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I. INTRODUCTION

One year ago, we described the area of law surrounding insurance coverage for environmental matters as a "state of flux."[1] Even this one-year time period has borne that oversimplified statement true. Although the Ohio Supreme Court has only recently been presented with the issue and has not ruled on it, courts in other jurisdictions have taken important clarifying strides, while others appear to be stumbling through the interpretive maze of analyzing and applying the pollution exclusion clause in the comprehensive general liability (CGL) insurance policy.

Our focus here is on the most recent judicial interpretations of the pollution exclusion clause. Most CGL policies included this standard clause from 1973 to 1986. The clause excluded coverage for pollution unless the pollution was sudden and accidental. The clause provides:

> It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere, or any watercourse or body of water; *but this exclusion does not apply if such discharge, dispersal, release, or escape is sudden and accidental.*[2]

Although we recognize that an effort to address the "most recent" cases must fail on its own since new cases are constantly being decided,

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1. *See* Fry & Saxton, *Interpreting the Pollution Exclusion Clause in the Comprehensive General Liability Policy - Ohio's Next Step*, 23 AKRON L. REV. 507 (1990).

2. Insurance Services Office, Inc., Comprehensive General Liability Insurance Coverage Part, Form No. L6394 (Ed. 1-73) (emphasis added to the so-called exception to the pollution exclusion). This portion of the clause has by far spawned the most litigation and generated the greatest number of written decisions. The greatest controversy has been over the definition of "sudden." Nevertheless, the definition of "accidental" has also been at issue in cases, as has whether the exception to the exclusion must be read in the conjunctive.

it is both possible and necessary to identify and analyze trends along with prevailing and persuasive lines of reasoning.

The dollars involved in providing a remedy for the environmental problems in this country are staggering.[3] At the same time, current environmental law generally applies a strict liability standard wherein a responsible party may be held liable for cleanup costs regardless of the degree of culpability of that individual or entity.[4] Moreover, under the doctrine of joint and several liability, one party may be held liable for a share of the cleanup costs far beyond its own actual contribution to the particular site or problem.[5] These parties are looking to their insurers to pay for reimbursement. With unidentifiable risks too great to insure, insurance companies added a special exclusion — the pollution exclusion clause. Courts have deemed the language selected for this clause less than a success in clearly excluding the majority of pollution claims.[6]

As a result, by the mid-1980s many insurers ceased to offer new insurance policies covering pollution-related damages.[7] Insurers began to withdraw from the pollution market.[8] This exit resulted from environmental legislation and court interpretations of environmental law

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3. According to one recent government study, the average cost for remedying a single Superfund site is at least $29 million. United States General Accounting Office, Report to the Chairman, Subcommittee on Policy Research and Insurance, Committee on Banking, Finance and Urban Affairs, House of Representatives: Hazardous Waste, Pollution Claims Experience of Property/Casualty Insurers, at 2 (Feb. 1991) (available from the United States General Accounting Office) [hereinafter General Accounting Office Report]. Of course, claims are often made on numerous insurance companies by literally hundreds of potentially responsible parties. The examination of the critical economic issues involved in environmental clean-up is beyond the scope of this article.

4. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) imposes strict liability for the past handling, transportation, storage, treatment and disposal of hazardous waste upon the site owners and operators, and on the waste generators and transporters. 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987). Whereas CERCLA focuses on past conduct, the Resource Conservation and Recovery Act (RCRA) is the "cradle to grave" regulation of hazardous waste. RCRA established procedures by which standards were promulgated that are applicable to generators and transporters of hazardous waste, and owners and operators of hazardous waste treatment, storage and disposal facilities (TSDF). 42 U.S.C. §§ 6901-6992 (1982 & Supp. V 1987). Liability may also be grounded upon common law theories.

5. For example, various courts have held that CERCLA imposes joint and several liability on defendants for response costs. *See, e.g.,* United States v. Western Processing Co., 734 F. Supp. 930 (W.D. Wash. 1990).

6. In the words of United States District Court Judge Crow, "an abundance of authority is generally desirable, except when it is extensively and sharply divided as with the issues" of insurance coverage for environmental damages. United States Fidelity & Guar. v. Morrison Grain Co., 734 F. Supp. 437, 443 (D. Kan. 1990).

7. General Accounting Office Report, *supra* note 3, at 3.

8. *Id.*

which broadened the liability exposure of the insurance carriers for policy coverage.[9]

Nonetheless, thousands of these policies were in place through the 1970s and up to the mid-1980s. As we now know, by today's standards, pollution of the environment was taking place at an alarming rate during this time. Although many sites have now been identified, more are being identified all the time, and new claims are being asserted for insurance coverage. The recurring issue in litigation resulting from these claims is the interpretation and application of the pollution exclusion clause.

The Ohio courts, which continue to refer to the clause as the "polluters exclusion,"[10] have written three decisions in the 1990s interpreting the clause.[11] These Ohio courts have followed existing Ohio precedent, finding the pollution exclusion to be ambiguous.[12] A finding that the pollution exclusion clause is ambiguous is nearly tantamount to assuring the party's coverage for the occurrence, regardless of the facts of the case, as an ambiguous clause is construed against the insurance company.[13] That is, the pollution exclusion would be equated with the definition of occurrence, which is defined elsewhere in the policy, and the clause would be rendered a nullity. One federal court, applying Ohio law, has reached a contrary conclusion, finding that the pollution exclusion clause was not ambiguous.[14] The Sixth Circuit Court of Appeals affirmed this holding,[15] and the United States Supreme Court de-

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9. *Id.* The extension of comprehensive general liability insurance policies to environmental claims, according to one commentator, has caused the "exodus of the insurance industry from the environmental field." Chemers & Franco, *The Contemporary View of the Pollution Exclusion - A Provincial Approach, in* MONOGRAPH: SELECTED ISSUES IN INSURANCE COVERAGE AND PRACTICE - DEFENSE RESEARCH INSTITUTE (1990).

10. This apparently is a carry-over from Ohio's first interpretation of the pollution exclusion clause. Buckeye Union Ins. Co. v. Liberty Solvents and Chemicals Co., 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984).

11. Hybud Equipment Corp. v. Sphere Drake, C.A. No. 14597 (Summit County Ct. App., Jan. 20, 1991) (LEXIS, States file, Ohio library), *cert. granted*, No. 91-641 (Ohio July 3, 1991); Morton Thiokol v. Harbor Ins., No. 89-03914 (Hamilton County C.P., Feb. 1, 1991); Morton Thiokol v. Aetna Cas. & Surety Co., No. 86-03799 (Hamilton County C.P., Mar. 1, 1990). The impart of a finding of ambiguity is that the insurance policy will be construed in favor of the insured.

12. *Buckeye Union*, 17 Ohio App. 3d at 132, 477 N.E.2d at 1233; Kipin Industries, Inc. v. American Universal Ins. Co., 41 Ohio App. 3d 228, 232, 535 N.E.2d 334, 338 (1987).

13. Of course, for there to be coverage under an insurance policy, all provisions of the policy must be considered including definitions, notice requirements, and exclusions. This article deals solely with the pollution exclusion clause.

14. Borden, Inc. v. Affiliated FM Ins. Co., 682 F. Supp. 927, 929-30 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 68 (interim ed. 1989). A finding that the clause is not ambiguous means that the applicability of insurance coverage depends, as it should, on the particular facts of the case. That is, whether the release of the pollutants was in fact sudden and accidental, giving those words their ordinary meanings.

15. *Borden*, 865 F.2d 1267.

nied review.[16] The two Ohio appellate courts which have considered the issue are not in conflict, and the Ohio Supreme Court has not reviewed the issue. We believe, based on an analysis of all of the cases which have addressed this issue, and particularly the recent cases which have thoroughly and completely identified and analyzed the issues, that the Ohio Supreme Court will find in a matter contrary to the appellate courts sitting in Hamilton and Summit counties and in a manner consistent with the better reasoned holdings.

II. OVERVIEW OF THE PRESENT STATUS OF THE LAW

The older and now clearly minority view throughout the country holds that the pollution exclusion clause is flawed by ambiguity.[17] Ambiguity in an insurance contract under Ohio law, and under most states' rules of construction, is to be interpreted against the insurance company.[18] As a result, an initial finding of ambiguity behind the meaning of the pollution exclusion clause generally leads to a holding that coverage exists for a particular matter as to a particular insured. This older line of case law which originated in New Jersey no longer represents the national consensus.[19]

The more rational approach holds that the pollution exclusion clause itself is not ambiguous, and that coverage depends on the particular factual scenario of the case. This rejects the contorted conclusion that the "sudden and accidental" exception language within the exclusion is merely a restatement of the definition of occurrence within the body of the policy.[20]

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16. *Borden*, 110 S.Ct. 68 (interim ed. 1989).

17. *Buckeye Union Insurance Company v. Liberty Solvents and Chemicals Co.*, 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984), is one example. The court followed an early trend which emerged from the New Jersey appellate courts. *See* Jackson Township Mun. Utilities Auth. v. Hartford Accident & Indem. Co., 186 N.J. Super. 156, 451 A.2d 990 (1982); Lansco, Inc. v. Dept. of Environmental Protection, 138 N.J. Super. 275, 350 A.2d 520 (1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977).

18. *See, e.g.*, King v. Nationwide Ins. Co., 35 Ohio St. 3d 208, 519 N.E.2d 1318 (1988) (declaratory judgment action to determine insureds); *see also* Ohio Farmers Ins. Co. v. Wright, 17 Ohio St. 2d 73, 246 N.E.2d 552 (1969).

19. In fact, even a New Jersey trial court has criticized the continued adherence to the New Jersey precedent. Diamond Shamrock Chemical Co. v. Aetna Casualty, 231 N.J. Super. 1, 554 A.2d 1342 (App. Div. 1989). More recently, the United States District Court for Rhode Island, applying New Jersey law, predicted that the New Jersey Supreme Court when presented with the interpretation of the pollution exclusion clause would not follow the New Jersey appellate courts' decisions. CPC Int'l v. Northbrook Excess & Surplus Ins. Co., 759 F. Supp. 966 (D.R.I. 1991) (applying New Jersey law). Nonetheless, *Buckeye Union*, which is based on the early New Jersey opinions, continues to influence Ohio appellate courts.

20. Several courts have soundly criticized certain judicial interpretations of the meanings of "sudden and accidental." "[C]ourts, in a quest for finding [insurance] coverage, have strained the plain meaning of the terms and circumvented the obvious scope of the clause; . . . the common sense meaning of simple terms should not be contorted into a vehicle for reaching a planned

The number of cases following this approach, holding that the pollution exclusion clause is not ambiguous per se, is growing. The cases decided in 1990 and 1991, however, still reflect a split of authority.[21] Although Ohio does not clearly fall into either approach, the status of the law in Ohio is consistent with yet another characteristic of the emerging law in this area, that being the federal-state split in authority. The federal courts seated in Ohio, and applying Ohio law, have reached conclusions which are contrary to the Ohio appellate courts. Interestingly, this has also occurred in other states.[22] The federal courts have consistently concluded that state supreme courts, when presented with the issue, will find that the pollution exclusion is not ambiguous and its applicability depends on the facts of the case.

A. 1990 Cases

While some courts in 1990 found that the pollution exclusion clause was per se ambiguous, the majority of courts presented with the issue held that the exception to the exclusion does not render the entire clause ambiguous.

Perhaps no case more clearly illustrates the point that words must be given their plain and ordinary meaning than the Iowa Supreme Court decision in *Weber v. I.M.T. Insurance Co.*[23] The issue in this case was whether hog manure constituted "waste material."[24] The insured argued that the term "waste material" was ambiguous and that hog manure should not be considered waste material.[25] The Iowa Supreme Court noted that "waste material" was not defined within the insurance policy, and that it was required to give the term its ordinary meaning.[26] The court made short order of the insured's argument that the terms of the insurance policy were ambiguous; it held that the ordi-

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destination." United States Fidelity & Guar. v. Morrison Grain Co., 734 F. Supp. 437, 445-46 (D. Kan. 1990).

21. Case law up to 1990 was discussed in a prior article. *See* Fry & Saxton, *supra* note 1. For analysis of cases decided in 1990 and 1991 see *infra* notes 23-82 and accompanying text.

22. *See infra* notes 83-103 and accompanying text.

23. 462 N.W.2d 283 (Iowa 1990).

24. *Id.*

25. *Id.* at 285.

nary meaning of waste material encompasses hog manure spilled on the road.[27]

Although on occasion courts must address the definition of pollutants and waste material, the majority of the decisions deal with the definitions of "sudden" and "accidental." For example, in what appears to be the first interpretation of the pollution exclusion clause by a Colorado state court, an appellate court in *West American Insurance Co. v. F. W. Baumgartner*[28] held that "sudden" was to be given a temporal dimension.[29] The court held that the pollution exclusion clause was not ambiguous and that only when a discharge is both sudden and accidental would there be insurance coverage under the exception to the exclusion.[30]

In 1990, the Florida courts completed their evolution from the state's mid-1980s case law to reject earlier Florida precedent and accord the terms sudden and accidental their ordinary meanings.[31] In other states, courts simply adhered to standing precedent that the exclusion clause is unambiguous.[32]

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27. *Id.* The court ultimately found that no insurance coverage was owed because the spillage of the manure was not accidental within the meaning of the exception to the pollution exclusion. *Id.* at 287-88.

28. 812 P.2d 969 (Colo. App. 1990).

29. *Id.*(rejecting City of Northglenn v. Chevron USA, Inc., 634 F. Supp. 217 (D. Colo. 1986)). The court cited *F.L. Aerospace v. Aetna Casualty & Surety Co.*, 897 F.2d 214 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 284 (1990) and *United States Fidelity & Guaranty Co. v. Morrison Grain Co.*, 734 F. Supp. 437 (D. Kan. 1990) in support of its holding.

30. *West American Ins. Co.*, 812 P.2d 969. *See also* Mays v. Transamerica, 103 Ore. App. 578, 799 P.2d 653 (1990). In Oregon's second interpretation of the pollution exclusion clause, the court found no ambiguity between the definition of occurrence as used within the policy and within the exclusion clause. *Mays*, 103 Ore. App. at 585, 799 P.2d at 657.

31. The United States District Court for the Middle District of Florida in *Industrial Indemnification Co. v. Crown Auto Dealerships, Inc.*, 731 F. Supp. 1517 (M.D. Fla. 1990), rejected a 1985 federal case, *Payne v. United States Fidelity & Guaranty Co.*, 625 F. Supp. 1189 (S.D. Fla. 1985), in which Florida law was applied. The *Crown Auto Dealerships* court found that "sudden" contained a temporal dimension, and that an accident is an event which is unexpected or unintended and does not take place within the usual course of events. *Crown Auto Dealerships*, 731 F. Supp. at 1520.

32. Two federal courts applying Pennsylvania law followed established Pennsylvania precedent that the pollution exclusion clause was not per se ambiguous. The court in *Northern Insurance Co. v. Aardvark Associates*, 743 F. Supp. 379 (W.D. Pa. 1990), predicted that the Pennsylvania Supreme Court would follow the established Pennsylvania appellate precedent. *Id.* at 380 (citing United States Fidelity & Guar. v. Korman Corp., 693 F. Supp. 253 (E.D. Pa. 1988); American Mut. Liability Ins. Co. v. Neville Chem. Co., 650 F. Supp. 929 (W.D. Penn. 1987); Fischer & Porter Co. v. Liberty Mut. Ins. Co., 656 F. Supp. 132 (E.D. Pa. 1986)). Also, in *Armotek Indus., Inc. v. Employers Insurance of Wausau*, No. 88-3110 (D.N.J. Oct. 15, 1990) (LEXIS, Genfed library, Dist file), a district court sitting in New Jersey, applying Pennsylvania law, found that a long-term release and disposal of pollutants which caused groundwater contamination would be excluded by the policy's pollution exclusion clause. *See also* United States Fidelity & Guar. Co. v. Morrison Grain Co., 734 F. Supp. 437 (D. Kan. 1990) (court followed Kansas precedent and expressly rejected scores of older cases).

In some jurisdictions the federal courts have certified to the state's highest court the issues of interpretation of the pollution exclusion clause. The United States District Court for Massachusetts certified two issues to the Massachusetts Supreme Judicial Court.[33] Massachusetts' highest court in *Lumberman's Mutual Casualty Co. v. Belleville Industries*,[34] noted at the outset that its analysis would be strictly a legal one.[35] The court examined the word "sudden" in conjunction with the word "accidental," and concluded that sudden had a temporal dimension.[36] Under the court's holding, the *release* of the pollutants must have occurred suddenly; neither the cause of the release nor the damage caused by the release are the determining factors.[37] The court noted that it was following the more recent judicial interpretations of the pollution exclusion clause.[38] The *Lumbermen's* case was quickly applied in several pending cases in Massachusetts.[39]

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33. In re Acushnet River and New Bedford Harbor, 725 F. Supp. 1264 (D. Mass. 1989). The court accepted the certified issues and rendered its decisions in *Lumbermen's Mutual Casualty Co. v. Belleville Industries*, 407 Mass. 675, 555 N.E.2d 568 (1990). The Michigan Supreme Court, however, declined to answer a similar certified question put to it in *International Surplus Lines v. Anderson Development, 432 Mich. 1239 (1989). See also* F.L. Aerospace v. Aetna Casualty & Surety Co., 897 F.2d 214 (6th Cir. 1990).

34. 407 Mass. 675, 555 N.E.2d 568 (1990).

35. "We, of course, reject any temptation to let our own ideas of public policy concerning the desirability of insurance coverage for environmental damage guide our legal conclusions." *Id.* at 679-80, 555 N.E.2d at 571.

36. *Id.* at 680, 555 N.E.2d at 572. The court also stated that release must be accidental, in addition to abrupt, for there to be coverage for an occurrence arising out of the discharge of pollutants.

37. *Id.* at 679, 555 N.E.2d at 571.

38. *Id.* (citing United States Fidelity & Guar. v. Star Fire Coals, 856 F.2d 31 (6th Cir. 1988); Fireman's Fund Ins. Co. v. Ex-Cell-O, 702 F. Supp. 1317 (E.D. Mich. 1988); State v. Amro Realty Corp, 697 F. Supp. 99 (N.D.N.Y. 1988), *aff'd*, 936 F.2d 1420 (2nd Cir. 1991); Borden, Inc. v. Affiliated FM Ins. Co., 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 68 (interim ed. 1989); American Motorists v. General Host Corp., 667 F. Supp. 1423 (D. Kan. 1987), *vacated*, No. 88-1503 (10th Cir., Aug. 29, 1991) (LEXIS, Genfed library, Courts file); Technicon Elect. Corp. v. American Home Assurance Co., 141 A.D.2d 124, 533 N.Y.S.2d 91 (1988), *aff'd*, 74 N.Y.2d 66, 542 N.E.2d 1048, 544 N.Y.S.2d 531 (1989)).

39. Covenant Ins. Co. v. Friday Eng'g, Inc., 742 F. Supp. 708 (D. Mass. 1990) (case originally stayed during certification of questions from In re Acushnet River and New Bedford Harbor, 725 F. Supp. 1264 (D. Mass. 1989)); Goodman v. Aetna Casualty and Sur. Co., No. 88-0052 (Mass. Super. Court Sept. 28, 1990) (the court followed the recent "landmark" decision in *Lumbermen's* in a case involving a leaking underground gasoline storage tank; it was clear that the lengthy discharge of gasoline into the soil and groundwater on the plaintiff's property could not be construed as a sudden occurrence, and hence the exclusion applied); Polaroid Corp. v. Travelers, No. 88-5207-C (Mass. Super. Court Sept. 28, 1990) (the court also followed *Lumbermen's* in this CERCLA case in which the insured conceded that the release of the toxic chemicals was not sudden and accidental, but argued that the release was not intentional). The court was not swayed by this argument, stating: "In the present case, there is no abrupt, accidental release, the pollution exclusion controls, and Polaroid is not entitled to the cost of cleanup as damages." Polaroid Corp. v. Travelers, No. 88-5207-C (Mass. Super. Court Sept. 28, 1990).

The New York decisions were comprehensively reviewed by a federal court in *State v. Amro Realty Corp.*[40] That court refused to reconsider its 1988 decision which, at the time it was rendered, varied with state court decisions on the interpretation of the pollution exclusion clause.[41] The court acknowledged that at the time of its original order the law concerning the proper interpretation and application of the clause was unsettled.[42] Since 1988, however, both the Court of Appeals for New York and the United States Court of Appeals for the Second Circuit have issued decisions clarifying the circumstances under which the pollution exclusion operates to preclude insurance coverage and making the 1988 decision consistent with New York law.[43] Several other New York cases were decided during 1990.[44]

Not all courts facing this issue in 1990 held that the pollution exclusion clause was free from ambiguity. In a decision vigorously opposed in a dissenting opinion, the Wisconsin Supreme Court in *Just v. Land Reclamation Ltd.*[45] reversed a court of appeals decision in a case involving coverage for pollution claims related to a landfill.[46] According to the court, the insurance policy at issue covered unexpected and unintended pollution damage occurring over a substantial period of time, notwithstanding the pollution exclusion clause.[47] The court found that "sudden" is reasonably susceptible to different meanings and, therefore, ambiguous.[48] The court rejected the argument that the phrase "sudden

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40. 745 F. Supp. 832 (N.D.N.Y. 1990).

41. *Id.*

42. *Id.* at 836.

43. *Id.* (citing Avondale Indus. v. Travelers Indem. Co., 887 F.2d 1200 (2nd Cir. 1989), *cert. denied*, 110 S. Ct. 2588 (interim ed. 1990); Powers Chem. Co., Inc. v. Federal Ins. Co., 74 N.Y.2d 910, 548 N.E.2d 1301, 549 N.Y.S.2d 650 (1989); Technicon Elec. v. American Home, 74 N.Y.2d 66, 542 N.E.2d 1048, 544 N.Y.S.2d 531 (1989)).

44. *See* Niagara County v. Fireman's Fund, No. 71134 (N.Y. Sup. Ct. March 6, 1990). *Niagara County* was a landfill case in which the court found that the recent court of appeals decisions in *Technicon* and *Powers Chem. Co* were dispositive in that the pollution exclusion is "unambiguous and operative." *Id.* It is noteworthy that the court explicitly found that there is no element of scienter inherent in the exclusion. *Id.* In *E.A.D. Metallurgical v. Aetna Casualty & Surety Co.*, 905 F.2d 8 (2nd Cir. 1990), the federal court of appeals held that insurance coverage was excluded where the insured's disposal of pollutants was intentional and continuous - purposeful conduct cannot be considered accidental.

45. 456 N.W.2d 570 (Wis. 1990).

46. *Id. But see id.* at 579 (Steinmetz, J., dissenting)

> The majority has used linguistic legerdemain "now you see it, now you don't" by interpreting the clear words "sudden and accidental" to be ambiguous and as a result to mean unexpected or unintended. In its zeal to provide insurance coverage where it does not exist, it has changed an insurance policy into an assurance policy.

Id.

47. *Id.* at 571-72.

48. *Id.* at 574.

and accidental" has only a temporal meaning.[49] The court relied upon and cited numerous cases[50] including *Buckeye Union Insurance Co. v. Liberty Solvents and Chemical Co.*[51] and *Kipin Industries, Inc. v. American Universal Insurance Co.*,[52] both of which are from Ohio and badly outdated.

Finally, perhaps the most telling case of 1990 was decided by a United States District Court in Massachusetts applying the law of the state of Maine.[53] The courts of Maine have not ruled on the pollution exclusion clause. The United States Court for the District of Massachusetts, following the rules of interpretation of the state of Maine, declared that Maine law would join the emerging nationwide judicial consensus which holds that:

> [the] "pollution exclusion" clause is unambiguous, and that an insured who is accused of causing injury or property damage by the intentional discharge of pollutants over an extended period of time is bound by the terms of the exclusion and is not entitled to be defended or indemnified by its insurer.[54]

B. 1991 Cases

The handful of cases decided in 1991 are consistent with what the United States District Court in Massachusetts declared was the "emerging nationwide judicial consensus."[55] The 1991 Illinois Appellate Court decision of *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*[56] is part of that consensus. The appellate court reviewed and analyzed Illinois precedent, which was split between holding that the clause was ambiguous, and holding that it was unambiguous.[57] In

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49. *Id.* Similarly, in *Boeing Co. v. Aetna Casualty & Surety*, No. C86-352WD (W.D. Wash. April 16, 1990), the United States District Court for the Western District of Washington held that sudden was practically synonymous with unforeseen and unexpected.

50. *Id.*

51. 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984).

52. 41 Ohio App. 3d 228, 535 N.E.2d 334 (1987).

53. A. Johnson & Co. v. Aetna Casualty & Sur. Co., 741 F. Supp. 298 (D. Mass. 1990).

54. *Id.* at 305 (quoting Technicon Electronics Corp. v. American Home Assurance Co., 141 A.D.2d 124, 533 N.Y.S.2d 91 (1988)). The court relied upon *Lumbermen's Mutual Casualty Co. v. Belleville Industries.*, 407 Mass. 675, 555 N.E.2d 568 (1990). *A. Johnson Co.* involved gradual occurrences, and under those circumstances the court held that there was no insurance coverage owed. *A. Johnson Co.*, 741 F. Supp. 298.

55. *A. Johnson Co.*, 741 F. Supp. at 304. The court indicated that the judicial consensus is that the pollution exclusion clause is unambiguous. *Id.*

56. 212 Ill. App. 3d 231, 570 N.E.2d 1154 (1991).

57. *Id.* at 1163. The Illinois appellate court in *International Minerals & Chemical Corp. v. Liberty Mutual Insurance Co.*, 168 Ill. App. 3d 361, 378, 522 N.E.2d 758, 768 (1988), concluded that in the context of the clause and the policy as a whole, the phrase was not ambiguous and the word "sudden" had a temporal connotation. *But see* United States Fidelity & Guar. Co. v. Wilkin Insulation Co., 183 Ill. App. 3d 1087, 1099, 550 N.E.2d 1032, 1039 (1989); United States Fidelity

1988, the court in *International Minerals and Chemical Corp. v. Liberty Mutual Insurance Co.*[58] had concluded that in the context of the clause and the policy as a whole, the phrase was not ambiguous and the word "sudden" had a temporal connotation.[59] The court in *Outboard Marine* followed *International Minerals* holding that the word "sudden" is not ambiguous and does have a temporal connotation.[60] The word is synonymous with "abrupt."[61] The court rejected the insured's argument that sudden could be construed to mean unexpected.[62] If "sudden" is construed to mean unexpected with no temporal connotation, then the word is reduced to "mere surplusage."[63] The court found that there was nothing sudden or abrupt about discharges occurring over an eleven year period.[64] Also in 1991, the Court of Appeals for the Tenth Circuit reviewed and affirmed the oft-cited Kansas case, *American Motorists Insurance Co. v. General Host Corp.*[65] The court noted the sharp division of authority on the issue of whether pollution that occurs over an extended period of time is sudden while there is an apparent lack of controversy concerning the meaning of the term accidental.[66] Courts have interpreted "accidental" to refer to pollution which is not expected or intended by the insured.[67] The court saw an open door in that the pollution in the case was not accidental, and held that for there to be coverage, the release must be both sudden and accidental.[68]

The Court of Appeals for the Second Circuit, applying New York law, did address the sudden component of the exception to the exclu-

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& Guar Co. v. Specialty Coatings, 180 Ill. App. 3d 378, 388, 535 N.E.2d 1071, 1075 (1989); Reliance Insurance Co. v. Martin, 126 Ill. App. 3d 94, 97-98, 467 N.E.2d 287, 289 (1984).

58. 168 Ill. App. 3d 361, 522 N.E.2d 758 (1988).

59. *Id.* at 378, 522 N.E.2d at 769.

60. *Outboard Marine*, 570 N.E.2d at 1163.

61. *Id.*

62. *Id.*

63. *Id.* The court defined accidental as "unexpected *and* unintended. If a party expects an event to occur, the event cannot reasonably be considered accidental with reference to that party." *Id.*

64. *Id.* at 1164. The court also rejected the argument that the pollution exclusion clause only applies to persons who actively pollute. *Id.* at 1163. *See also* West American Ins. Co. v. F.W. Baumgartner, 812 P.2d 696 (Colo. App. 1990). The clause was held to exclude *pollutants*, not *polluters* who caused the release. *Id.* This peripheral point may be instructive on the holdings of the Ohio courts with their anomaly, "the polluter's exclusion."

65. 667 F. Supp. 1423 (D. Kan. 1987), *aff'd*, No. 88-1503 (10th Cir. 1991) (LEXIS, Genfed library, Courts file), *vacated in part*, No. 88-1503 (10th Cir. Aug. 29, 1991) (LEXIS, Genfed library, Courts file). The court's review of the district court's order granting summary judgment was de novo. *Id.* Upon petition, the court vacated its order in part and remanded due to an improper consideration by the court of certain facts. *Id.* The court in its order vacating and remanding, reaffirmed its holding relative to the interpretation of the pollution exclusion clause. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

sion.[69] That court held that a release or discharge would be sudden if it had "occurred over a short period of time."[70] The court found that the allegation of the underlying complaint that contamination occurred continuously for thirty-three years did not comport with the definition of sudden.[71]

The developments in New Jersey case law have been alluded to previously. The two most recent cases interpreting the pollution exclusion clause under New Jersey law were decided by two federal courts sitting outside of New Jersey. In *Firemen's Fund Insurance Co. v. Meenan Oil Co.*,[72] the United States District Court for the Eastern District of New York noted that the "decisional law in New Jersey . . . has tended to interpret the pollution exclusion and, more particularly, the 'sudden and accidental' exception, as simply a 'restatement of the definition of occurrence.' "[73] The court followed in step and held that "the pollution exclusion focuses upon the intention, expectation and foresight of the insured."[74] By contrast, the United States District Court for Rhode Island, in *CPC International, Inc. v. Northbrook Excess & Surplus Insurance Co.*,[75] undertook a detailed analysis of the New Jersey intermediate court decisions interpreting the pollution exclusion clause.[76] The court noted that the New Jersey Supreme Court had never interpreted the clause, and concluded that the New Jersey Supreme Court would refuse to pursue the direction indicated by the New Jersey appellate courts in the early cases of *Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co.*[77] and *Broadwell Reality Services v. Fidelity & Casualty Co.*[78] The court concluded that the New Jersey Supreme Court would not find ambiguity in the pollution exclusion clause and would follow the plain meaning of the phrase "sudden and accidental."[79] The court refused to "engage

69. Ogden v. Travelers Indemnity Co., 924 F.2d 39 (2d Cir. 1991).

70. *Id.* at 42. (quoting Technicon Electronics Corp. v. American Home Assurance Co., 141 A.D.2d 124, 137, 533 N.Y.S.2d 91, 99 (1988), *aff'd*, 74 N.Y.2d 66, 542 N.E.2d 1048, 544 N.Y.S.2d 531 (1989)). *See also* E.A.D. Metallurgical, Inc. v. Aetna Casualty & Sur. Co., 905 F.2d 8 (2d Cir. 1990).

71. *Ogden*, 924 F.2d at 42. Additionally, "[u]nder New York law, the contamination of a site is accidental when the conduct, the activity resulting in pollution, was unintended." *Id.*

72. 755 F. Supp. 547 (E.D.N.Y. 1991).

73. *Id.* at 550 (quoting Broadwell Realty Services v. Fidelity & Casualty Co., 218 N.J. Super. 516, 528 A.2d 76, 85-86 (1987)).

74. 755 F. Supp. at 550.

75. 759 F. Supp. 966 (D.R.I. 1991).

76. *Id.* at 971-73.

77. 186 N.J. Super. 156, 451 A.2d 990 (1982).

78. 218 N.J. Super. 516, 528 A.2d 66 (1987); *see CPC Int'l*, 759 F. Supp. at 973.

79. *CPC Int'l*, 759 F. Supp. at 973.

in a strained construction to support the imposition of liability."[80] As the court noted, "the exclusion would allow coverage only for events which are accidental, that is, unexpected and unintended and sudden, that is, which have occurred abruptly, precipitantly or over a short period of time. Coverage for gradual pollution would be barred, . . . as would coverage for intentional pollution."[81] The court stated that this interpretation would be in accord with the courts across the country.[82]

C. *The Federal Court - State Court Split*

Under the *Erie* doctrine, a federal court sitting in a diversity case must apply the law the state court would apply.[83] With respect to case law, the law of the state is the most recent pronouncement by the highest court of that state.[84] If the highest court has not ruled on a particular issue, then the federal court has the task of anticipating or predicting how the court would rule if faced with the issue. While state appellate courts would be persuasive in this respect, they are not binding upon the federal court. Therefore, federal courts at times issue rulings in contradiction to state appellate courts. This is common in cases with issues of insurance coverage and environmental matters.[85]

The split between the United States Court of Appeals for the Sixth Circuit applying Ohio law and the Ohio appellate and trial courts is but one example of contradictory decisions. An Ohio appellate court first interpreted the pollution exclusion clause in 1984 in *Buckeye Union Insurance Co. v. Liberty Solvents & Chemical Co.*[86] The Ohio court found the phrase "sudden and accidental" within the pollution exclusion clause ambiguous on its face since it was not separately defined within the policy.[87] The court went on to hold that the pollution exclusion clause was simply a restatement of the definition of occurrence.[88] In 1987, an Ohio appellate court sitting in Hamilton County expressly

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80. *Id.*
81. *Id.*
82. *Id.*
83. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
84. *See Id.*
85. This is particularly true with the pollution exclusion clause. One commentator has stated:

> As a consequence of the high stakes involved, the state and federal courts are fighting a "civil war" over the interpretation of the pollution exclusion clause in the comprehensive general liability insurance policy. This civil war pits the "polluting" companies and individuals against their insurers in a battle to determine coverage under the CGL policy.

Greenlaw, *The CGL Policy and the Pollution Exclusion Clause: Using the Drafting History to Raise the Interpretation Out of the Quagmire*, 23 COLUM. J.L. & SOC. PROBS. 233, 233 (1990).
86. 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984).
87. *Id.* at 132, 477 N.E.2d at 1234.
88. *Id.* at 133, 477 N.E.2d at 1234.

followed *Buckeye Union*.[89] In reaching its holding in *Kipin Industries, Inc. v. American Universal Insurance Co.*, the appellate court held that "an event is 'sudden and accidental', and thus not excluded from comprehensive coverage, if the damaging result is neither expected nor intended by the insured."[90] Because of its ambiguity, the clause was strictly construed.[91]

That same year, the Sixth Circuit, applying Ohio law, concluded that the Ohio Supreme Court would not follow *Buckeye Union*.[92] The United States District Court for the Southern District of Ohio held that the pollution exclusion clause was not ambiguous.[93] "Sudden means happening without previous notice or with very brief notice," and "accidental means occurring sometimes with unfortunate results by chance."[94] The Sixth Circuit interpretation of Ohio law is obviously at odds with the Ohio appellate court decisions.

Michigan is another example of a state in which the decisions of state appellate courts are at odds with the federal decisions. The leading Michigan appellate court case was decided in 1986.[95] In *Jonesville Products, Inc. v. Transamerica Insurance Group*, allegations of continuous pollution fell within the pollution exclusion so long as these continuous releases were unintended.[96] *Jonesville Products* has been followed by subsequent Michigan appellate court decisions, including *Upjohn Co. v. New Hampshire Insurance Co.*[97] and *Polkow v. Citizens Insurance*.[98] The federal courts, however, applying Michigan law, have refused to follow *Jonesville Products*. The federal courts have focused on the actual discharge of the pollutants and away from the more neb-

89. Kipin Industries, Inc. v. American Universal Ins. Co., 41 Ohio App. 3d 228, 231, 535 N.E.2d 334, 337 (1987).

90. *Id.* at 231, 535 N.E.2d at 338.

91. *Id.* at 232, 535 N.E.2d at 338.

92. Borden Inc. v. Affiliated FM Ins., 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F. 2d 1267 (6th Cir.), *cert. denied*, 110 S. Ct. 68 (interim ed. 1989). "This court is convinced that the Ohio Supreme Court would not adopt the construction of the pollution exclusion set forth in *Buckeye*." *Borden*, 682 F. Supp. at 929.

93. *Borden*, 682 F. Supp. at 930.

94. *Id.*

95. Jonesville Prod., Inc. v. Transamerica Ins. Group, 156 Mich. App. 508, 402 N.W.2d 46 (1986).

96. *Id.*

97. 178 Mich. App. 706, 444 N.W.2d 813 (1989). The court held that even a continuous discharge of chemicals may be accidental and sudden, and, therefore, outside the pollution exclusion. Accidental was equated with unintended; sudden was equated with unexpected. The pollution at issue was leakage from an underground storage tank. *Id.*

98. 180 Mich. App. 651, 447 N.W.2d 853 (1989). The court found that sudden means unexpected and that accidental means unintended. Since the plaintiff in this case did not expect or intend to spill pollutants, plaintiff was entitled to insurance coverage. *Id.*

ulous issue of the intent of the insured.[99] The United States District Court for the Eastern District of Michigan in *Ray Industries v. Liberty Mutual*[100] was convinced that the Michigan Supreme Court would not follow *Polkow*.[101] According to the *Ray* court, *Polkow* rewrote the insurance contract by collapsing the definition of occurrence and the exceptions of the pollution exclusion.[102] The court found that discharges that took place continuously and regularly for approximately thirteen years could not be sudden and accidental.[103]

III. FOCUS ON RECENT OHIO CASES

Since the early Ohio cases interpreting the pollution exclusion clause were decided, *Buckeye Union Insurance Co. v. Liberty Solvents & Chemical Co.*[104] in 1984 and *Kipin Industries, Inc. v. American Universal Insurance Co.*[105] in 1987, two trial courts and one appellate court have rendered decisions interpreting the clause. In *Hybud Equipment Corp. v. Sphere Drake Insurance Co.*,[106] the appellate court for Summit County followed the 1984 *Buckeye Union* case without addressing the rationale which caused courts to move away from this earlier view.[107] In a case involving pollution from a landfill, the *Hybud* court held that the phrase " 'sudden and accidental' " was a reaffirmation of the principle that coverage will not be provided for intended results of intentional acts, but will be provided for the unintended re-

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99. *See* Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 702 F. Supp. 1317 (E.D. Mich. 1988). A discharge or release that is brief or lasting only a short time comes within the meaning of sudden. *Id.* The Sixth Circuit, applying Michigan law, sent an even stronger signal in *F.L. Aerospace v. Aetna Casualty & Surety*, 897 F.2d 214 (6th Cir. 1990), when it affirmed its district court decision. The court found that the pollution exclusion clause was not ambiguous. *Id.* The terms sudden and accidental should be given their plain, everyday meaning. According to the court, a sudden and accidental event is something that happens quickly, without warning, and fortuitously or intentionally. *Id.* The court noted that the Michigan Supreme Court would, in its opinion, find that sudden had a temporal component. *F.L. Aerospace* was cited and followed in *Detrex Chemical Indus. v. Employers Ins.*, No. C85-2278Y (N.D. Ohio April 12, 1990) (applying Michigan law). In *International Surplus v. Anderson Dev.*, 901 F.2d 1368 (6th Cir. 1990), the court held that the leak of a by-product over a three week time span would not be sudden and accidental. The court found *F. L. Aerospace* to be controlling. In *Grant-Southern Iron & Metal v. CNA Ins. Co.*, 905 F.2d 954 (6th Cir. 1990), the court held that the phrase "sudden and accidental" in exception to the pollution exclusion clause in industrial liability policy has temporal components.

100. 728 F. Supp. 1310 (E.D. Mich. 1989).

101. *Id.*

102. *Id.* at 1317.

103. *Id.* at 1318.

104. 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984).

105. 41 Ohio App. 3d 228, 535 N.E.2d 334 (1987).

106. C.A. No. 14597 (Summit County Ct. App., Jan. 30, 1991) (LEXIS, Ohio library, Courts file), *cert. granted*, No. 91-641 (Ohio July 3, 1991).

107. *Id.*

sults of intentional acts."[108] In other words, the phrase was a restatement of the definition of occurrence. The court specifically noted that "sudden should not be limited to instantaneous" events.[109] The Ohio Supreme Court has accepted this case for review.[110]

Two opinions have recently emerged from the trial courts in Hamilton County. Judge Nadel granted partial summary judgments to the insured in *Morton-Thiokol, Inc. v. Aetna Casualty & Surety Co.*[111] Judge Morrissey granted a similar partial summary judgment in related litigation in *Morton International v. Harbor Insurance Co.*[112]

IV. CONCLUSION

The addition of the *Hybud Equipment Corp. v. Sphere Drake Insurance Co.*[113] appellate decision and the *Morton International* trial court decision has not altered Ohio law. Indeed, the status of the law has remained stagnant since the original Ohio case interpreting the pollution exclusion clause in 1984, *Buckeye Union Insurance Co. v. Liberty Solvents & Chemical Co.*[114] The appellate court in *Buckeye Union* analyzed the issues in interpretation of the pollution exclusion clause, and chose to follow the line of cases that had been developing in New Jersey. The trend in recent times is clearly away from these early New Jersey decisions, which held that "sudden and accidental" was ambiguous and superfluous. Therefore, the insurance policies must be con-

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108. *Id.* (citations omitted).

109. *Id.*

110. Hybud Equipment Corp. v. Sphere Drake Ins. Co., C.A. No. 14597 (Summit County Ct. App., Jan. 30, 1991) (LEXIS, Ohio library, Courts file), *cert. granted*, No. 91-641 (Ohio July 3, 1991); *see also* Saxton, *The Pollution Exclusion Clause in Ohio: Ohio Supreme Court May Finally Resolve the Issue*, 3 ENVIRONMENTAL LAW JOURNAL OF OHIO 10 (1991).

111. No. A8603799 (Hamilton County C.P. March 1, 1990). Morton-Thiokol sought indemnification from its insurers for alleged liability to share the expenses of cleaning up the Summit National Service site in Portage County, Ohio. *Id.* Judge Nadel drafted a somewhat obscure opinion which simply stated, as to the pollution exclusion, that "the polluter's exclusion found at exclusion F in the Aetna policy does not apply to the third party disposal or release of alleged pollutants." *Id.* The court did not offer any citations to case law; however, it obviously relied upon the 1984 *Buckeye Union* case in which the peculiar phrase "polluter's exclusion" appears. This order granting plaintiff partial summary judgment was appealed to the First Appellate District, sitting in Hamilton County, Ohio. Morton Int'l, Inc. v. Aetna Casualty & Sur. Co., No. C-900283 (Hamilton County Ct. App. Oct. 2, 1991). The appellate court reversed and remanded the judgment based upon the trial court's improper application of Ohio law instead of Pennsylvania law. *Id. See generally* RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 188 (1971); Nationwide Mutual Ins. Co. v. Ferrin, 21 Ohio St. 3d 43, 487 N.E.2d 568 (1986).

112. A-8903914 (Hamilton County C.P. Feb. 4, 1991). The court held that "the polluter's exclusion . . . does not apply to the third party disposal or release of alleged pollutants." *Id.* Again, this case appears to be based on *Buckeye Union.*

113. C.A. No. 14597 (Summit County Ct. App., Jan. 30, 1991) (LEXIS, Ohio library, Courts file), *cert. granted*, No. 91-641 (Ohio July 3, 1991).

114. 17 Ohio App. 3d 27, 477 N.E.2d 1227 (1984).

strued against insurers and in favor of coverage. Numerous state supreme courts have penned comprehensive and well-researched opinions in which the justices have refused to contort the clear meaning of "sudden and accidental" into an ambiguity. Our federal courts, charged with the responsibility of applying state law not necessarily as the state trial courts and courts of appeals have applied it, but as the high court of the state would apply it if presented with the issue, have nearly unanimously held that the pollution exclusion clause is not ambiguous. The federal courts from Ohio, Michigan, and Rhode Island have been charged with the responsibility of making an in-depth analysis and deciding issues in the way they believe the state high courts would decide them. Although the state courts need not be persuaded by federal decisions, such judicial decisions should not be overlooked, just as lower state court decisions are considered by the federal courts. The uniform trend evidenced by the recent federal court decisions is but one more indicator of the consensus of all courts in the interpretation of the standard language within the pollution exclusion clause.

The reliance by Ohio courts on *Buckeye Union* is no longer justified. Ohio courts have revisited the *Buckeye Union* decision but have never comprehensively and critically reviewed the underpinnings of the decision. Such a review would reveal that the decision is based upon older cases which have been criticized even within the jurisdictions in which those cases were decided. The *Hybud* case presents to the Ohio Supreme Court this opportunity to make a thorough review of *Buckeye Union.*

Ohio jurists must start with a clean slate and make a new and independent analysis of the law. The interpretation of the pollution exclusion clause is not philosophical, political or economic. Our courts are not in place to legislate insurance coverage, to re-write the English language, or to equate "insurance policy" with "insurance coverage." The court's role is to analyze the law and apply the law to the facts. If that is done, the result will be that all vestiges of *Buckeye Union* and Ohio's contortion of the "polluter's exclusion" will be respectfully left behind in it's rightful place in the 1980s.