issues has produced a new and prevailing approach to the interpretation of the pollution exclusion clause. The days of knee-jerk decisions labeling the clause ambiguous are past. The clause, in the eyes of today's courts, now stands on footing equal to the other provisions within the CGL. It is unambiguous as written and, the language must be accorded a literal, and reasonable, interpretation. There is no need to construe the clause against the insurer or to perform semantic gymnastics to remove any temporal sense from "sudden." The discussion in the cases has now moved from the definitions of "sudden" and "accidental" to, properly, the factual situation within the cases. Whether insurance coverage exists for pollution now rests, as it should, upon the cold factual record.

It is against this contemporary setting that Ohio courts today will interpret the pollution exclusion clause in years to come. We will not speculate as to the outcome in any insurance coverage dispute since such a resolution will be entirely dependent upon the particular facts of the case.

CONCLUSIONS

The unique area of law surrounding insurance coverage for environmental matters is in a state of flux. At the same time, the stakes for all involved are growing. The number of hazardous waste sites discovered is increasing, and remediation costs are rising. Insured assert every viable argument available to them to secure insurance coverage for their costs. Insurance companies, on the other hand, assert that their policies were carefully written to cover some risks but not others. The pollution exclusion clause is a prime example.

Many courts have been called upon to resolve disputes involving this clause. In this rapidly evolving area of the law, the Ohio decisions on point have simply become dated. While arguments could have been made at the time the Ohio decisions were handed down to support the holdings, such arguments are no longer tenable. The issue of the pollution exclusion clause has now been refined by the courts. The correct interpretation has become apparent. This cannot be ignored by the Ohio courts.

Co. v. Liberty Mutual Ins. Co., 656 F. Supp. 132; and *Barnet of Indiana, Inc. v. Security Ins. Group.*, 425 N.E.2d 201 (Ind. 1981).

