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"SUDDEN AND ACCIDENTAL" POLLUTION EXCLUSIONS: THE BATTLE BETWEEN INSURANCE CARRIERS AND INSUREDS CONTINUES

PENNY R. WARREN*

After years of contentious litigation in federal and state courts, the war between insurance carriers and the purchasers of comprehensive general liability (hereinafter "CGL") insurance policies[1] over whether their CGL policies cover environmental damage continues in our judicial system. Between the early 1970's and the mid-1980's, CGL policies contained a standard pollution exclusion ostensibly aimed at limiting the carrier's liability for damages done by the insured's polluting activities. Also contained in the CGL policies of the day was a "sudden and accidental" exception to the exclusion, under which the company would still be liable for pollution damages if the contamination was "sudden and accidental." Application of these clauses continues to produce a judicial standoff between insurance companies, who assert there is no coverage for gradual environmental pollution, and insureds who seek coverage for unexpected and unintended environmental damage. Although the insurance industry discarded the "sudden and accidental" clause in 1985 in favor of an absolute pollution exclusion, the "sudden and accidental" exclusion continues to be triggered for environmental damage that might have occurred in the 1970's and 1980's.[2]

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[1] CGL policies are designed to protect policyholders, mostly businesses and governments, against many forms of unexpected and unintended liability. These policies place a duty on insurers to defend and indemnify policyholders against any such successful claims. *See* Nancer Ballard & Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610, 620-21 (1990).

[2] *See* Robert G. Russell, *Insuring for Protection Against Strict Liability Imposed on Owners of Contaminated Property* 4 ENVIRONMENTAL CORPORATE COUNSEL, No. 2 (May 1997) (explaining that typical environmental coverage cases involve latent contamination and, therefore, which insurance policy (or policies) provides coverage becomes an important inquiry). The author notes on page 3 that courts generally recognize four "triggers of coverage":

> 1. Exposure. Some courts recognize that exposure triggers policies in effect at the time of each release of a contaminant. *See, e.g.*, Insurance Co. of North Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *aff'd. on reh'g*, 657 F.2d 814

The Insurance Services Office (hereinafter "ISO")[3] proffered exclusion "f" to apply to the standard form CGL policy, limiting coverage in light of the growing demands for environmental protection.[4] The exclusion provides:

> This insurance does not apply ...
>
> (f) to bodily injury or property damage arising out of 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 water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.[5]

While ISO drafted the "sudden and accidental" exclusion to clarify what pollution would be covered by standard insurance policies, the phrase

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(6th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981).

2. Manifestation. Some courts recognize that manifestation triggers policies at the time the contamination is first discovered (or, perhaps, should have been discovered). *See, e.g.*, Eagle-Picher Indus. Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983).

3. Injury-in-Fact. Some courts recognize that exposure does not always result in damage and that, very often, injury (in the context of contamination) has occurred before manifestation. They have adopted an "injury-in-fact" trigger. *See* American Home Products Corp. v. Liberty Mut. Ins. Co., 565 F.Supp. 1485 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2nd Cir. 1984).

4. Continuous Trigger. Triggers each policy in effect when property was exposed or injured-in-fact or when the damage was manifest. One of the best, and most comprehensive, discussions of the continuous trigger is found in *Montrose Chemical Corp. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal 1995)(*en banc*). Essentially, the court held that bodily injury and property damage that was continuous or was progressively deteriorating throughout several policy periods was potentially covered by all of the policies in effect during those periods.

[3] ISO and its predecessors drafted and continue to draft standard insurance contract provisions that are then sent to state insurance commissioners for approval. State insurance commissioners adopted Exclusion "f" and included it in CGL policies during the 1970's and early 1980's. *See* Ballard & Manus, *supra* note 1, at 625-27.

[4] *See* Thad R. Mulholland, Comment and Case Note, *The Saga of the Pollution Exclusion Clause: How a "Sudden" Change Occurred Gradually*, 2 MO. ENVTL. L. & POL'Y REV. 26, 27 (1994)(citation omitted). "Insurers constantly endeavor to narrow the scope of liability. Their primary weapon in environmental law has been the 'pollution exclusion clause.'" *Id.*

[5] ISO form GL 00 02, Ed. 01-73.

"sudden and accidental" has produced many conflicting legal interpretations.[6]

This article focuses on some of the recent interpretations of the "sudden and accidental" pollution exclusion and the influence of the drafting history of that exclusion upon those interpretations. Part I describes the drafting history of CGL policies and the abandonment of the "sudden and accidental" clause in favor of an absolute pollution exclusion in the mid-1980's. Part II examines several recent cases interpreting the meaning of "sudden and accidental." Some courts decided the exclusion is unambiguous or contains a temporal element, while others decided the clause leads to conflicting interpretations and, therefore, should be interpreted in favor of the insured. One court even went so far as to say that, despite the temporal meaning connoted by "sudden and accidental," the insurance industry should be estopped from denying coverage based on representations made to state insurance commissions and insureds when the exclusion was introduced.[7]

Part III analyzes how the Supreme Court of Kentucky might interpret the "sudden and accidental" exclusion if it should have the opportunity in an appropriate case. Part IV concludes that, although the majority of state and federal courts preclude coverage under this exclusion, recent state court trends demonstrate a willingness to extend coverage for environmental claims.

I. A BRIEF HISTORY OF POLLUTION EXCLUSIONS IN CGL POLICIES

Pollution related insurance coverage in CGL policies found its genesis in the early 1960's with the beginning of the environmental movement in the United States.[8] Prior to 1966, the standard CGL policy excluded coverage for environmental damage unless it was "caused by accident."[9] Those policies failed to define the term "accident."[10] Perhaps the industry decided that courts would accept the definition of "accident" developed by insurance law scholars, as referring to "a distinctive event

[6] *See, e.g.*, Sinclair Oil Corp. v. Republic Ins. Co., 929 P.2d 535, 541 n. 3-4 (Wyo. 1996) (citing over three dozen cases reaching various conclusions on the meaning and application of the "sudden and accidental" exclusion).

[7] Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831 (N.J. 1993).

[8] *See generally* Robert M. Tyler, Jr. & Todd J. Wilcox, *Pollution Exclusion Clauses: Problems in Interpretation and Application Under the Comprehensive General Liability Policy*, 17 IDAHO L. REV. 497 (1981).

[9] E. Joshua Rosenkrantz, Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237, 1241 (1986).

[10] *Id.*

that takes place by some unexpected happening at a date that can be fixed with reasonable certainty."[11] Subsequently, major difficulties surfaced concerning the classification of environmental damage as an accident or non-accident.[12]

By the mid-1960's, insurance consumers demanded broader liability coverage for environmental damage. At the same time, most courts interpreted the term "accident" expansively.[13] In 1966, the insurance industry changed its standard coverage from "accident-based" to "occurrence-based." "Occurrence" was defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected or intended from the standpoint of the insured."[14]

Insurance industry spokespersons heralded the new "occurrence-based" coverage as a "boon to policyholders."[15] In fact, the Assistant Secretary of Liberty Mutual Insurance Company, Gilbert L. Bean, said in a 1965 paper presented to the Mutual Insurance Technical Conference:

> It is in the waste disposal area that a manufacturer's basic premises operation coverage is liberalized most substantially . . . . Manufacturing risks producing insecticides, plant foods, fertilizers, weed killers, paints, chemicals, thermostats or other regulating devices, to name a few, have severe gradual [property damage] exposure. They need this protection and should legitimately expect to be able to buy it, so we have provided it.[16]

In only a few years, "occurrence" proved too burdensome to

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[11] Tyler & Wilcox, *supra* note 8, at 499 (quoting 11 COUCH ON INSURANCE 2d, § 44.283 (1963)).

[12] Tyler & Wilcox, *supra* note 8, at 499.

[13] *Id.*

[14] Tyler & Wilcox, *supra* note 8, at 499-500 (quoting the standard language from the 1973 Comprehensive General Liability Policy promulgated by ISO).

[15] Carl M. Salisbury, *Pollution Liability Insurance Coverage, The Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia*, 21 ENVTL. L. 357, 364 (1991).

[16] *Id.* at 365-66 (quoting Gilbert L. Bean, *New Comprehensive General and Automobile Program, The Effect on Manufacturing Risks*, paper presented at Mutual Insurance Technical Conference, Nov. 15-18, 1965) (emphasis added).

companies trying to avoid coverage for environmental damage,[17] so ISO went back to the drawing board in 1970. The result was the "sudden and accidental" pollution exclusion that attempted to eliminate all coverage for pollution unless it was "sudden and accidental."[18] As ISO had done previously with the definition of "accident," it again chose not to define "sudden" or "accidental." Committee reports support the position that the "sudden and accidental" exclusion was merely a clarification of the "unexpected and unintended" language in the occurrence-based policy.[19] Courts were thus left with the chore of interpreting "sudden and accidental" according to the basic principles of contract construction.[20]

Based on some of the recognized definitions of "sudden" and "accidental,"[21] the ISO may have believed that the cards were in its favor and insurance coverage would be denied for all environmental claims unless the damage occurred unexpectedly or abruptly. The idea that "sudden" included a temporal element, requiring the environmental damage to have occurred quickly and without notice rather than gradually, appeared to be supported by several definitions of the term.[22] Therefore, insurance companies may have felt confident that they would face liability for coverage only when the environmental damage occurred quickly and unexpectedly. Moreover, the industry may have presumed that limiting coverage for "unexpected and unintended" environmental

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[17] Sharon M. Murphy, Note, *The "Sudden and Accidental" Exception To the Pollution Exclusion Clause In Comprehensive General Liability Insurance Policies: The Gordian Knot of Environmental Liability*, 45 VAND. L. REV. 161, 166 (Jan. 1992). According to the author, many courts found coverage for intentional polluters under the "occurrence" language, despite the insurance industry's intent to preclude all coverage for intentional polluters. *Id.* at 166, n. 31(citing Steyer v. Westvaco Corp., 450 F.Supp. 384 (D. Md. 1978); Grand River Lime Co. v. Ohio Cas. Ins. Co., 289 N.E.2d 360 (Ohio Ct. App. 1972)).

[18] *See generally* Ballard & Manus, *supra* note 1.

[19] Salisbury, *supra* note 15, at 371.

[20] Ballard & Manus, *supra* note 1, at 614. As a further illustration, it has been observed that:

> This analysis of the ["sudden and accidental"] pollution exclusion is supported by longstanding rules applicable to the construction of insurance contracts. The law is firmly settled that to be effective, an exclusion must be conspicuous, plain and clear and must be construed strictly against the insurer and liberally in favor of the insured. The law is also established that an insurer relying on an exclusion has the burden to prove that the exclusion is applicable . . . and that any ambiguities in an insurance policy must be resolved in favor of the insured. Another fundamental concept is that "the words used by the insurer must be interpreted in accordance with the plain, ordinary and commonly understood meaning of the language employed."
> Tyler & Wilcox, *supra* note 9, at 513 (quoting Lansco, Inc. v. Department of Environmental Protection, 350 A.2d 520, 523 (N.J. 1975)).

[21] For an extensive list of different dictionary definitions of the terms "sudden" and "accidental," *see* Ballard & Manus, *supra* note 1, at 614-17.

[22] *See id.*

damage would sufficiently confine its duty to indemnify while appeasing the needs of an increasingly insurance-dependent society.[23] If the insurance industry had adequately anticipated the huge number of environmental cleanup sites in the 1980's and the astronomical costs associated with their remediation, it may have defined "sudden and accidental" and left nothing for interpretation.

In 1980, Congress enacted a monumental hazardous waste cleanup program placing crippling financial liability on businesses and individuals across the United States. This legislation, the Comprehensive Environmental Response, Compensation and Liability Act[24] ("CERCLA"), marked the beginning of the end for the "sudden and accidental" pollution exclusion.

CERCLA, more commonly known as Superfund, imposes strict, retroactive, joint and several liability[25] on all potentially responsible parties ("PRPs") for cleanup of contaminated waste sites.[26] CERCLA liability thus leaves companies and individuals responsible for massive environmental cleanup costs and scrambling for coverage under their CGL policies.[27] Because many companies and individuals face liability for environmental damage that occurred gradually and often many years ago, it is natural to look to CGL policies purchased at the time.[28]

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[23] Exclusion f was drafted before the enactment of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") and other environmental legislation that has placed huge financial burdens on those parties found liable for damages and remediation costs.

[24] 42 U.S.C. §§ 9601-9675 (1988), *amended by* Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. 99-499, 100 Stat. 1613 (1986).

[25] Under CERCLA, a company or individual may be held liable for cleanup of an entire site, even though that PRP contributed to only a small part of the pollution. CERCLA has necessitated pollution insurance coverage more than perhaps any other environmental program in the United States. *See* Melody A. Hamel, Comment, *The 1970 Pollution Exclusion In Comprehensive General Liability Policies: Reasons For Interpretations In Favor Of Coverage In 1996 And Beyond*, 34 DUQ. L. REV. 1083, 1085-86. *See also* Salisbury, *supra*, note 15, at 357.

[26] Murphy, *supra* note 17, at 173 n. 76, observed that:

> The stated purposes of CERCLA are to empower the federal government and the states to take legal action against parties responsible for unauthorized releases of hazardous substances into the environment; to provide funds for government cleanup efforts where quick action is necessary or the responsible parties cannot be identified; to collect information about hazardous waste sites, particularly abandoned or inactive sites; and to assist cleanup efforts by requiring prompt notification by responsible parties of any release or substantial threat of release of hazardous substances into the environment (quoting 2 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 10A.02[1][c] (1990)).

[27] *See* John G. Nevius & Steven J. Dolmanisth, Note and Comment, *The Pollution-Exclusion Conspiracy: A Newly Recognized Basis for Recovery*, 13 PACE ENVTL. L. REV. 1103, 1104-05 (Spring 1996).

[28] *See generally* Russell, *supra* note 2.

Insurance companies faced with an onslaught of coverage claims began denying claims which were not the result of "abrupt" and "unintended" pollution.[29]

The passage of CERCLA, coupled with early judicial decisions construing "sudden and accidental" as ambiguous,[30] forced the insurance industry to limit its duty to defend and indemnify environmental claims even further. The "sudden and accidental" clause was displaced by the absolute pollution exclusion in the mid-1980's. The absolute pollution exclusion clause was designed to eliminate coverage for *all* environmental claims, not just those which are "sudden and accidental."[31]

Although the "sudden and accidental" clause was replaced by the absolute exclusion in standard CGL policies, there are many current environmental claims where coverage is triggered in policies issued between the 1970's and the mid-1980's and the "sudden and accidental" exclusion applies. Thus, the "sudden and accidental" pollution exclusion continues to be a highly litigious issue in this country's jurisprudence. The next section of this Article discusses the conflicting rationales used by courts in interpreting the "sudden and accidental" clause.

II. JUDICIAL INTERPRETATION OF THE "SUDDEN AND ACCIDENTAL" EXCLUSION

Many federal courts and several state courts have denied coverage for environmental claims after concluding the "sudden and accidental" pollution exclusion is either unambiguous or contains a temporal requirement. A growing number of state courts, however, have sided with insureds and held that coverage is available. Several recent cases decided by the federal circuits and state supreme courts provide an overview of the current trends in interpreting the "sudden and accidental" exclusion.

Courts have interpreted the "sudden and accidental" pollution exclusion in three ways: [1] Unambiguous and/or containing a temporal requirement; [2] ambiguous and/or not containing a temporal

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[29] *See* Ballard & Manus, *supra* note 1, at 612.

[30] Russell, *supra* note 2, at 4 (explaining that between 1981 and 1986, 27 of 35 courts interpreted the "sudden and accidental" clause in favor of insureds).

[31] *Id.* While analysis of the absolute pollution exclusion is beyond the scope of this article, it is important to note that most courts have upheld the clause as unambiguous and enforceable. *See, e.g.*, Kruger Commodities, Inc. v. United States Fidelity & Guar. Co., 923 F.Supp. 1474 (M.D.Ala. 1996). At least two courts, however, including the Kentucky Court of Appeals, have ruled in favor of coverage. Calvert Ins. Co. v. S & L Realty Corp., 926 F.Supp. 44 (S.D.N.Y. 1996); Motorists Mut. Ins. Co. v. RSJ, Inc., 926 S.W.2d 679 (Ky.App. 1996).

requirement; or [3] despite the fact that "sudden" contains a temporal element, the insurance industry is estopped from denying coverage.

A. Federal Circuit Courts And Several State Courts Have Held In Favor Of Insurers By Concluding That The "Sudden And Accidental" Pollution Exclusion Clause Is Unambiguous And/Or Contains A Temporal Requirement.

The first line of cases strongly supports insurers by concluding that "sudden and accidental" is unambiguous.[32] Most of these decisions place a temporal requirement on the term "sudden,"[33] requiring abrupt environmental damage rather than gradual, cumulative damage in order to trigger the insurance company's duty to defend or indemnify the CGL policyholder for environmental damage.[34]

Courts which decide that "sudden and accidental" is unambiguous properly refuse to consider extrinsic evidence and, instead, analyze the policy according to the plain, common, and popular meaning of the terms.[35] The Tenth Circuit quoted from a decision of the Oklahoma Supreme Court criticizing contrary holdings: "Decisions finding ambiguity have focused on technical distinctions rather than the

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[32] Most federal circuits have upheld the "sudden and accidental" exception as unambiguous and/or requiring "abrupt or sudden" environmental damage. *See, e.g.*, A. Johnson & Co. v. Aetna Cas. & Sur. Co., 933 F.2d 66, 72-73 (1st Cir. 1991) (Maine law); Ogden Corp. v. Traveler's Indem. Co., 924 F.2d 39, 42 (2d Cir. 1991) (New York law); Northern Ins. Co. of N.Y. v. Aardvark Assoc., Inc., 942 F.2d 189, 192-93 (3d Cir. 1991) (Pennsylvania law); Snyder General Corp. v. Century Indem. Co., 113 F.3d 536, 539 (5th Cir. 1997) (Texas law); United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31, 34 (6th Cir. 1988) (Kentucky law); Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc., 40 F.3d 146, 152-53 (7th Cir. 1994) (Indiana law); Aetna Cas. & Sur. Co. v. General Dynamics Corp., 968 F.2d 707, 710 (8th Cir. 1992) (Missouri law); Smith v. Hughes Aircraft Co., 22 F.3d 1432, 1437 (9th Cir. 1993) (California and Arizona law); United States Fidelity & Guar. Co. v. Morrison Grain Co., 999 F.2d 489, 493 (10th Cir. 1993) (Kansas law); City of Delray Beach, Fla. v. Agricultural Ins. Co., 85 F.3d 1527, 1532-33 (11th Cir. 1996) (Florida law).

[33] See cases cited *supra* note 32. Also, approximately one-half of the state supreme courts confronting this issue have determined that "sudden" means "abrupt." *See, e.g.*, Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So.2d 700, 704 (Fla. 1993); Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392, 397-98 (Mich. 1991); Board of Regents of the Univ. of Minn. v. Royal Ins. Co., 517 N.W.2d 888, 892 (Minn. 1994); Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374, 382-83 (N.C. 1986); Hybud Equipment Corp. v. Sphere Drake Ins. Co., 597 N.E.2d 1096, 1102 (Ohio 1992), *cert. denied*, 507 U.S. 987, 113 S.Ct. 1585, 123 L.Ed.2d 152 (1993); Kerr-McGee Corp. v. Admiral Ins. Co., 905 P.2d 760, 763 (Okla. 1995).

[34] *See, e.g.*, Aeroquip Corp. v. Aetna Cas. & Sur. Co. 26 F.3d 893, 894 (9th Cir. 1994) (per curiam); Lumbermens Mut. Cas. v. Belleville Indus., 555 N.E.2d 568, 572 (Mass. 1990); Kerr-McGee Corp. v. Admiral Ins. Co., 905 P.2d 760, 763-64 (Okla. 1995); Sharon Steel v. Aetna Cas. & Sur. Co., 931 P.2d 127, 135 (Utah 1997).

[35] *See, e.g.*, Macklanburg-Duncan Co. v. Aetna Cas. & Sur. Co., 71 F.3d 1526, 1536 (10th Cir. 1995).

finding ambiguity have focused on technical distinctions rather than the ordinary understanding of the word."[36] Since most pollution and damage occurs gradually over time, construing the term "sudden" to contain a temporal element significantly limits coverage.

1. Tenth Circuit: *Quaker State Minit-Lube, Inc. v. Fireman's Fund Insurance Co.*[37]

The Tenth Circuit examined state and federal court decisions analyzing the meaning of "sudden and accidental" under Utah law[38] and ultimately concluded that the phrase is unambiguous and means "abrupt or quick and unexpected."[39] The court refused to consider "sudden" as including "'gradual,' 'routine' or 'continuous.'"[40] In reaching this conclusion, the court reasoned that construing "sudden" as devoid of a temporal element would render the term "accidental" redundant.[41] The Idaho Supreme Court recently agreed with the Tenth Circuit and held that, under Idaho law, the "sudden and accidental" exclusion unambiguously requires that pollution occur abruptly.[42]

The Tenth Circuit's opinion in *Quaker State Minit-Lube* points out one problem facing courts that construe "sudden" as meaning "abrupt" -- should the court employ a "spill-by-spill" analysis or an overall damage analysis to pollution that has occurred gradually over many years? That court, like most others considering this issue, refused to hold that the gradual damage was caused by a series of individual pollution occurrences, each of which happened abruptly.[43]

2. Third Circuit: *General Ceramics, Inc. v. Firemen's Fund Insurance Co.*[44]

This case presented an interesting choice-of-law dilemma for the Third Circuit in light of Pennsylvania's and New Jersey's differing interpretations of the "sudden and accidental" pollution exclusion. The

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[36] *Id.* (quoting Kerr-McGee Corp. v. Admiral Ins. Co., 905 P.2d 760 (Okla. 1995)).

[37] Quaker State Minit-Lube, Inc. v. Firemen's Fund Ins. Co., 52 F.3d 1522 (10th Cir. 1995).

[38] *Id.* at 1527.

[39] *Id.* at 1528.

[40] *Id.* at 1527-28 (citations omitted).

[41] *Id.* (citations omitted).

[42] North Pac. Ins. Co. v. Mai, 939 P.2d 570, 572-73 (Idaho 1997).

[43] Quaker State Minit-Lube, Inc. v. Firemen's Fund Ins. Co., 52 F.3d 1522, 1530 (10th Cir. 1995).

[44] General Ceramics, Inc. v. Firemen's Fund Ins. Co., 66 F.3d 647 (3rd Cir. 1995).

and accidental" exclusion in its CGL policy.[45] The plaintiff's manufacturing process occurred in New Jersey, but the waste was hauled to a site in McAdoo, Pennsylvania, by a private hauler.[46] The insurance company argued Pennsylvania law applied and precluded coverage for "gradual" pollution. The district court agreed and granted summary judgment for the insurance company.

The Third Circuit concluded that Pennsylvania law precluded coverage here unless "the discharge is abrupt and unexpected."[47] New Jersey law, on the other hand, would provide much broader coverage under the *Morton* doctrine.[48] The court disagreed that New Jersey would follow a "bright line" rule regarding the site of the pollution as largely controlling the choice of law issue and, instead, concluded that New Jersey had the most dominant, significant relationship to the transaction and the parties under Section 6 of the RESTATEMENT (SECOND) OF CONFLICTS.[49] Accordingly, the Third Circuit reversed the lower court's summary judgment in favor of the insurance company.[50]

3. Minnesota: *Anderson v. Minnesota Insurance Guaranty Ass'n*[51]

The Minnesota Supreme Court decided the "sudden and accidental" pollution exclusion unambiguously precludes coverage for pollution which is "not both sudden, meaning abrupt, and accidental, meaning unexpected and unintended."[52] The court reiterated its previous interpretation of the clause and concluded that any reliance on other explanations of the terms "sudden" and "accidental" were unreasonable.[53]

This case is significant because of the court's unwillingness to apply an equitable estoppel theory to the pollution exclusion.[54] Concluding that equitable estoppel requires reasonable reliance by the

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[45] The EPA requested that the plaintiff remove from a site in McAdoo, Penn., approximately 115 toxic waste drums that had been deposited there by private waste haulers from plaintiff's Haskell, N.J. manufacturing facility. *Id.* at 650.

[46] *Id.*

[47] *Id.* at 652.

[48] Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831 (N.J. 1993). For a discussion of this case, *see infra* note 94 and accompanying text.

[49] *General Ceramics*, 66 F.3d at 655.

[50] *Id.* at 659. The case was remanded to the district court for a determination of whether the discharge was unintentional and whether the damage was unexpected and unintended.

[51] Anderson v. Minnesota Ins. Guar. Ass'n, 534 N.W.2d 706 (Minn. 1995).

[52] Id. at 709 (citing Board of Regents v. Royal Ins. Co. of Am., 517 N.W.2d 888, 892 (Minn. 1994)).

[53] *Anderson*, 534 N.W.2d at 709.

[54] *Id.*

Concluding that equitable estoppel requires reasonable reliance by the insured and that the terms "sudden and accidental" were unambiguous in the policy, the Minnesota Supreme Court rejected "equitable estoppel" as a theory under which an insured may obtain coverage.[55]

4. Maryland: *American Motorists Insurance Co. v. Artra Group, Inc.*[56]

Maryland's highest court embraced lower court and federal court decisions in concluding that the "sudden and accidental" exclusion disallows coverage for gradual pollution, because "sudden" necessarily contains a temporal element.[57] This case arose out of Sherwin-Williams' purchase of a paint manufacturing site from Artra.[58] After the Maryland Department of Environment required Sherwin-Williams to investigate and remediate hazardous waste contamination in the soil and groundwater at the site, the company sued Artra and other previous owners to recover investigation and remediation costs.[59] Artra demanded that its CGL insurer provide a defense and indemnify it against any liability; but the carrier refused and brought a declaratory judgment action for a determination that it had no such duties.[60] Maryland's highest court ultimately ruled in favor of the insurance company. The court cited numerous state and federal court decisions holding that "sudden" means "abrupt;" therefore, coverage for pollution activity occurring on a regular basis for an extended period of time was precluded by the "sudden and accidental" pollution exclusion.[61] Accordingly, there was no duty to defend or indemnify.[62]

Despite the reluctance of these and other courts to find coverage under the "sudden and accidental" pollution exclusion, a number of state courts have determined that coverage may be available for insureds.

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[55] *Id.* at 709-10.

[56] American Motorists Ins. Co. v. Artra Group, Inc., 659 A.2d 1295 (Md. 1995).

[57] *Id.* at 1308.

[58] *Id.* at 1296.

[59] *Id.* at 1297.

[60] *Id.*

[61] *Id.* at 1310 ("We agree with the numerous cases holding that allegations of longstanding business activities resulting in pollution do not constitute allegations of 'sudden and accidental' pollution.").

[62] *Id.* at 1311.

B. A Growing Number Of State Courts Have Decided Cases In Favor Of Insureds By Construing "Sudden And Accidental" As Ambiguous And Non-Temporal.

Decisions by the supreme courts of eleven states favor insureds in their interpretations of the "sudden and accidental" pollution exclusion, including Alabama,[63] Colorado,[64] Georgia,[65] Illinois,[66] Indiana,[67] New Jersey,[68] Oregon,[69] South Carolina,[70] Washington,[71] West Virginia,[72] and Wisconsin.[73] These decisions indicate a slight swing away from the early plethora of decisions denying coverage. Three recent state supreme court decisions are particularly illustrative of this judicial willingness to provide coverage for environmental claims under the sudden and accidental exclusion.

1. Alabama: *Alabama Plating Co. v. United States Fidelity & Guaranty Co.*[74]

In December 1996, the Alabama Supreme Court reversed its earlier decision in the same case and held that the term "sudden," as used in the "sudden and accidental pollution exclusion," is ambiguous.[75] The case involved a metal finishing business seeking coverage under several CGL policies for wastewater contamination created by its electroplating process.[76]

The insurance company argued the policy provided coverage only for pollution contamination "caused by an abrupt, short-lived event."[77] The lower court agreed and granted summary judgment in

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[63] Alabama Plating Co. v. United States Fidelity & Guar. Co., 690 So.2d 331 (Ala. 1996).

[64] Hecla Mining Co. v. New Hampshire. Ins. Co., 811 P.2d 1083 (Colo. 1991).

[65] Claussen v. Aetna Cas. & Sur. Co., 380 S.E.2d 686 (Ga. 1989).

[66] Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204 (Ill. 1992).

[67] American States Ins. Co. v. Kiger, 662 N.E.2d 945 (Ind. 1996).

[68] Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831 (N.J. 1993).

[69] St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co., 923 P.2d 1200 (Or. 1996).

[70] Greenville County v. South Carolina Ins. Reserve Fund, 443 S.E.2d 552 (S.C. 1994).

[71] Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha, 882 P.2d 703 (Wash. 1994).

[72] Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W. Va. 1992).

[73] Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990).

[74] Alabama Plating Co. v. United States Fidelity & Guar. Co., 690 So. 2d 331 (Ala. 1996).

[75] *Id.* at 335.

[76] *Id.* at 332-33.

[77] *Id.* at 334.

favor of the insurer.[78] The supreme court chose to follow the "narrow majority of state supreme courts" which had held that the "sudden and accidental" exclusion is ambiguous and must be construed in favor of the policyholder to provide coverage for pollution which was "unexpected and unintended."[79] In coming to the conclusion that "sudden" is ambiguous, the court pointed out that several dictionaries defined the term as meaning "unexpected."[80] Moreover, the court decided that, when the exclusion was drafted, the insurance industry expressed its unequivocal intent that the exclusion be considered merely a clarification of the "occurrence" definition, which provided coverage for gradual pollution and only disallowed coverage for intentional pollution.[81] Resolving these ambiguities in favor of the policyholder, the court held that Alabama Plating presented substantial evidence that its insurance company had a duty to provide coverage.[82]

2. Oregon: *St. Paul Fire & Marine Insurance Co. v. McCormick & Baxter Creosoting Co.*[83]

In a unanimous decision, the Oregon Supreme Court also found coverage for environmental liability under the "sudden and accidental" pollution exclusion.[84] *McCormick* involved a wood treatment plant charged with liability for the leaching of several hazardous chemicals from wastewater surface impoundments into the surrounding soil and groundwater.[85] These impoundments were used in one location from 1967 to 1971 and in another location from 1942 to 1978, and use of such impoundments was a standard practice in the industry at the time.[86] The plant sought coverage under several different CGL policies, including some with a "sudden and accidental" exclusion.[87] The insurance

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[78] *Id.* at 339.

[79] *Id.* 334-35.

[80] *Id.* at 335. After examining dictionaries published around 1970, the court decided that "sudden" was ambiguous, because the term could be defined in at least two different ways, with "unexpected" being the primary definition. The court determined that this ambiguity created the need to examine the intent of the drafters of the exclusion. *Id.*

[81] *Id.* at 335-36. The court concluded that the drafters expressed their intent that inclusion of the "sudden and accidental" exception in policies would result in "no reduction in coverage." This intent was expressed through statements made by industry representatives and form letters sent to state insurance departments. *Id.*

[82] *Id.* at 338.

[83] St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co., 923 P.2d 1200 (Or. 1996).

[84] *Id.* at 1218.

[85] *Id.* at 1204.

[86] *Id.*

[87] *Id.*

company argued that a temporal meaning should be assigned to the term "sudden," requiring some sort of "abrupt" environmental damage.[88] However, the insured convinced the court that "sudden and accidental" is ambiguous for four distinct reasons.

First, the court concluded several definitions of "sudden" indicate the term may or may not include temporal restraints.[89] The court also noted that, when used in reference to events, "accidental may stress lack of intent."[90] Second, use of the terms "sudden and accidental" by the insurance industry in business interruption and boiler and machinery insurance policies, prior to its use in the pollution exclusion, had been interpreted by courts to mean "unexpected and unintended."[91] Third, a policyholder could reasonably interpret the exclusion as applying only to "expected and intended" pollution.[92] And fourth, growing judicial recognition of coverage, despite the "sudden and accidental" pollution exclusion, supported the policyholder's interpretation as reasonable.[93]

These two decisions exemplify the prevailing rationale used by courts to conclude that the "sudden and accidental" exclusion should not abrogate coverage for environmental claims. The New Jersey Supreme Court went further by estopping the insurance industry from denying coverage based on representations it made to insureds and state insurance commissions in the early 1970's.

C. *Morton International, Inc. v. General Accident Insurance Co.* -- A Watershed Case In Favor Of Insureds.[94]

In 1993, the New Jersey Supreme Court opened a new door for coverage claims under the "sudden and accidental" exclusion.[95] The court reversed seventeen years of New Jersey jurisprudence and held that the phrase "sudden and accidental" contains a temporal element.[96] However, the court concluded that the insurance industry should be

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[88] *Id.* at 1216. The insurance company also argued that an "accidental event cannot be something that is 'allowed to occur as part of [M & B]'s regular business practices for more than four decades.'" *Id.*

[89] *Id.* at 1217.

[90] *Id.* (citation omitted).

[91] *Id. See also* Salisbury, *supra* note 15, at 379-82 (arguing that previous interpretations of "sudden and accidental" in standard boiler and machinery industry contracts supported an interpretation equating "sudden and accidental" with "unexpected and unintended").

[92] *McCormick*, 923 P.2d at 1217-18.

[93] *Id.* at 1218.

[94] Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831 (N.J. 1993).

[95] *See* Robert D. Chesler, *New Door Wide Open for Pursuing Coverage Claims*, ENVT'L COMP. & LIT. STRATEGY 3 (July 1994).

[96] *Morton*, 629 A.2d at 847.

foreclosed from denying coverage under this exclusion, based on representations it made in the early 1970's about the meaning and extent of coverage under the exclusion.[97]

Morton, a successor in interest to Ventron, faced liability for remediation costs associated with mercury pollution in a creek adjacent to a mercury processing plant operated for more than forty years.[98] After insurance carriers denied coverage and required Morton to provide its own defense, Morton sought reimbursement for its defense costs and indemnity for the cleanup and remediation expenses.[99] The trial court granted summary judgment for the other insurance providers, but held General Accident liable for a portion of Morton's costs in defending the action. The intermediate appellate court reversed and the New Jersey Supreme Court granted review.[100]

Analysis of the standard "sudden and accidental" pollution exclusion clause in several of the triggered insurance policies consumed a great deal of the court's opinion. The court overruled previous case law holding that the clause merely imposed the same conditions on coverage as were imposed by "occurrence-based" policies:

> [W]e are persuaded that "sudden" possesses a temporal element, generally connoting an event that begins abruptly or without prior notice or warning, but the duration of the event -- whether it lasts an instant, a week, or a month -- is not necessarily relevant to whether the inception of the event is sudden. The meaning of the term "accidental" being generally understood, we discern that the phrase "sudden and accidental" in the standard pollution-exclusion clause describes only those discharges, dispersals, releases, and escapes of pollutants that occur abruptly or unexpectedly and are unintended.[101]

Despite the decision to characterize "sudden" as "abrupt," the court refused to enforce the pollution exclusion as written. Instead of extending the "occurrence" definition of liability for "unexpected and unintended" pollution, the court held the clause improperly restricted

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[97] *See generally, id.* at 848-55.
[98] *Id.* at 834.
[99] *Id.* at 835.
[100] *Id.*
[101] *Id.* at 847.

pollution coverage.[102]

The court decided that construing the exclusion in favor of the insurer would contravene an important New Jersey public policy requiring regulatory approval of standard industry-wide policy forms and would condone the insurance industry's misrepresentations pertaining to the scope of coverage under the "sudden and accidental" exclusion.[103] The Insurance Rating Board had repeatedly asserted that the exclusion should be applied only to intentional polluters and not passive polluters.[104] Moreover, if the exclusion was to be strictly applied, insurance premiums should have been reduced accordingly.[105] Interestingly, the court noted that other jurisdictions interpreted the pollution exclusion differently, depending on the level of the insured's culpability -- the more that evidence indicates intentional pollution by the insured, the less likely a court would find coverage, and vice versa.[106]

Although most courts have refused to follow the *Morton* regulatory estoppel doctrine, the decision has definitely exposed insurance companies to other potential unfavorable decisions. Other jurisdictions, which may even have ruled that sudden means abrupt, now have an additional avenue for extending coverage for pollution.

III. HOW MIGHT KENTUCKY COURTS CONSTRUE THE "SUDDEN AND ACCIDENTAL" EXCLUSION?

The conflict demonstrated by the decisions construing the "sudden and accidental" pollution exclusion leaves many Kentucky corporations and individuals, especially those faced with CERCLA cleanup costs, asking the "million dollar question" -- how might Kentucky courts decide this issue? Naturally, insurance companies would rely on several Sixth Circuit opinions construing Kentucky law as barring CGL coverage under policies containing the "sudden and accidental" exclusion unless the pollution is "abrupt."[107] However, it must be remembered that Kentucky state courts are not bound by Sixth

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[102] *Id.*

[103] *See generally, id.* at 847-55.

[104] *Id.* at 869.

[105] *Id.* at 851.

[106] *Id.* at 870-71.

[107] *See*, Transamerica Ins. Co. v. Duro Bag Mfg. Co., 50 F.3d 370 (6th Cir. 1995) (refusing to certify interpretation of the "sudden and accidental" pollution exclusion to the Kentucky Supreme Court); United States Fidelity & Guar. Co. v. George W. Whitesides Co., 932 F.2d 1169 (6th Cir. 1991); United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988).

Circuit decisions regarding Kentucky law.[108] Moreover, several published state court opinions suggest that Kentucky courts may disagree with the Sixth Circuit's interpretation of Kentucky law regarding the "sudden and accidental" exclusion.

A. State Court Decisions Provide Guidance in Analyzing how Kentucky Might Interpret the "Sudden And Accidental" Exclusion.

1. *James Graham Brown Found., Inc. v. St. Paul Fire & Marine Insurance Co.*[109]

In *Brown*, the Supreme Court of Kentucky reversed the lower court's determination that there was no "occurrence" within the meaning of the policies and held that whether contamination was intended or expected (and, thus, whether the insured had coverage under its "occurrence-based" CGL policy), was a question of fact for jury determination.[110] Although most of the policies at issue did not contain the "sudden and accidental" exclusion,[111] the broad duty to defend imposed on insurance companies may suggest how the Kentucky Supreme Court would interpret the "sudden and accidental" exclusion.[112]

Brown involved a wood preserving treatment plant where the EPA had imposed CERCLA liability for wastewater discharge, chemical spills, and rainwater runoff.[113] After its CGL carriers denied coverage, Brown sought a declaratory judgment in state court regarding the duties to defend and indemnify. The circuit court held there was no coverage under the "occurrence" language in the policy because wood processing plants "were aware of the damage that was being incurred by the routine operations."[114] The court of appeals affirmed.[115]

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[108] In a case involving duty to defend and indemnify a policyholder charged with CERCLA cleanup costs, the Campbell Circuit Court refused to grant Home Indemnity Company's motion for summary judgment and, instead, decided that genuine issues of material fact existed as to whether the duty existed. David J. Joseph Co. v. Home Indem. Co., No. 92-CI-00181, (Campbell Circuit Court, Mar. 19, 1993). Although this decision is not binding, it provides some insight as to how Kentucky courts might construe pollution exclusion clauses.

[109] James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273 (Ky. 1991).

[110] *Id.* at 281.

[111] *Id.* at 277. These policies were apparently issued before 1970.

[112] It should also be noted that two members of the five-justice majority and the two dissenting justices are no longer sitting on the Supreme Court.

[113] *Brown*, 814 S.W.2d at 275.

[114] *Id.* at 276.

[115] *Id.*

The Supreme Court of Kentucky held the record failed to show that plant managers and executives "intended or expected" any environmental damage from the plant's operations.[116] Importantly, the court declared that the essence of CGL policies implies broad coverage. Accordingly, "[a]ll risks not expressly excluded are covered, including those not contemplated by either party."[117]

Subsequently, the Sixth Circuit in *Transamerica Insurance Co. v. Duro Bag Manufacturing. Co.*[118] attempted to disregard the import of *Brown* by stating that *Brown* merely "reiterated the interpretation principles relied on by this Court in *Star Fire Coals*."[119] *Brown*, however, suggests a willingness to grant broader coverage for environmental claims than the Sixth Circuit will acknowledge. Evidence includes the supreme court's interpretation of "occurrence" as creating broad coverage under CGL policies and the holding that Brown should be covered by its insurance unless there was a "specific and subjective" intent to cause the pollution damage.[120] As the court said:

> [W]e agree that if injury was not actually and subjectively intended or expected by the insured, coverage is provided even though the action giving rise to the injury itself was intentional and the injury foreseeable.[121]

2. *Motorists Mutual Insurance Co. v. RSJ, Inc.*[122]

In 1996, the Court of Appeals of Kentucky decided that the standard "absolute" pollution exclusion in a CGL policy was ambiguous and refused to deny coverage based on the exclusion.[123] This case involved a dry cleaning business sued by its neighboring businesses.[124] RSJ sought coverage under its CGL policy, but was denied.[125] The lower court granted the insured's motion for summary judgment and determined that the absolute pollution exclusion clause was ambiguous

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[116] *Id.* at 277.

[117] *Id.* at 278.

[118] Transamerica Ins. Co. v. Duro Bag Mfg. Co., 50 F.3d 370 (6th Cir. 1995).

[119] *Id.* (citing United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1995)).

[120] James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273, 278 (Ky. 1991).

[121] *Id.*

[122] Motorists Mutual Ins. Co. v. RSJ, Inc., 926 S.W.2d 679 (Ky. App. 1996).

[123] *Id.*

[124] All Alterations, the business located adjacent to RSJ, Inc., brought action against the dry cleaning business for bodily injury sustained from a carbon monoxide leak. *Id.*

[125] *RSJ*, 926 S.W.2d at 680.

under Kentucky's principles of contract construction.[126]

The court advanced three reasons for its conclusion that the exclusion was ambiguous. First, conflicting legal interpretations of the exclusion were a "factor to be evaluated in passing on the ambiguity in the exclusion."[127] Second, relying on a portion of the *Morton* decision, the court declared that the insurance industry's representations about the meaning of the exclusion, along with lay understanding of environmental law terminology, led to the conclusion that a business could reasonably interpret the policy as not barring coverage for this type of environmental damage.[128] Third, literal interpretation of the exclusion would lead to "absurd consequences."[129]

Although the Supreme Court of Kentucky was not asked to review the decision, the court of appeals' opinion offers encouragement to insureds seeking coverage in Kentucky under the "sudden and accidental" pollution exclusion or the "absolute" exclusion. So far, only two other courts have found the absolute exclusion ambiguous. Because eleven courts have determined that the "sudden and accidental" clause resounds in ambiguity, the foregoing Kentucky cases provide a solid basis for an argument that the Kentucky Supreme Court would disagree with the Sixth Circuit's interpretation of the "sudden and accidental pollution exclusion" under Kentucky law.

3. *Howard v. Motorists Mutual Insurance Co.*[130]

Kentucky's Supreme Court also recently applied the estoppel doctrine to an insurance carrier. After concluding that the insurance company misled the insureds in handling claims related to a 1991 automobile accident, the court estopped the insurer from denying coverage after it cashed the insured's check and retained the funds.

According to the court, estoppel requires a party to prove the following:

(1) Conduct, including acts, language and silence,

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[126] *Id.*

[127] *Id.* at 681. This is the same factor relied upon by several courts when concluding that the sudden and accidental exclusion was ambiguous.

[128] *Id.* at 681-82. The Court appears at this point to have attributed to the absolute pollution exclusion some of the *Morton* analysis regarding the sudden and accidental pollution exclusion.

[129] *Id.* at 682.

[130] 44 K.L. Summary 7, 17 (June 27, 1997) (petition for rehearing is pending at the time of this writing).

> amounting to a representation or concealment of material facts; (2) the estopped party is aware of these facts; (3) these facts are unknown to the other party; (4) the estopped party must act with the intention or expectation his conduct will be acted upon; and (5) the other party in fact relied upon this conduct to his detriment.[131]

The *Morton* decision highlights several misrepresentations made by the insurance industry which appear to satisfy at least some, if not all, of Kentucky's elements for estoppel.[132]

B. Kentucky Case Law Appears to Support Insureds

Although Sixth Circuit opinions hold otherwise, Kentucky state court opinions so far support insureds regarding coverage for pollution. *RSJ* provides the most persuasive argument that Kentucky courts would find the "sudden and accidental" clause ambiguous because the court of appeals held that the absolute pollution exclusion clause is ambiguous. Moreover, *Brown*, a Kentucky Supreme Court decision, indicates the court would afford generous coverage under all aspects of the CGL policy, not only those based on the "occurrence" definition. There is even a possibility that courts would apply the *Howard* estoppel theory and conclude, like *Morton*, that the industry is estopped from denying coverage based on representations made in the early 1970's regarding coverage under the "sudden and accidental" exclusion.

The Sixth Circuit decisions interpreting Kentucky law may be of little comfort to insurance carriers. They are not binding on the state courts and have been proven wrong in the past. Just recently, the Michigan Supreme Court ruled on this question and rejected prior Sixth Circuit interpretations of Michigan law that had denied coverage.[133] Only time will tell if the Supreme Court of Kentucky will do likewise.

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[131] *Id.*

[132] Examples include the insurance industry's repeated assurances that the exclusion applied only to intentional polluters and their knowledge that companies were relying on these misrepresentations. Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831, 849-55 (N.J. 1993).

[133] American Bumper & Mfg. Co. v. Hartford Fire Ins. Co., 550 N.W.2d 475 (Mich. 1996) (holding that insurers had a duty to defend a CGL policyholder during a CERCLA investigation; the insurance policies contained the "sudden and accidental" clause). Prior decisions by the Sixth Circuit to the contrary include: *FL Aerospace v. Aetna Cas. & Sur. Co.*, 897 F.2d 214 (6th Cir. 1990) and *International Surplus Lines Ins. Co. v. Anderson Dev. Co.*, 901 F.2d 1368 (6th Cir. 1990).

IV. CONCLUSION -- THE BATTLE CONTINUES

As this article demonstrates, state and federal courts will likely continue to disagree over the scope of coverage available to insureds under the "sudden and accidental" pollution exclusion. Decisions will continue to conflict regarding whether the clause is unambiguous and temporal or ambiguous and non-temporal. It is also possible that courts having decided that the terms have a temporal meaning may still adopt the *Morton* analysis and preclude a denial of coverage.

These continuing battles highlight one consideration. If courts cannot agree on the interpretation of the "sudden and accidental" pollution exclusion, how could insureds be reasonably expected to understand the scope of coverage? As one court recently observed, the existence of so many conflicting interpretations of the scope of coverage under CGL policies is strong evidence of ambiguity.[134] The Kentucky Court of Appeals followed this reasoning in *RSJ*.

One point remains clear -- coverage may still be available to CGL policyholders under the "sudden and accidental" pollution exclusion. This battle will eventually cease as policies containing the "sudden and accidental" exclusion become distant history. At present, the end is nowhere in sight.

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[134] Sullins v. Allstate Ins. Co., 667 A.2d 617, 624 (Md. 1995).