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Excluding the Pollution Exclusion: City of Johnstown, New York v. Bankers Standard Insurance Company, 877 F.2d 1146

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EXCLUDING THE POLLUTION EXCLUSION: *CITY OF JOHNSTOWN, NEW YORK* v. *BANKERS STANDARD INSURANCE COMPANY*, 877 F.2d 1146 (2d Cir. 1989)

Aggressive state and federal laws force polluters to pay for personal and property damages.[1] Insurers attempt to exclude such damages from coverage and limit their financial burden by inserting a standard pollution exclusion clause into general liability policies.[2] This clause excludes insurance coverage of damages arising from environmental pollution except when the pollution is "sudden and accidental."[3] In

1. Congress enacted stringent environmental regulations largely in response to increased public awareness of environmental issues. Sive, *Forward: Roles and Rules in Environmental Decisionmaking*, 62 IOWA L. REV. 637 (1977) (regarding the formation of environmental interest groups); *cf.* Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-87 (1982); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-57 (1982). The Resource Conservation and Recovery Act (RCRA), § 3005(e), 42 U.S.C. § 6925(e)(2)(b) (1982), *as amended by* Pub. L. No. 98-616, 98 Stat. 3321 (1984), terminated interim status of all land disposal facilities on November 8, 1985 unless the facility owners certified that their facilities complied with all applicable financial responsibility requirements. RCRA requires each person who owns or operates a hazardous waste facility to obtain a permit. 42 U.S.C. § 6925(a) (1982). A facility with interim status may operate until EPA disposes of the permit application. 42 U.S.C. § 6925(e)(1) (1982 & Supp. IV 1986). *See, e.g.*, Grand River Lime Co. v. Ohio Casualty Insurance Co., 289 N.E.2d 360, 32 Ohio App. 2d 178 (1972) (the insurance policy covered an insured which intended the release of pollution but did not expect or intend the damage which the pollution caused).

2. For an overview of liability insurance policies expressly covering environmental damages, see Smith, *Environmental Damage Liability Insurance — A Primer*, 29 BUS. LAW 333 (1983). The Smith article discusses the risks which environmental damage insurance policies cover and the types of policies available to prospective insureds. *See also* Note, *The Pollution Exclusion in the Comprehensive General Liability Insurance Policy*, 1986 U. ILL. L. REV. 897, 905 (the pollution exclusion clause evolved from decisions such as *Grand River Lime*).

3. The standard pollution exclusion clause in a comprehensive general liability insurance policy (CGL) excludes from coverage:

[b]odily injury or property damage arising out of the discharge, dispersal, release or

City of Johnstown, New York v. Bankers Standard Insurance Co.,[4] the Second Circuit held that, despite this clause and prior notice to the insured city of groundwater contamination from its municipal landfill, insurers were required to defend the city in a liability suit where the city had assumed a risk of hazardous chemical leakage.[5]

In *Johnstown*, wastes from a city-owned dump leaked into and polluted surrounding groundwater.[6] The state sued the city under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[7] The city sought a declaration that their insurance policy required their insurers to defend and indemnify them in the CERCLA action.[8] The insurance companies claimed that a pollution

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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.*

Tyler & Wilcox, *Pollution Exclusion Clauses: Problems in Interpretation and Application Under the Comprehensive General Liability Policy*, 17 IDAHO L. REV. 497, 500 (1981) (emphasis added).

4. 877 F.2d 1146 (2d Cir. 1989).

5. *Id.* at 1152. The exception for "sudden and accidental" pollution discharges is controversial. Note, *supra* note 2, at 899. Some courts interpret the language as ambiguous. *See infra* note 23 and accompanying text for discussion of the case law following this line of interpretation. Others find it unambiguous. *See infra* note 32 and accompanying text for a discussion of the case law finding the language unambiguous; Technicon Electronics Corp. v. American Home Assurance Co., 141 A.D.2d 124, 533 N.Y.S.2d 91 (1988), *aff'd*, 74 N.Y.2d 77, 542 N.E.2d 1098, 544 N.Y.S.2d 531 (1989) (manufacturing plant could not recover costs of property damage caused by exposure to hazardous substances). The insurers had the burden of proving that the damage was not "sudden and accidental." They met this burden by showing that the insureds "expected or intended" the resulting damage. *Id.* at 134, 533 N.Y.S.2d at 97.

6. 877 F.2d at 1152. The landfill now receives only general household refuse, but until 1979 the landfill also received various industrial wastes. *Id.*

7. 42 U.S.C. §§ 9601-57 (1982), *as amended by* the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986). CERCLA has become known as the "superfund" law. Its main purpose is the cleanup of leaking hazardous waste disposal sites. FINDLEY & FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 169 (1988). The Act is comprised of four main elements:

> First, it establishes an information gathering and analysis system to enable federal and state governments to characterize chemical dump sites and develop priorities for response actions. Second, it establishes federal authority to respond to hazardous substance emergencies and to clean up leaking sites. Third, it creates a Hazardous Substances Trust Fund to pay for removal and remedial actions. Finally, it makes those who are responsible for hazardous substances releases liable for cleanup and restitution costs.

Id. at 169-71.

8. 877 F.2d at 1147. The companies argued that the city "expected" or "intended"

exclusion clause in the city's insurance policy exempted the insurers from defending the city.[9] The District Court for the Northern District of New York granted the insurers' motion to dismiss.[10] On appeal, the Second Circuit reversed and remanded, holding that evidence indicating the city had notice that the landfill was leaking into surrounding groundwater did not relieve the insurers of their duty to defend the city in the state's action to recover clean up costs.[11]

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the damages alleged in the CERCLA complaint. *Id.* *See infra* note 11 (to allow the exception to the exclusion clause, damage must be neither expected nor intended). The insurers' motion to dismiss rested on three key documents which showed that the city had notice of the contamination problem yet failed to stop it. 877 F.2d at 1151. The court did not find these documents sufficiently "probative" to meet the insurers' burden of proof. *Id.* at 1152.

9. 877 F.2d at 1147. In its decision, the court only addressed the issue of the duty to defend. *Id.* at 1148. "Under New York law, the duty to defend and the duty to indemnify are separate and distinct." *Id.* at 1146. The duty to defend is broader because an insurer must defend even if it wins the suit. Niagara County v. Utica Mut. Ins. Co., 80 A.D.2d 419, 435 N.Y.S.2d 538 (1981). *See also* International Paper Co. v. Continental Casualty Co., 35 N.Y.2d 322, 320 N.E.2d 619, 427 N.Y.S.2d 1191 (1974) (insurer's obligation to furnish insured with a defense is heavy and broader than its duty to pay).

10. 877 F.2d at 1148. In support of their motion to dismiss for summary judgment, the insurers argued that the pollution damage was a "known risk," so the city must have "expected" it. *Id.* at 1147-48. A leading treatise explains this issue at 1 COUCH ON INSURANCE 2D §§ 1:5, 2:7 (rev. ed. 1984). Liability insurance is intended to cover only fortuitous events: "a contract of insurance . . . depends upon some contingent event against the occurrence of which it is intended to provide, even though the event may never occur." *Id.* The Court of Appeals briefly addressed the "known risk" theory. 877 F.2d at 1153. Defending its decision not to thoroughly assess the known risk doctrine, the court argued that no New York case law shows that the knowledge of a risk makes that risk uninsurable. *Id.* Attorneys for the insurers address this assertion in their petition for rehearing:

> Contrary to this Court's understanding, the "known risk" doctrine has a very firm foundation in the law of New York. Section 1101 of the New York Insurance Law defines an insurance contract to be "dependent upon the happening of a fortuitous event" and defines a "fortuitous event" to mean "any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party." N.Y. INS. LAW § 1101 (McKinney 1985 & Supp. 1990). Inherent in that statute is the concept that insurance is not available for an event which is no longer fortuitous because it has already happened at the time the insurance policy incepted. . . . In its decision, the court ignored this statutory definition.

Appellees Petition for Rehearing and Suggestion for Rehearing at 3, City of Johnstown, New York v. Bankers Standard Insurance Co., 887 F.2d 1146 (2d Cir. 1989) (No. 88-9051). *See infra* note 16 (where environmental damage is expected and intended it will not be covered by the policies).

11. 877 F.2d at 1154. The District Court opined that evidence indicated the city knew of conditions from which it could expect the release and subsequent damage alleged in the CERCLA complaint, yet the city did not come forward with anything to

When Congress enacted CERCLA in 1980,[12] creating a powerful cause of action against polluters,[13] insurers became concerned about their financial responsibility for remedial response cost judgments against their policyholders.[14] Comprehensive general liability insurance policies (CGL) traditionally allow policyholders to recover clean up costs when there has been an "occurrence."[15] For an "occurrence" to take place under the language of a standard CGL, damage from an

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rebut the information. *Id.* at 1154. The Court of Appeals, however, found that the occurrences listed in the policy did occur within the policy term of the insurance companies. *Id.* at 1146. The city's policies with Bankers Standard and Pacific Employers insurance companies stated that the insurers would defend and indemnify the city only if the liability at issue arose out of an "occurrence," as defined by the policies. *Id.* at 1149. Each policy defined "occurrence" as follows:

> An accident, including continuous or repeated exposure to the same event, that results, during the policy period, in loss or damage to your property or in bodily injury, personal injury, or property damage. Such injury or *damage must be neither expected nor intended by the insured.*

Id. (emphasis added). The court reasoned that the insureds had the burden of proving that the insured "expected and intended" the damage. *Id.*

12. 42 U.S.C. §§ 9601-57 (1982). The Superfund Amendments and Reauthorization Act of 1986 (SARA) revised CERCLA by establishing schedules for response actions. FINDLEY & FARBER, *supra* note 7, at 172.

13. Section 107 of CERCLA states:

> generators and transporters of hazardous substances, as well as owners and operators of the disposal or treatment facilities receiving such substances, shall be liable for (a) all costs of removal or remedial action incurred by the federal or state government "not inconsistent with" the National Contingency Plan (NCP); (b) any other "necessary" response costs incurred by any person "consistent with" the NCP; and (c) damages to "natural resources" resulting from release of hazardous substances.

FINDLEY & FARBER, *supra* note 7, at 171. Moreover, courts have held that § 107 of CERCLA imposes strict liability. *Id. But cf.* Glass, *Superfund and SARA: Are There Any Defenses Left?* 12 HARV. ENVTL. L. REV. 385, 397-99 (1988) (discussing § 107-based defenses). *See also supra* note 1 for a discussion of the evolution of legislative environmental protection.

14. 42 U.S.C. §§ 9601-57 (setting procedures for cost assessment under CERCLA). *See supra* note 1 (environmental concern groups and legislation increased awareness of the detrimental effects of pollution).

15. Note, *supra* note 2, at 903. Prior to 1966, the CGL insured against injury to persons or property "caused by accident." *Id.*; Tyler & Wilcox, *supra* note 3, at 499. Some courts required an accident to be sudden; the majority of courts did not require a sudden event. Note, *supra* note 2, at 904. *See* Holmes, *Applicability of Liability Insurance Coverage to Private Pollution Suits: Do We Insure Pollution?*, 40 TENN. L. REV. 377 (1973) (as courts increasingly found that "accident" included non-sudden events, insurers realized a change in policy was appropriate). For further discussion of the development of the pollution exclusion clause, see Tyler & Wilcox, *supra* note 3.

accident must be neither "expected" nor "intended."[16] In addition, insurers invoke a standard pollution exclusion clause, which denies coverage in cases of environmental pollution except when the "discharge, dispersal, release or escape" is "sudden and accidental."[17]

The majority of courts employ a four-step analysis[18] to determine whether the occurrence falls under the "sudden and accidental" language of the pollution exclusion.[19] First, courts ask whether the pollution involved constitutes an "occurrence," focusing on whether the damage was "expected or intended."[20] Second, courts focus on the expectation element of the word "sudden" in the "sudden and acciden-

16. Note, *supra* note 2, at 904. After 1966, the CGL covered "occurrences" instead of "accidents." *Id.* The post-1966 CGL read:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, *caused by an occurrence*, and the company shall have the right and duty to defend any suit against its insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent . . .

Id. (quoting McGeough, *Insurance Coverage of Actions for Environmental Damages* in ENVIRONMENTAL LAW - DEFENSE AND INSURANCE PROBLEMS 26 (1977) (emphasis added)). The 1966 policy definition of "occurrence" stated: "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 insured." Note, *supra* note 2, at 905. In 1973, the insurers deleted from this definition the phrase "during the policy period." *Id.*

17. *See supra* note 3 for language of the exclusion clause. In 1982, the New York legislature repealed that portion of the state statute requiring inclusion of the pollution exclusion in CGLs. *See* N.Y. INS. LAW, *supra* note 10, at § 1113, as quoted in Technicon Electronics v. Am. Home Assur., 141 A.D.2d 124, 533 N.Y.S.2d 91 (1988). The purpose of the 1982 New York legislation was to encourage New York industry to handle its hazardous wastes more responsibly. 141 A.D.2d at 142, 533 N.Y.S.2d at 103 (quoting 1982 N.Y. Legis. Ann. at 272). In theory, the lack of a pollution exclusion within a CGL would prohibit insurance companies from covering environmental damage due to the high cost of liability. Lack of coverage would place all damage costs directly on the polluting industry. *Id.* The elimination of this clause from CGLs, however, does not negate the relevancy of this Comment. Litigation still arises over cases based on policies which included the pollution exclusion clause. Moreover, its elimination has prompted debate over who holds the financial responsibility for environmental damage. *Id.*

18. *See* Note, *supra* note 2, at 907-09.

19. *Id.* at 907.

20. *Id.* The court asks whether there was an "occurrence." *Id.* If the court does not find an "occurrence" then the pollution exclusion clause is irrelevant because the policy only covers "occurrences." *Id.* (citing American States Ins. Co. v. Maryland Casualty Co., 587 F. Supp. 1549 (E.D. Mich. 1984)).

tal" exception to the pollution exclusion.[21] Third, courts explore the repeated use of "accident" and "accidental" in both the definition of "occurrence" and the exception to the pollution exclusion clause to show that the two are essentially synonymous.[22] Fourth, courts note that while liability insurance does not cover the intended results of intentional acts, the policy will cover the unintended results of an intentional act.[23]

In *Lansco, Inc. v. Department of Environmental Protection*,[24] vandals caused a major oil spill when they opened valves on Lansco's oil tanks. The New Jersey Court of Appeals held that a spill may be "sudden and accidental" under the exclusion clause even if the deliberate act of a third party causes the spill.[25] The court interpreted "sudden" to mean "unexpected."[26] This took the temporal element from the word "sudden" and made the exception to the pollution exclusion clause easily applicable to a polluter. Moreover, the terms "sudden" and "accidental" were interpreted to mean the same thing. Defining "occurrence" in part as "an accident," the *Lansco* court read the "accident" exception as identical to the definition of an "occurrence." The court then determined that the "accidental" nature of the incident must be viewed from the standpoint of the insured.[27] While stressing that the relevant inquiry was whether the discharge, not the loss, was "sudden and acci-

21. Lansco, Inc. v. Department of Envtl. Protection, 138 N.J. Super. 275, 282, 350 A.2d 520, 524 (1975). Courts note that the definition of "sudden" includes "happening without notice or on very brief notice; unforeseen; unexpected; unprepared for." *Id.*

22. The policy defines "occurrence" as an "accident." The discharge must be "accidental" to fall within the exception to the pollution exclusion. *See supra* notes 3 and 11 for the contractual language.

23. Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co., 186 N.J. Super. 156, 164, 451 A.2d 990, 994 (1982).

24. 138 N.J. Super. 275, 350 A.2d 520 (1975).

25. *Id.* at 277, 350 A.2d at 522.

26. *Id.* at 279, 350 A.2d at 524 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1954); BLACKS LAW DICTIONARY (4th ed. 1968)). The court reasoned that the common meaning of "sudden" is "happening without previous notice or on very brief notice; unforeseen; unexpected; unprepared for." *Id.*

27. *Id.* The "occurrence" definition expressly provided that the inquiry of whether the loss was "expected or intended" must be viewed from the standpoint of the insured. *See supra* note 16 for language of a standard CGL. Moreover, the pre-1966 accident-based coverage policies generally viewed the definition of accident from the standpoint of the insured. Because the pollution exclusion reinstated coverage for accidental damage, it logically follows that the standpoint from which to evaluate a pollution discharge ought to be that of the insured as well. Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237, 1255 (1986).

dental," the court found that the damage was "sudden and accidental" because the insured did not expect or intend it.[28]

In *Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co.*[29] and *Township of Jackson v. American Home*,[30] landowners sued Jackson Municipal Utility Authority after pollutants from the plant's adjacent landfill leaked into groundwater.[31] Jackson Municipal Utility Authority sought to compel its insurers to defend it.[32] In both cases the court followed *Lansco* and found that the pollution exclusion clause restates the definition of "occurrence."[33] In the first case, the court expanded *Lansco* and held that the relevant inquiry is whether

28. *Id.* at 279, 350 A.2d at 524. The *Lansco* court held that the "oil spill" was sudden and accidental because it was neither intended nor expected. *Id.* The court did not discuss whether the ultimate loss was sudden and accidental. Note, *supra* note 27, at 1255.

29. 186 N.J. Super. 156, 451 A.2d 990 (1982).

30. No. L-20237-8, slip op. (N.J. Super. Ct. Law Div. Aug. 31, 1984) (unpublished) in Note, *supra* note 27, at 1256-60.

31. Note, *supra* note 27, at 1256. Pollutants allegedly were leaking from the landfill into a nearby aquifer. 186 N.J. Super. at 157, 451 A.2d at 991.

32. *Id.* Jackson Township impleaded the Jackson Township Municipal Utilities Authority (MUA), a statutorily created entity which collected liquid wastes and deposited them at designated landfills, as well as twenty other companies, hazardous waste transporters, and other public bodies that allegedly deposited hazardous wastes at the site. *Id.* Jackson Township alleged that MUA knew or had reason to know that the liquid wastes it deposited in the landfill would leak through the landfill soil and into nearby wells. *Id.* In the first case, MUA sued its insurers to compel them to defend. In the second case, Jackson Township sued its own insurer. *Id.*

33. Note, *supra* note 2, at 907. Courts which construe the pollution exclusion clause as coextensive with the definition of occurrence generally cite LONG, LAW OF LIABILITY INSURANCE APP. 58 (1983). *Id.* According to Long, the pollution exclusion "eliminates coverage for damages arising out of pollution or contamination, where such damages appear to be expected or intended on the part of the insured and hence are excluded by the definition of 'occurrence.'" LONG, LAW OF LIABILITY INSURANCE APP. 58 (1983) *as quoted in* Waste Management, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374 (1986). *Accord* NEWMAN, LIABILITY COVERAGE PRINCIPLES 133 (rev. ed. 1983) (citing Selected Risks Ins. Co. v. East Windson Mun. Util. mandator, No. L-15205-81, slip op. (N.J. Super. Ct. Sept. 3, 1982)). *But see* Hickman, *The Pollution Exclusion Clause: A Hazardous Wasteland* in *Insurance Law Conference: The Most Important Topics of the 80's* B-18 (CGL Reporter's Seminar, Apr. 25-26, 1985) *as quoted in* Note, *supra* note 27, at 1260. *Cf.* American States Ins. Co. v. Maryland Casualty Co., 587 F. Supp. 1549 (E.D. Mich. 1984) (if the court finds no "occurrence," the court does not need to invoke the pollution exclusion clause because the policy only covers "occurrences"); Buckeye Union Insurance Company v. Liberty Solvents and Chemicals Co., Inc., 477 N.E.2d 1227 (Ohio App. 1984) (the courts found that the insured "neither expected nor intended" the release of chemicals into the environment; this finding established an "occurrence" according to the definition).

the resulting loss or damage was unexpected or unintended, not whether the event or discharge was "expected or intended."[34] In the second case, the court redefined "expected" to mean "knew."[35] It required evidence from the insurer that the insured plant knowingly deposited the substances at the landfill before the court would deny recovery.[36] The *Jackson* cases illustrate the problem facing the insurance industry. Courts circumvent the pollution exclusion clause for the purpose of forcing the polluter to pay any resulting damages and have avoided giving force to the plain meaning of that exclusion.

A minority of courts view the pollution exclusion clause as unambiguous.[37] These courts hold that "occurrences" are not "sudden and accidental" by definition.[38] Giving the language of both CGL provisions equal weight, the minority position preserves the intent of the contract. This interpretation encourages insurers to continue to provide requisite coverage for legitimate "sudden and accidental" pollution occurrences. It also promotes environmental awareness among the policyholders. Knowledge that their liability costs will no longer be passed on to the insurer will force polluters to make a conscious effort to avoid triggering damage. Stretching the provisional language to an all-encompassing proportion, however, serves to dissuade the insurers from any further policy coverage.

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34. Note, *supra* note 27, at 1258.

35. *Id.* (foreseeability was insufficient to label the loss "expected or intended").

36. *Id.* The term "knew" also meant "intended." Under this court's reasoning, therefore, "intended or expected" meant "intended." *Id.*

37. Note, *supra* note 2, at 922. *See also supra* note 23 (the ambiguity doctrine).

38. *See* Great Lake Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1984) (the contamination of soil and water by toxic waste contained no allegation of a sudden and accidental discharge); National Standard Ins. Co. v. National Union Fire Ins. Co., No. CA-3-81-1015-D (N.D. Tex. Oct. 4, 1983) (the policy clearly excluded the claims of residential claimants, who asserted exposure to chemicals through the atmosphere over a number of years; the court held that these claims were not sudden and accidental); Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374 (1986) (where a transporter of wastes negligently deposited waste at a landfill, the court found that the owners of the landfill neither expected nor intended the damage caused); Transamerica Ins. Co. v. Sunnes, 77 Or. App. 136, 711 P.2d 212 (1985) (the court found that because the property damage was not intended there was an 'occurrence' within the meaning of the policy definition); Techalloy Co. v. Reliance Ins. Co., 338 Pa. Super. 1, 487 A.2d 820 (1984) (the court found that long term dumping of hazardous chemicals did not constitute a sudden event); City of Milwaukee v. Allied Smelting Corp., 117 Wis. 377, 244 N.W.2d 523 (1983) (the subjection of city sewers to acid for a period of from two to ten years provides more than adequate grounds to reject the city's contention that the discharge was sudden and accidental).

Techalloy Co. v. Reliance Insurance Co.[39] illustrates the minority view.[40] In *Techalloy*, the plaintiffs filed a CERCLA suit alleging that the defendant company recklessly dumped or stored a hazardous chemical[41] over an extended period of time.[42] The court conceded that the discharge may have been accidental but concluded that the complaint did not allege a "sudden" event.[43] The court stressed that the pollution exclusion clause unambiguously denied recovery for a toxic discharge unless it was both "sudden" and "accidental."[44] Unlike the majority view, *Techalloy* recognized that the pollution exclusion clause contains two separate and distinct sections.[45] The first section of the clause excluded from coverage certain pollution-related events. The second part of the clause comprised an exception to the exclusion where the "discharge, dispersal, release or escape was sudden and accidental." The court stressed the exclusionary language rather than emphasizing the exception.[46] It recognized that the purpose of the pollution exclusion was to impose financial responsibility on polluters for their environmental abuse. The focus, therefore, ought to be in maintaining that objective.

Similarly, in *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*,[47] landfill owners sued a waste transporter for negligently depositing waste at the landfill.[48] The North Carolina Supreme Court held that insurers did not have an obligation to defend the transporter.[49] The court reasoned that neither the definition of "occur-

39. 338 Pa. Super. 1, 487 A.2d 820 (1984).

40. *See supra* note 33 for a listing of recent cases which applied the same analysis as that in *Techalloy*.

41. 487 A.2d at 827. The suit alleged that Techalloy recklessly dumped or stored trichloroetheline on a regular or sporadic basis from time to time during the past twenty-five years. *Id.*

42. *See supra* note 36 for duration.

43. 338 Pa. Super. at 14, 487 A.2d at 826. The court reasoned that a duration of twenty-five years may not be "sudden." *Id.*

44. *Id. See supra* note 3 for exact language of the pollution exclusion clause with respect to the "sudden and accidental" exception.

45. *Id.* at 14, 487 A.2d at 827.

46. *Id. See also* Note, *supra* note 2, at 910.

47. 315 N.C. 688, 340 S.E.2d 374 (1986).

48. *Id.* The transporter of wastes, Waste Management, did business as Trash Removal Services. 315 N.C. at 689, 340 S.E.2d at 376.

49. *But see* Aetna Casualty & Sur. Co. v. Martin Bros. Constr. & Timber Corp., 256 F. Supp. 145 (D. Or. 1966) (the court defined "occurrences" differently). The court held that the policy covered emission of fly ash from the insured's plant, even though

rence" nor the exclusion clause required coverage.[50] The court addressed three parts of the policy.[51] First, the court determined that because the insured had not "expected or intended" the leakage or the damage, it was an "occurrence."[52] Second, the court noted that the pollution exclusion clause concerned the nature of the damage rather than what the insured intended, expected or foresaw.[53] Finally, the court recognized that a gradual release of pollutants over a period of time was not "sudden."[54] Thus, the "occurrence," which the pollution exclusion removed from coverage, was not brought back within coverage by the "sudden and accidental" exception to the exclusion.[55]

New York courts traditionally adopt the majority analysis.[56] For example, in *Allstate Ins. Co. v. Klock Oil Co.*,[57] the court ordered an insurer to defend a policyholder in an action for negligently installing a

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the insured was aware of such emissions and had made efforts to rectify the problem. The court held that the resultant damage was at best "accidental" within the meaning of the policy language. 315 N.C. at 701, 340 S.E.2d at 383.

50. 315 N.C. at 695, 340 S.E.2d at 375.

51. Note, *supra* note 2, at 927. The court addressed the definition of "occurrence," the exclusion in the pollution exclusion clause, and the exception to the pollution exclusion clause. 315 N.C. at 695, 340 S.E. 2d at 379.

52. 315 N.C. at 696, 340 S.E.2d at 380. The court reasoned that since the insureds neither expected nor intended the contaminants to leak from waste materials into the groundwater, they could not have expected the damages which the leaking caused. Therefore, an "occurrence" had taken place. *Id.*

53. *Id.* at 696-700, 340 S.E.2d at 380-83 (the exclusion concerns itself with the nature of the damage).

54. *Id.* at 699, 340 S.E.2d at 382. The court observed that by focusing entirely on the aspect of "sudden" meaning "unexpected," "sudden" must be viewed as synonymous with "accidental." Such a reading renders the coverage language indistinguishable from its exclusion. *Id.*

55. *Id.* at 700, 340 S.E.2d at 383. A more proper application of the word "sudden," argues the court, describes events which last for short periods of time. *Id.* at 699, 340 S.E.2d at 382.

56. Note, *supra* note 2, at 912 (quoting N.Y. INS. LAW § 46 (McKinney 1982), *repealed and superseded by* N.Y. INS. LAW § 367 (McKinney 1984)) (New York Insurance Law § 46, since repealed, required that liability insurance policies for commercial or industrial enterprises in New York contain the pollution exclusion clause). Courts applying the original New York statute utilized the same rationale as in those cases finding the pollution exclusion clause to restate the definition of "occurrence." *Id. See also* Niagara County v. Utica Mutual Insurance Co., 103 Misc. 2d 814, 427 N.Y.S.2d 171 (1980), *appeal dismissed*, 54 N.Y.2d 608, 427 N.E.2d 1191 (1981) (where plaintiffs alleged that the insured was dumping chemicals into Love Canal, the court concluded that the pollution exclusion clause did not apply to insureds who were not actively and knowingly polluting).

57. 73 A.D.2d 486, 426 N.Y.S.2d 603 (1980).

gasoline storage tank[58] after the tank leaked and caused damage to adjoining property.[59] The court equated "accidental" with "sudden"[60] and held that if the gasoline leak were "accidental," it could be "sudden" even though the discharge was "undetected for a substantial period of time."[61] This made the policyholder's burden easier to meet. At the time, the state statute mandated the pollution exclusion,[62] reflecting a policy encouraging a cleaner environment by eliminating the opportunity for industry to spread the risk of loss it causes by pollution.[63] However, the court still upheld the insurance contract and held that Allstate had the burden to prove its entitlement to the exclusion. It noted that where an ambiguity exists, courts construe contracts to favor the insured.[64] In this case, the ambiguity existed in the interpretation of the "expected and intended" and "sudden and accidental" CGL provisional language.[65]

However, some New York courts have recently followed the minority view and held the pollution exclusion clause unambiguous.[66] In *Technicon Elecs. Corp. v. American Home Assurance Co.*,[67] for example, the New York Supreme Court, Appellate Division, reversed a finding of ambiguity and denied the policyholder indemnification. In *Technicon*, a manufacturer sought defense from its insurer to recover costs of property damage caused by hazardous substances discharged

58. 73 A.D.2d at 487, 426 N.Y.S.2d at 604. The tank was installed at an automobile dealership. *Id.*

59. *Id.* The complaint alleged "negligent installation and maintenance of a gasoline storage tank." *Id.*

60. *Id.* at 488, 426 N.Y.S.2d at 604. The court reasoned that the word "sudden" in liability insurance policies need not be limited to an instantaneous happening. *Id. See* McGroarty v. Great American Insurance Co., 329 N.E.2d 172, 175, 368 N.Y.S.2d 485, 490 (1985) (the New York Supreme Court, Appellate Division, applied its "transaction as a whole" test in determining whether the term "accident," as used within liability policy under which recovery is sought, is applicable to a given situation).

61. 73 A.D.2d at 487, 426 N.Y.S.2d at 604.

62. *Id. See* N.Y. INS. LAW § 46 (13-14) (McKinney 1982).

63. 73 A.D.2d at 487, 426 N.Y.S.2d at 604.

64. *Id.* (quoting Messersmith v. American Fidelity Co., 232 N.Y. 161, 166, 133 N.E. 432, 433 (1921)).

65. 73 A.D.2d at 487, 426 N.Y.S.2d at 604 (citing Farm Family Mut. Ins. Co. v. Bagley, 64 A.D.2d 1014, 409 N.Y.S.2d 294 (1978)).

66. *See* Technicon Electronics v. American Home Assur. Co., 141 A.D.2d 124, 140, 533 N.Y.S.2d 91, 103 (1988). *But see* Avondale Industries, Inc. v. Travelers Indem. Co., 697 F. Supp. 1314 (S.D.N.Y. 1988), *aff'd*, 887 F.2d 1200 (2d Cir. 1989).

67. 141 A.D.2d 124, 533 N.Y.S.2d 91 (1988).

from the manufacturer's plant.[68] The *Technicon* court stated that the relevant inquiry is not whether the policyholders expected or intended the damage but whether they expected or intended the release.[69] With this finding, the court made the burden easier on the insurer, requiring it only to establish an intentional discharge of toxic waste. The significance of *Technicon* lies in the New York Supreme Court's message that it will not allow intentional polluters to pass costs on to insurers.[70]

Similarly, in *EAD Metallurgical v. Aetna Casualty & Surety Co.*,[71] a federal district court concluded that the insured's disposal of waste over a long period of time in the regular course of business was neither "sudden" nor "accidental."[72] The court reasoned that a finding that the pollution exclusion clause exempts these activities from coverage would render such an exclusion practically meaningless.[73] It stressed that by effectively subsidizing a polluter's activities through insurance mechanisms, the courts eliminate the polluter's incentive to minimize polluting. This, the court concluded, contradicts New York's strong policy of encouraging a clean environment.[74]

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68. 141 A.D.2d at 128, 533 N.Y.S.2d at 93. Technicon is a Delaware corporation having its principal place of business in Tarrytown, New York. Technicon owns and operates a plant in Humacao, Puerto Rico, for the manufacture of machines to analyze blood samples. The underlying action is based upon bodily injury which allegedly occurred as a result of exposure to toxic chemicals discharged from Technicon's Puerto Rican plant. *Id.* at 126, 533 N.Y.S.2d at 92.

69. *Id.* at 128, 533 N.Y.S.2d at 93. The *Technicon* court reasoned that there was no allegation of a sudden or accidental discharge in the underlying complaint. In fact, the complaint alleged a long-standing, continuous and intentional discharge of toxins. A finding that there was a knowing discharge of toxic wastes into Frontera Creek and other bodies of water during several years cannot, as a matter of law, be considered a "sudden and accidental" discharge of toxic wastes. *Id.* at 144, 533 N.Y.S.2d at 104.

70. 141 A.D.2d at 143, 533 N.Y.S.2d at 103.

71. 701 F. Supp. 397 (W.D.N.Y. 1988).

72. *Id.* at 402 (words in an insurance contract should be given their plain meaning). *Cf.* County of Broome v. Aetna Casualty & Surety Co., 146 A.D.2d 336, 540 N.Y.S.2d 620 (1989) (property damages are expected if the actor knew or should have known there was a substantial probability that a certain result would take place).

73. 701 F. Supp. at 402. *See supra* note 33 for a discussion of the pollution exclusion clause as coextensive with the definition of "occurrence."

74. 701 F. Supp. at 402. *See Technicon*, 141 A.D.2d at 142, 533 N.Y.S.2d at 102 (quoting 1971 N.Y. Legis. Ann. at 353-54):

> New York State has adopted stringent standards to prohibit despoiling the environment through the discharge of noxious substances into the water and air. These standards, which are the most comprehensive in the Nation, go far beyond merely strengthening and supplementing the common law rules against pollution. As strict as these laws are, however, their effectiveness could be substantially reduced

City of Johnstown, New York v. Bankers Standard Insurance Co.[75] presented the court with an opportunity to define "expect or intend" as it appears in the definition of "occurrence" and to define "sudden and accidental" within the context of the pollution exclusion clause.[76] The *Johnstown* court interpreted "expect or intend" narrowly,[77] holding that the standard CGL excludes only those losses that are not "accidental."[78] In defining "accidental," the court focused on the relationship between an intentional act and the resulting damage.[79] The *Johnstown* court found that the city neither expected nor intended the resulting damage.[80] This was sufficient to require the insurers to defend the policyholders despite the pollution exclusion clause.

The court distinguished "damages which flow directly from an intended act and damages which accidentally arise out of a chain of foreseeable events."[81] While an intentional act may ultimately cause damages, the court reasoned, the damages may be "accidental" if the total situation constitutes an accident.[82] In this case, the court concluded that the insurers failed to meet their burden of proving that the damages were not accidental.[83]

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if polluters were able to purchase insurance to protect themselves from having to pay the fines and other liabilities that may be imposed upon them for polluting. *Id.*

75. 877 F.2d 1146 (2d Cir. 1989).

76. *Id.* at 1147.

77. *Id.* at 1149-50.

78. *Id.* at 1150.

79. *Id.* Although an intentional act may ultimately cause damages under New York law, those damages will be "accidental" if the total situation constitutes an accident. *Id. See also McGroarty, supra* note 60.

80. 877 F.2d at 1151. Following the majority line, the court reasoned that since the policy defines "occurrence" as "an accident . . . neither expected nor intended . . .," any occurrence that is both unexpected and unintended is "accidental" within the meaning of the exclusion. Thus, only where the insured intends both the discharge and the damage which the discharge causes will be the policy not cover the insured. *Id.* at 1150-51.

81. 877 F.2d at 1150.

82. *Id. See supra* note 60 discussing the *McGroarty* transaction as a whole test.

83. 877 F.2d at 1151. An insurer seeking to avoid its duty to defend bears a heavy burden. *Id.* The *Johnstown* court dismissed the insurers' known risk argument. For a more complete discussion of the known risk doctrine, see *supra* note 10. The court, unable to cite applicable case law, stated briefly that the doctrine was inapplicable in New York. The New York Court of Appeals decision finding the insurers responsible for defense of a CERCLA action was incorrect for four reasons. First, the court improperly rejected the known risk doctrine. 877 F.2d at 1152-53. Attorneys for the insurers have cited the generally accepted case law as well as New York insurance law.

The New York Court of Appeals decision was incorrect for three reasons. First, the court improperly equated "expected" with "intended" and "sudden" with "accidental."[84] The "occurrence" definition states that either intended or expected damage is excluded from coverage.[85] Furthermore, the New York Supreme Court in *Technicon* recognized that both terms have independent meaning.[86] Additionally, *Technicon* stressed the importance of giving effect to each contract term.[87] The *Johnstown* court's view that "sudden" and "accidental" were synonymous contradicts reason as well as the *Technicon* rationale.[88] Such an interpretation provides polluters with little economic incentive to alter their methods. It pushes insurers into a corner from which their escape may be a denial of any future pollution accident coverage.

Second, the court found the pollution exclusion clause to conflict with its original purpose.[89] The court in *Technicon* found that calling an intentional discharge of pollutants over a course of years "sudden and accidental" distorts the plain and clear language in the policy.[90]

See supra note 10. *See also* Reply Memorandum of Law in Support of Defendants' Motion to Dismiss, City of Johnstown, N.Y. v. Bankers Ins., 877 F.2d 1146 (2d Cir. 1989) (No. 88-9051) at 3-7. The city argues that the insurers confused their known-risk argument with the definition of "occurrence" such that neither become applicable. *Id.* Second, the known risk doctrine asserts that the knowledge of a risk makes that risk uninsurable. The known risk doctrine nullifies insurance coverage where the risk is known prior to acquisition of the policy. 1 COUNCH ON INSURANCE 2D § 27 (rev. ed. 1984). "In order to have a contract of insurance, there must be a risk which is specified or capable of identification, since a risk which is the coverage of the contract is of the very essence of insurance." *Id.*, as quoted in Petition for Rehearing at 6, City of Johnstown, New York v. Bankers Standard Insurance Co., et. al., 877 F.2d 1146 (2d Cir. 1989) (No. 88-9051) (en banc). Third, attorneys for the insurers cited an expansive amount of documentation in support of their known risk argument. Petition for Rehearing at 3 (quoting New York Insurance Law, *supra* note 10, at § 1101). Fourth, the city did not cite a single known risk case in support of its contentions. The argument that such a doctrine might swallow the narrower doctrines of 1) concealment and misrepresentation, and 2) damages that are "expected" or "intended" by the insured is unsubstantiated. 877 F.2d at 1153.

84. 877 F.2d at 1150.

85. 141 A.D.2d 124, 132-33, 553 N.Y.S.2d 91, 96 (1988)

86. *Id.* at 134, 533 N.Y.S.2d at 97.

87. *See supra* notes 66-70 and accompanying text for a discussion of *Technicon*.

88. For an appraisal of the recent trend in New York case law, see *supra* notes 54-61 and accompanying text.

89. *See Technicon and EAD Metallurgical, supra* notes 66-74 and accompanying text.

90. *Technicon*, 141 A.D.2d at 132, 553 N.Y.S.2d at 96.

Providing coverage for unintended damages, claimed to have resulted from the deliberate long-term emission of toxic substances, rewrites the pollution exclusion clause.[91] It conflicts with the original purpose of excluding from coverage those who intentionally pollute.[92] Moreover, a court should not vary the meaning of an insurance contract to accomplish its own notions of moral obligation.[93] Equitable considerations will not allow an extension of the coverage beyond its fair intent and meaning.[94]

Finally, public policy mandates enforcing the pollution exclusion clause. The State of New York has stringent standards prohibiting the discharge of noxious substances into the water and air.[95] The effectiveness of these standards is substantially reduced if polluters can purchase insurance to avoid paying the fines for polluting.[96] The implementation of the pollution exclusion clause within the CGL significantly prevents such abuse.[97] The *Johnstown* court broadened the exclusion clause in the CGL policy by devaluing the meaning of its terms. In so doing, it has contributed to the widespread environmental problem of responsibility evasion.[98]

Johnstown recognized the terms "expect and intend" within the definition of an "occurrence," as well as the terms "sudden and accidental" within the context of the pollution exclusion clause, as being essentially synonymous.[99] By disregarding the plain meaning of the contract language, *Johnstown* enables polluters in New York to divert their environmental damage costs to the insurance companies.[100]

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91. *Id.*

92. *See supra* note 61 regarding purpose of the exclusion clause under New York law.

93. *Technicon*, 141 A.D.2d at 143, 533 N.Y.S.2d at 103.

94. *See id.* at 141-2, 533 N.Y.S.2d at 102-3 (citing 1972 N.Y. Legis. Ann. at 353-4 and 1982 N.Y. Legis. Ann. at 272); N.Y. INS. LAW § 46 (McKinney 1982); N.Y. INS. LAW, *supra* note 10, at § 113.

95. *Id.* Deferring the cost to insurance companies will reduce any cost incentive the insured has to stop polluting. *Id.*

96. *See supra* notes 1-3 for an implementation rationale.

97. With the burden of cost resting fully on the insurer, polluters may figure the price of damage insurance into the cost of doing business. They will have little economic incentive to reduce their activities. Tyler & Wilcox, *supra* note 3, at 520.

98. 877 F.2d at 1146.

99. *Id.*

100. For a discussion of the public policy implications of placing the full burden on the insurers, see *supra* notes 95-98 and accompanying text.

Pushing damage costs upon the insurers, however, will undoubtedly serve as a deterrent for future environmental coverage. At that point, polluters may have to account for their actions.

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RECENT DEVELOPMENTS