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I. Introduction

Because it transfers risk and reduces uncertainty, insurance is widely and properly regarded as an essential component of virtually all commercial activity.[1] Perhaps the most prominent example of how insurance performs this critical role is general liability insurance,[2] often referred to as comprehensive general liability, or "CGL," insurance. For more than fifty years, insurance companies have marketed CGL insurance to both the consuming public and the state regulatory authorities charged with protecting the public interest[3] as a means of externalizing the unpredictable and ever-expanding risks that policyholders face at the hands of the American legal liability system. So successful was this marketing effort that nearly every commercial establishment (as well as countless non-profit and public entities and many individuals) has purchased, and continues to purchase, some form of general liability insurance.

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[1] *See, e.g.*, Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 948 (1988) ("[L]iability insurance is as important to many enterprises as electricity . . . ."); ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW § 1.1(a) (1988) ("Insurance may well be an essential system for risk distribution in any industrialized society comprised of independently owned and operated businesses.").

[2] "General liability insurance" is defined as follows:

> A form of insurance designed to protect owners and operators of businesses from a wide variety [of] liability exposures. These exposures could include liability arising out of accidents resulting from the premises or the operations of an insured, products sold by the insured, operations completed by the insured, and contractual liability.

MERRITT, GLOSSARY OF INSURANCE TERMS 108 (5th ed. 1994).

[3] See *infra* notes 94-120 and accompanying text.

This article discusses the "qualified pollution exclusion," a specific provision found in virtually all of the CGL policies issued to individuals, businesses, governmental units, and other organizations in Pennsylvania[4] (and most other United States jurisdictions)[5] between 1970 and 1985. That exclusion purports to bar coverage for liabilities resulting from "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 water course or

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[4] Virtually all of the general liability insurance policies issued to United States insurance consumers between 1970 and 1985 were based on standard forms prepared by the Insurance Services Office, Inc. (ISO), "an association of approximately 1,400 domestic property and casualty insurers," Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2896 (1993); by ISO's predecessor, the Insurance Rating Board (IRB), by the IRB's predecessor, the National Bureau of Casualty Underwriters (NBCU); and by the Mutual Insurance Rating Board (MIRB) — all very similar organizations consisting of stock and mutual insurance companies, respectively. *See* Steven G. Bradbury, *Original Intent, Revisionism, and the Meaning of the CGL Policies*, 1 ENVTL. CLAIMS J. 279, 280 (1989). A similar role was played by Lloyd's Non Marine and Fire Underwriters Association (NMA), an analogous insurance industry organization operating in connection with the London Insurance Market. *See* Eugene R. Anderson et al., *Is London on Mars?*, MEALEY'S LITIG. REP. - INS., June 1, 1994, at 15, 17.

During the 1970 to 1985 period, ISO's standard form of general liability policies were written on an "occurrence" basis and generally incorporated "qualified pollution exclusions," which permitted coverage only for pollution damage which resulted from a "sudden and accidental" release of pollutants. *Hartford Fire Ins. Co.*, 113 S. Ct. at 2896. After 1985, standard form general liability insurance policies incorporated purportedly absolute "pollution exclusions," which some of today's insurers claim bar coverage for all pollution damage. *Id.*

Standardized policy language markedly reduces the cost of providing insurance by eliminating the need to negotiate and price a unique policy for each potential insured and to completely assess all risks faced by each potential insured. KEETON & WIDISS, *supra* note 1, § 2.10(a), at 119; *see also* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1223-24 (1983) (discussing the necessity of using standard form language in insurance contracts).

[5] Insurance regulators in New Hampshire, Maryland, North Carolina, and Puerto Rico rejected the qualified pollution exclusion when it was introduced in 1970. Eugene R. Anderson et al., *Liability Insurance Coverage for Pollution Claims*, 12 U. HAWAII L. REV. 83, 94 n.38 (1990). As a result, the qualified pollution exclusion may not have been incorporated into policies issued in those jurisdictions.

body of water . . . ."[6] The pollution exclusion, however, "does not apply if such discharge, dispersal, release or escape is sudden and accidental."[7]

Scholars and judges alike have noted, and bemoaned, the onslaught of litigation over this provision, and in particular over the meaning of the term "sudden."[8] Scores of law review articles and notes[9] have considered the exclusion, as have hundreds of reported opinions,[10] and perhaps

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[6] Continental Casualty Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 957 (E.D. Pa. 1995); Nancer Ballard & Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610, 613 (1990) (quoting Insurance Services Office Form GL 00 02, Ed. 01-73).

Where approved by state insurance regulators, the qualified pollution exclusion was added to standard form CGL policies as a mandatory endorsement in 1970. After 1973, the exclusion was incorporated into the standard form CGL policy itself. *See* Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha, 882 P.2d 703, 718 (Wash. 1994).

[7] *Diversified Indus.*, 884 F. Supp. at 957; Ballard & Manus, *supra* note 6, at 613 (quoting Insurance Services Office Form GL 00 02, Ed. 01-73).

[8] *See, e.g.*, Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831, 855-56 (N.J. 1993) ("[A]n enormous outpouring of judicial energy already has been expended in attempting to fathom how this exclusion should be interpreted."), *cert. denied*, 114 S. Ct. 2764 (1994); KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW 1 (1991) ("In virtually every state, such litigation is consuming the time and energy of the courts and the assets of policyholders and insurers.").

[9] *See, e.g.*, Eugene R. Anderson et al., *Environmental Insurance Coverage in New Jersey: A Tale of Two Stories*, 24 RUTGERS L.J. 83 (Fall 1992); Richard L. Antognini, *The Coming Guerilla War Over the Pollution Exclusion*, 6 ENVTL. CLAIMS J. 521 (1994); David J. Barberie, Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.: *Reaching in the Wrong Pocket?*, 9 J. LAND USE & ENVTL. L. 161 (1993); Edward C. Laird & Ellis I. Medoway, Morton*'s Binding Legacy on the Pollution Exclusion*, 7 ENVTL. CLAIMS J. 25 (1994); Thomas C. Mielenhausen, *Insurance Coverage for Environmental and Toxic Tort Claims*, 17 WM. MITCHELL L. REV. 945 (1991); Thad R. Mulholland, *The Saga of the Pollution Exclusion Clause: How a 'Sudden' Change Occurred Gradually*, 2 MO. ENVTL. L. & POL'Y REV. 26 (1994); Michael E. Petrella, *Back to the Future for the Pollution Exclusion Clause?*: Morton International, Inc. v. General Accident Insurance Co., 44 CASE W. RES. L. REV. 265 (1993); Kelly J. Sosnow, *Insurance Industry Misrepresentation and the Pollution-Exclusion Clause* — Morton International, Inc. v. General Accident Insurance Company of America, *629 A.2d 831 (N.J. 1993)*, 18 HARV. ENVTL. L. REV. 249 (1994); Joseph C. Gruber, Note, Hybud Equipment Corporation v. Sphere Drake Insurance Company*: The Meaning of the Pollution Exclusion Established in Ohio*, 20 N. KY. L. REV. 391 (1993); Sharon M. Murphy, Note, *The "Sudden and Accidental" Exception to the Qualified Pollution Exclusion Clause in Comprehensive General Liability Insurance Policies: The Gordian Knot of Environmental Liability*, 45 VAND. L. REV. 161 (Jan. 1992); E. Joshua Rosenkranz, Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237 (1986); Brian S. Rudick, Note, *The Pollution Exclusion Clause in Pennsylvania: Revisiting* Techalloy v. Reliance, 56 U. PITT. L. REV. 885 (1995); Raymond T. Elligett, Jr. & Charles P. Schropp, *Running for Cover: Environmental Insurance Coverage Issues*, FLA. B.J., July/Aug. 1993 at 67; Edward Zampino & Victor C. Harwood III, *The Pollution Exclusion: Debunking The Policyholders' Regulatory Estoppel Myth*, FOR DEF., July 1995, at 2. For citations to additional articles, see Thomas M. Reiter et al., *The Pollution Exclusion Under Ohio Law: Staying the Course*, 59 U. CINCINNATI L. REV. 1165, 1176 n.48 (1991).

[10] *See, e.g.*, *Morton*, 629 A.2d at 855-70 (surveying published cases interpreting the qualified pollution exclusion); GEORGE J. COUCH, COUCH ON INSURANCE 2D § 44A:122, at 110-37

thousands of unreported opinions.[11] The principal reasons for the intensity and duration of the controversy are not difficult to identify. First, the stakes almost defy comprehension. The underlying environmental investigation and remediation expenses giving rise to pollution claims are estimated to exceed $1.5 trillion.[12] Coverage for such claims is often available under CGL policies written before 1985, many of which incorporate the qualified pollution exclusion.[13] Second, virtually no general liability policy contains an explicit choice-of-law provision.[14]

(Ronald A. Anderson ed., 1984 & Supp. 1995) (same).

[11] In its approximately 400 issues published since 1984, MEALEY'S LITIGATION REPORTS - INSURANCE has reported or reproduced several thousand court decisions in environmental insurance cases. In any given issue, several cases will specifically address the qualified pollution exclusion.

Other services also publish unreported environmental insurance decisions, including BNA'S INSURANCE COVERAGE LITIGATION REPORT, published by the Bureau of National Affairs, Inc.; the INSURANCE LITIGATION REPORTER, published by Shepard's McGraw-Hill; and the INSURANCE INDUSTRY LITIGATION REPORTER, published by Andrews Publications, Inc.

[12] Martin Giles, *Where There's Muck . . .*, THE ECONOMIST (A SURVEY OF INSURANCE), Dec. 3, 1994, at 9.

[13] Policies issued after 1985 typically incorporate a different, and purportedly absolute, form of pollution exclusion. Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2896 (1993).

Besides the qualified pollution exclusion quoted above, two alternative qualified pollution exclusions may commonly be found in CGL policies issued to insureds in the United States between 1970 and 1985: the so-called "Travelers pollution exclusion," *see* Travelers Indem. Co. v. Dingwell, 414 A.2d 220, 223 (Me. 1980) (quoting exclusion), and the so-called "Lloyd's," or "London," pollution exclusion, also known as "NMA 1685," *see* Eugene R. Anderson et al., *Is London on Mars?*, MEALEY'S LITIG. REP. - INS., June 1, 1994, at 15, 25 n.10 (quoting NMA 1685).

The "occurrence-based" policies that were issued between 1970 and 1985 are "triggered," not by the date of the claim made against the policyholder, but rather by the date of the underlying injury or damage giving rise to the claim. *See, e.g.*, J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 507 (Pa. 1993). The typical environmental claim involves waste disposal activities and progressive property damage dating back before 1985 and, accordingly, may "trigger" coverage under an "occurrence-based" CGL policy issued before 1985. *See, e.g.*, Federal Ins. Co. v. Susquehanna Broadcasting Co., 727 F. Supp. 169, 172 n.4 (M.D. Pa. 1989), *modified*, 738 F. Supp. 896 (M.D. Pa. 1990), *aff'd*, 928 F.2d 1131 (3d Cir.), *cert. denied*, 502 U.S. 823 (1991).

[14] Some courts have held that the so-called "service of suit" provision incorporated into CGL policies subscribed to by the Underwriters at Lloyd's, London and London Market Companies operates as a choice of law provision. *See, e.g.*, Capital Bank & Trust Co. v. Associated Int'l Ins. Co., 576 F. Supp. 1522, 1525 (M.D. La. 1984) (determining that a service of suit provision required application of the law of the forum jurisdiction). Other courts have rejected that position. *See, e.g.*, Chesapeake Utils. Co. v. American Home Assurance Co., 704 F. Supp. 551 (D. Del. 1989); W. R. Grace & Co. v. Hartford Accident & Indem. Co., 555 N.E.2d 214 (Mass. 1990). The "service of suit" provision states:

> It is agreed that in the event of the failure of the Insurer(s) or Underwriters hereon to pay any amount claimed to be due hereunder, the Insurer(s) or Underwriters hereon, at the request of the insured (or reinsured), will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all require-

Because insurance contract construction presents questions of state, not federal, law,[15] each state must fashion its own interpretation of policy language. The resulting jurisprudence is a crazy-quilt of the states' varying approaches to interpreting the exclusion, complicated by courts' resolutions of choice of law issues in the particular context of each case.[16]

On the issue of liability insurance coverage for unforeseen, gradual pollution damage, Pennsylvania law is regarded by some as among the most pro-insurer in the country. This perception is unquestionably a product of the interpretation, by courts applying Pennsylvania law, of the qualified pollution exclusion.[17] In what is usually considered the seminal Pennsylvania decision on the subject, the Pennsylvania Superior Court ruled, in the 1984 case of *Techalloy Co. v. Reliance Insurance Co.*, that the qualified pollution exclusion permitted coverage only for pollution damage arising out of abrupt and accidental events.[18] Subsequently, the superior court extended this interpretation of the exclusion to bar coverage even where the policyholder did not foresee the pollution discharge which gave rise to its liabilities.[19] Such rulings eliminate almost entirely the possibility of insurance recovery for unforeseen, gradual pollution damage under the most accessible type of insurance.[20] As a result, Pennsylvania

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ments necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.

31 PA. CODE § 123.42 (1990), *quoted in* Order at 19, Westinghouse Elec. Corp. v. Liberty Mut. Ins. Co. (No. L-069352-87) (N.J. Super. Ct. Oct. 9, 1991), *reprinted in* MEALEY'S LITIG. REP. - INS., Nov. 1, 1991, at J-1, J-11.

[15] *See, e.g.*, Hudson Ins. Co. v. American Elec. Corp., 748 F. Supp. 837, 841 (M.D. Fla. 1990)., *aff'd*, 957 F.2d 826 (11th Cir.), *cert. denied*, 506 U.S. 955 (1992).

[16] *See, e.g.*, BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 10.02[c] and [d] (7th ed. 1994) (discussing varying interpretations of the qualified pollution exclusion that have been reached by courts); Peter J. Kalis et al., *The Choice-Of-Law Dispute in Comprehensive Environmental Coverage Litigation: Has Help Arrived from the American Law Institute Complex Litigation Project?*, 54 LA. L. REV. 925, 934-35 (1994) (discussing states' varying approaches to the choice of law question in environmental insurance coverage disputes).

[17] Pennsylvania law is considered to be generally pro-policyholder on most, if not all, of the other issues implicated by environmental insurance claims, including "trigger," *J.H. France Refractories*, 626 A.2d at 507 (all policies on the risk during progressive development of asbestos-related disease triggered); "expected or intended," United Servs. Auto. Ass'n v. Elitzky, 517 A.2d 982 (Pa. Super. Ct. 1986) (finding "expected or intended" language ambiguous and construing it in favor of coverage), *appeal denied*, 528 A.2d 957 (Pa. 1987); and notice issues, Brakeman v. Potomac Ins. Co., 371 A.2d 193 (Pa. 1977) (insurer must show that it has been prejudiced by late notice of a claim to deny coverage on the basis of late notice).

[18] 487 A.2d 820, 826-28 (Pa. Super. Ct. 1984), *appeal denied* (Pa. 1985).

[19] *See* Lower Paxton Township v. United States Fidelity & Guar. Co., 557 A.2d 393, 402-04 (Pa. Super. Ct.), *appeal denied*, 567 A.2d 653 (Pa. 1989).

[20] Other types of insurance, including certain "all risk" or "difference in condition" coverages and the so-called "environmental impairment liability" policies introduced in the early

businesses and taxpayers fund environmental cleanups that in other jurisdictions (including the neighboring states of New Jersey[21] and West Virginia)[22] are funded in much greater part by insurers.

Reasonable people can and obviously do differ regarding the interpretation of the qualified pollution exclusion.[23] Nonetheless, it is the thesis of this article that the existing law in the Commonwealth of Pennsylvania on the qualified pollution exclusion is indefensible, not simply because of its erroneous interpretation of the exclusion, but also because it results from both a gross misuse by the insurance industry of the regulatory process and a continuing perversion of the judicial precedent on which our common law system relies.

Specifically, this article will describe how, in 1970, the insurance industry obtained the statutorily required approval of the Pennsylvania Insurance Commissioner to insert the qualified pollution exclusion into already issued standard-form CGL policies. This regulatory approval was obtained on the basis of the insurance industry's representations: (i) that the qualified pollution exclusion only clarified, and did not curtail, existing coverage; and (ii) that coverage for "accidents" was preserved. Today, when faced with substantial environmental claims from their policyholders, the same insurers undertake extraordinary efforts to shield from judicial

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1980s, might also provide coverage for environmental liabilities. *See* Matthew L. Jacobs & Helena M. Barch-Kuchta, *Alternatives to the CGL Policy for Recovering Costs*, 6 ENVTL. CLAIMS J. 41 (1993). Of course, coverage might also be available for such liabilities under CGL policies issued before 1970, which are unlikely to incorporate pollution exclusions. *See* Lancaster Area Refuse Auth. v. Transamerica Ins. Co., 263 A.2d 368 (Pa. 1970).

[21] *See Morton*, 629 A.2d at 875 (determining that CGL policies incorporating the qualified pollution exclusion permit coverage for discharges of pollutants which were not expected by the insured).

[22] *See* Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493, 499 (W.Va. 1992) (determining that CGL policies incorporating the qualified pollution exclusion permit coverage for discharges of pollutants that were not expected by the insured).

[23] *See* John D. Shugrue & Thomas A. Marrinson, *Beyond "Sudden": The New Wave of Pollution Exclusion Litigation*, 7 ENVTL. CLAIMS J. 3, 4 & 15 nn.5 & 6 (1995) (recognizing that the highest courts of Washington, Illinois, Colorado, Wisconsin, Georgia, West Virginia, South Carolina, and New Jersey have interpreted the qualified pollution exclusion to permit coverage for gradual, unforeseen pollution damage, while the highest courts of Ohio, Michigan, North Carolina, Minnesota, Florida, and Massachusetts have rejected such an interpretation of the exclusion). The Supreme Court of Oklahoma has also construed the qualified pollution exclusion to permit coverage only for property damage that arises out of abrupt releases of pollutants, Kerr-McGee Corp. v. Admiral Ins. Co., 905 P.2d 760, 763-64 (Okla. 1995), while the Supreme Court of Indiana has recently determined that the exclusion is ambiguous and permits coverage for "unexpected" releases, American States Ins. Co. v. Kiger, No. 32S05-9409-VB-836, 1996 WL 137511, at *2-3 (Ind. Mar. 27, 1996). For a discussion of the different approaches that courts across the United States have taken in interpreting the qualified pollution exclusion, see ABRAHAM, *supra* note 8, at 148-50.

inquiry such representations, and advance contradictory coverage positions in litigation before courts applying Pennsylvania law. Such conduct need not be countenanced; Pennsylvania law permits a court to estop an insurer from denying coverage on a basis that is inconsistent with its prior representations to officials of the Commonwealth.

This article will also detail how this pro-insurer Pennsylvania case law is attributable to a relatively recent breakdown in judicial precedent. The failure of the purportedly seminal decision of the Pennsylvania Superior Court in *Techalloy* to consider the existence of at least four decisions by Pennsylvania courts that had previously considered the interpretation of the qualified pollution exclusion under Pennsylvania law is the most notable example of this breakdown.

Moreover, the superior court failed to follow well-established rules of policy construction in such cases as *Techalloy* and *Lower Paxton*, and also failed to hold insurers to the representations that were made in 1970 to the Pennsylvania Insurance Commissioner regarding the qualified pollution exclusion. Such decisions by the superior court have undermined Pennsylvania policyholders' reasonable expectations of coverage for liabilities arising out of unforeseen, gradual pollution under CGL policies written between 1970 and 1985.

Fortunately for those policyholders, change may be on the way. Less than two years ago, the Pennsylvania Supreme Court accepted allocatur in *Central Dauphin School District v. Pennsylvania Manufacturers' Ass'n Insurance Co.*, and was poised to issue a definitive ruling interpreting the qualified pollution exclusion. After the Central Dauphin School District and its supporting amici curiae, including the Department of Environmental Resources (DER)[24] filed briefs that discussed the drafting history of the qualified pollution exclusion to support the argument that the exclusion is ambiguous, the school district's insurers settled the case for more than two times the amount of the school district's claim. Nevertheless, the supreme court's order granting allocatur in *Central Dauphin* established that the proper interpretation of the qualified pollution exclusion remains an open question under Pennsylvania law, and also established that the insurance industry's representations regarding the exclusion may be admitted as evidence to interpret the exclusion. Hope remains that the Pennsylvania Supreme Court will undo the superior court's errors, and thereby fulfill policyholders' reasonable expectations for coverage under

[24] The Department of Environmental Resources became the Department of Environmental Protection, effective July 1, 1995. Law of June 28, 1995, Pub. L. 89, No. 18 (codified at 71 PA. STAT. ANN. § 1340.101 (Supp. 1995)).

CGL policies written between 1970 and 1985 for liabilities arising out of unforeseen, gradual pollution.

II. The Drafting History of the Key Policy Provisions

This part of the article will trace the development of general liability insurance for United States policyholders to show why their expectations for coverage for liabilities arising out of unforeseen, gradual pollution are reasonable. Accordingly, this part first discusses the development of comprehensive general liability insurance and the "accident-based" and, later, the "occurrence-based" standard-form coverages. Next, this part examines the drafting of the qualified pollution exclusion, and concludes by examining the insurance industry's deceptive marketing of the qualified pollution exclusion to policyholders and state insurance regulators.

A. Coverage for Pollution Damage Before the Introduction of the Qualified Pollution Exclusion

This subpart traces the development of standard-form CGL wordings prior to the 1970 introduction of the qualified pollution exclusion, and examines the coverage that they provided for liabilities arising out of unforeseen, gradual pollution. As this subpart shows, before 1970, CGL policyholders could reasonably, and unquestionably, expect that their CGL policies permitted coverage for such liabilities.

1. "Accident-Based" Policies

Liability insurance, which indemnifies the insured "against liability on account of injuries to the person or property of another,"[25] first became available to United States businesses in the 1880's.[26] The relatively small

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[25] BLACK'S LAW DICTIONARY 805 (6th ed. 1990).

[26] 7A JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW & PRACTICE § 4491, at 3 (Walter F. Berdal ed. 1979) ("General liability insurance came into prominence in the United States around 1880 . . . . At first, companies drafted their own policies using their own language. There was little uniformity, and the result was confusion, disputes and considerable litigation. Efforts to develop uniformity began in the 1930's, culminating with the development of a standard policy in 1940."); Randolph M. Fields, *The Underwriting of Unlimited Risk: The London Market Umbrella Liability Policy — 1950-1970*, COVERAGE, July/Aug. 1995, at 36, 37 ("The insurance of legal liability is of comparatively recent origin. The first recognizable contracts were written in 1885 to cover the employer's liability risk. By the turn of the century public liability risks, that is, the liability of the insured towards members of the public, were being underwritten, but generally only in connection with the operations of horse or mechanically

number of liabilities that could be insured against in the late 1800's gradually expanded, until eventually, in the 1930's, American businesses were able to purchase comprehensive public liability policies from the "innovative" insurance underwriters at Lloyd's, London.[27] The domestic insurance industry soon followed London's lead; the National Bureau of Casualty Underwriters (NBCU)[28] introduced standard form CGL insurance to the United States insurance market in January 1941.[29]

Prior to the NBCU's introduction of standard-form CGL insurance, United States insurers developed and sold separate and distinct insurances to cover each new hazard as that hazard was identified. As a result, most businesses in the United States were forced to arrange coverage for the liabilities that they might face by purchasing separate insurance to cover each recognized hazard arising out of each location of their operations,[30] or, alternatively, to purchase comprehensive coverages through the London Market.[31] This situation was not only expensive and cumbersome for businesses, but was also "dangerous" to their welfare: "If [a business] insures only against hazards which [it] anticipates may result in losses and

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powered conveyances. Recognizable Public Liability coverage was being written in both the U.S. and UK by 1920.") (footnotes omitted).

[27] Fields, *supra* note 26, at 37. By at least 1934, Underwriters at Lloyd's offered a "broad occurrence type cover" to United States insurance buyers, including the Pacific Gas & Electric Company and the Denver & Rio Grande Western Railroad, providing (in the case of Pacific Gas & Electric) coverage for "injury to and/or death on any and all persons occurring in any one accident." *Id.* Further, by 1938, the Lloyd's Non Marine and Fire Underwriters Association (NMA) had approved "a standard excess public liability wording, the TP form." *Id.* Fields theorizes that the Underwriters' "proclivity for an all risk of loss basis may derive from [the London Market's] long experience with marine contracts written to indemnify the assured against all the perils of the sea," and that "[t]his philosophy meant that Lloyd's was prepared to write American risks on a comprehensive basis covering all legal liability of the assured in one policy." In fact, "[t]he only restriction on the breadth of coverage was that the injuries or damage had to be accidental." *Id.*

[28] NBCU was an organization consisting of employee-representatives of stock insurance companies. Ballard & Manus, *supra* note 6, at 622. "In the late 1960s, the NBCU became known as the Insurance Rating Board, which together with the MIRB published the standard form pollution exclusion in 1970, and in the early seventies both entities were merged into the Insurance Services Office, which has continued the work of revising and filing standard form CGLs and other standard provisions until the present." Robert N. Sayler & David M. Zolensky, *Pollution Coverage and the Intent of the CGL Drafters: The Effect of Living Backwards*, 1 MEALEY'S LITIG. REP. - INS. 4425, 4427 (1987).

[29] *Casualty and Surety, Comprehensive Liability Program of National Bureau Makes Its Debut*, THE EASTERN UNDERWRITER, Jan. 24, 1941, at 32, *cited in* Fields, *supra* note 26, at 37 [hereinafter *Debut*]; PETER M. LENCSIS, THE LAW OF LIABILITY INSURANCE § 10.03[2] (1995).

[30] Fields, *supra* note 26, at 37.

[31] *Id.* at 38-39 (describing the development of "Broad Form Excess Comprehensive Liability," or "umbrella," policies by the London Market between approximately 1930 and approximately 1948).

remains uninsured against hazards which [it] hopes will not result in losses, an unanticipated loss may seriously deplete [its] business assets."[32] Moreover, United States insurers began losing business to the London Insurance Market, especially after 1949, when the London Underwriters introduced the "broad form excess comprehensive liability," or "umbrella," policy.[33]

The standard-form CGL insurance that the NBCU introduced in 1941 was designed to meet these concerns by insuring, in one policy, "against liability for all hazards not specifically excluded,"[34] provided only that the damage giving rise to the liability was "caused by accident."[35] Specifically, the 1941 standard-form CGL insurance provided coverage for "all sums which the Insured shall become obligated to pay as damages because of injury to or destruction of property, including loss of use thereof, caused by accident."[36] Because these early CGL policies left the key term "accident" undefined,[37] a running controversy developed over whether gradual injury processes which the insured neither expected nor intended would cause injury were "caused by accident." Despite early representations that the "accident-based" CGL policy would provide coverage for

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[32] *Id.* at 37 n.11 (quoting Elmer W. Sawyer, *Comprehensive Liability Insurance*, THE WEEKLY UNDERWRITER, Dec. 16, 1939, at 1280).

[33] *Id.* at 38.

[34] *Debut*, *supra* note 29.

[35] *See, e.g.*, Continental Casualty Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 957 (E.D. Pa. 1995); Rosenkranz, *supra* note 9, at 1241.

[36] Ballard & Manus, *supra* note 6, at 623; *see* American Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1500-01 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984).

[37] Ballard & Manus, *supra* note 6, at 623; Rosenkranz, *supra* note 9, at 1241. In 1969, the Missouri Court of Appeals noted:

> "Accident" is a chameleonic term, taking on different hues and shades of meaning in different circumstances, contexts and classes of cases as is graphically portrayed and convincingly confirmed on the 192 pages devoted to that term in 1 *Words and Phrases* (beginning at page 466) and the current pocket part, in the 34 pages devoted to it in 1 *C.J.S.* (beginning at page 425) and the current pocket part, and in the 129 cases . . . listed in 32 *West's Missouri Digest, Words and Phrases*, and the current pocket part. It is indeed a term "susceptible of being given such scope that one would hardly venture to define its boundaries." *Soukop v. Employers' Liability Assur. Corp. of London, England*, 341 Mo. (banc) 614, 626, 108 S.W.2d 86, 91, 112 A.L.R. 149, 154. All of which makes it readily understandable why no definition of the term has been attempted by counsel here but moves us to confess our wonderment that insurers throughout the years have issued innumerable liability policies employing the phrase "caused by accident," and apparently still continue to do so, without defining either that phrase or the critical word "accident."

White v. Smith, 440 S.W.2d 497, 511 (Mo. App. 1969).

"liability for all hazards not specifically excluded,"[38] some insurers sought to use the policy's "caused by accident" language to restrict coverage to liabilities which resulted from "an identifiable event which is sudden, detrimental and fixed in place."[39] That putative temporal restriction is not consistent with the "most commonly accepted meaning" and the "ordinary and popular sense" of the word "accident":

> [Accident] may be defined as meaning a fortuitous circumstance, event or happening, an event that takes place without one's foresight or expectation; an event happening without any human agency, or, if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens; an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence; an unusual or unexpected result attending the operation or performance of a usual or necessary act or event.[40]

Accordingly, most courts recognized that gradual processes which unintentionally and unexpectedly caused injury were "caused by accident" in the context of the early CGL policies.[41] A number of opinions to that effect by courts applying Pennsylvania law, including one by the Supreme Court of Pennsylvania, are especially notable in this regard.

For example, in *Beryllium Corp. v. American Mutual Liability Insurance Co.*,[42] the United States Court of Appeals for the Third Circuit determined that the deaths of the wife of one of the policyholder's employees and the daughter of another, as the result of "beryllium poisoning contracted through handling the employees' work clothes during periods of five and eight years respectively,"[43] were "caused by acci-

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[38] *Debut*, *supra* note 29; *cf.* Sayler & Zolensky, *supra* note 28, at 4429 ("By the 1940's, many insurers were willing to provide coverage for any liability, immediate or otherwise, and regardless of policy language, so long as that liability arose from *unintentional damage* on the part of the policyholder.").

[39] Gilbert L. Bean, *The Accident Versus the Occurrence Concept*, 1959 INS. L.J. 550, 551 (1959), *quoted in* Rosenkranz, *supra* note 9, at 1241-42; *see also Diversified Indus.*, 884 F. Supp. at 957 (noting that "insurers argued that these policies covered only brief catastrophic events").

[40] 1 C.J.S. ACCIDENT 425 (1985).

[41] *Diversified Indus.*, 884 F. Supp. at 957; Ballard & Manus, *supra* note 6, at 623; Rosenkranz, *supra* note 9, at 1243-45. However, not all courts accepted the argument that "accident" could include unforeseen, gradual damage. *See* Rosenkranz, *supra* note 9, at 1246 n.43 (citing cases).

[42] 223 F.2d 71 (3d Cir. 1955) (applying Pennsylvania law).

[43] *Id.* at 72.

dent."[44] The court based its determination on a finding that the policyholder "had not designedly exposed the employees' families to the poison and indeed had no thought that they were."[45] It is particularly noteworthy that the court also rejected the insurer's argument that the deaths were not "caused by accident" because "it was not just one but a series of causes which produced them,"[46] reasoning that the policy's coverage was not limited to injuries "caused by *an* accident."[47] This reasoning was bolstered by the court's reliance on *Canadian Radium & Uranium Corp. v. Indemnity Insurance Co.*,[48] in which the Illinois Supreme Court recognized that the mere fact that a similar gradual injury process required many exposures "should not and does not render the event any less accidental, as that term is commonly understood by the ordinary businessman."[49]

Similar reasoning was applied to an environmental property damage claim in *Moffat v. Metropolitan Casualty Insurance Co. of New York*.[50] In *Moffat*, a federal district court applying Pennsylvania law determined that a liability insurance policy provided coverage for the policyholder's liabilities associated with damage to nearby property which was "caused by the emanation of destructive gases from culm banks created and maintained by [the policyholder]."[51] In the twenty-six underlying trespass actions brought against the policyholder, it was determined that over a three-year period the culm banks "oxidized and produced hydrogen sulphide and other destructive gases which caused the property damage."[52]

The *Moffat* court recognized that under Pennsylvania law an "accident" is "an event which under the circumstances, is unusual and unexpected by the person to whom it happens."[53] Although the court noted that the property owners did not expect, or find usual, the oxidation of the culm

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[44] The comprehensive general liability insurance policy at issue in *Beryllium* provided coverage for "'damages . . . because of bodily injury, sickness or disease . . . caused by accident.'" *Id.*

[45] *Id.* at 73.

[46] *Id.*

[47] *Id.* at 74 (emphasis added).

[48] 104 N.E.2d 250 (1952).

[49] *Beryllium*, 223 F.2d at 74 (quoting *Canadian Radium*, 104 N.E.2d at 255).

[50] 238 F. Supp. 165 (M.D. Pa. 1964) (applying Pennsylvania law).

[51] *Id.* at 167. "Culm banks are refuse banks resulting from the mining and preparation of coal. Usually they contain rock, shale, bone, iron pyrites and other waste products, as well as reclaimable coal." *Id.* at 168.

[52] *Id.* at 167-68.

[53] *Id.* at 170 (quoting Hey v. Guarantors' Liab. Indem. Co. of Pennsylvania, 37 A. 402 (Pa. 1897)).

banks and the resultant property damage,[54] it based its coverage determination on the *policyholder's* lack of intent to damage property:

> The banks were created and maintained in accordance with the general custom and practice of the anthracite industry. That [the policyholder] knew or should have known that the banks could oxidize and give off products which could cause harmful effects to property in view of the high probability of circulation by atmospheric means does not spell out conduct calculated to cause substantial damage . . . . [The policyholder's] conduct was not for the purpose of causing the invasion. Neither was it for the purpose of causing the damage.[55]

Accordingly, the policyholder's liabilities arising out of the damage done to neighboring property by the emanation of gases from the policyholder's culm banks were "not excluded from accident coverage in a liability policy."[56]

The Supreme Court of Pennsylvania ruled as early as 1970 that a negligently caused gradual injury process is an "accident" within the meaning of a liability insurance policy's grant of coverage.[57] From November 1960 to April 1961, the liability insurance policyholder, Lancaster Area Refuse Authority, operated a landfill on leased property.[58] Beginning in January 1961 and continuing until at least October 1962, leachate from landfilled materials contaminated wells on neighboring property.[59] In the neighbors' underlying suit against the policyholder, it was determined that the policyholder negligently caused the contamination of its neighbors' wells.[60] The policyholder paid the neighbors' judgments and submitted a claim to its liability insurance carrier; the insurer denied coverage on the basis that negligently caused harm was not "accidental."[61]

The dispute between the policyholder and its insurer also went into litigation. Eventually the Pennsylvania Supreme Court determined, without discussion, that "harm which is caused by negligence may still be harm 'caused by accident' within the meaning of the insurance contract,"

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[54] *Id.* at 170.
[55] *Id.* at 172-73.
[56] *Id.* at 173.
[57] Lancaster Area Refuse Auth. v. Transamerica Ins. Co., 263 A.2d 368, 369 (Pa. 1970).
[58] Reinhart v. Lancaster Area Refuse Auth., 193 A.2d 670, 671 (Pa. Super. Ct. 1963).
[59] *Id.*
[60] *Lancaster Area Refuse Auth.*, 263 A.2d at 369.
[61] *Id.*

and remanded the case "with directions to enter judgment for the [policyholder]."[62]

Thus, "accident-based" CGL insurance was developed in response to United States policyholders' demand for comprehensive protection from liabilities. Although insurers sometimes argued that "accident-based" CGL policies did not provide coverage for liabilities arising out of gradual injury processes, court decisions, including *Beryllium*, *Moffatt*, and *Lancaster Area Refuse Authority*, generally recognized that policyholders' reasonable expectations for comprehensive liability coverage did not hinge on the duration of the event giving rise to their liabilities, but rather on the unexpectedness of the damage caused. Such decisions also set the stage for a new development in CGL insurance, the standard-form "occurrence-based" coverages.

2. *"Occurrence-Based" Coverages*

Disputes between policyholders and insurers over the extent to which "accident-based" CGL policies covered gradual injury processes, such as those in *Beryllium*, *Moffat*, and *Lancaster Area Refuse Authority*, were decided by courts throughout the United States, nearly universally, in favor of policyholders.[63] Such disputes produced three significant effects on the insurance market. The first effect was that the courts' decisions confirmed that any attempt to inject a temporal limitation into the meaning of the policy term "accident" was futile, at least as to CGL policies.[64] The second effect on the insurance market was that "accident-based" general liability policies apparently fell out of favor with policyholders as more of them realized that their insurers might attempt to use the term "accident"

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[62] *Id.*

[63] *See, e.g.*, Continental Casualty Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 957 (E. D. Pa. 1995); Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831, 849 (N.J. 1993), *cert. denied*, 114 S. Ct. 2764 (1994); Reiter et al., *supra* note 9, at 1188 n.97 (citing cases); *but see* Rosenkranz, *supra* note 9, at 1245 n.43 (citing cases where "accident" was given a temporal limitation).

[64] Sayler & Zolensky, *supra* note 28, at 4429 ("[I]nsurers recognized that instantaneous damage was not a condition of coverage under accident policies. . . . [T]his recognition resulted from judicial interpretation[s] of 'accident' which provided coverage for liabilities resulting from long-term exposures to conditions."); Rosenkranz, *supra* note 9, at 1243-45; Bean, *supra* note 39, at 555 ("The courts have repeatedly torn down the fences which the phrase 'caused by accident' was intended to build around the scope of standard coverage."). The London insurance market apparently reached the same conclusion at about the same time. *See* Fields, *supra* note 26, at 46 ("In 1959, . . . Lloyd's Underwriters came to the realization that coverage written on a caused by accident basis was effectively the same as an occurrence wording as a result of a significant broadening of interpretation of the word accident by the American courts during the 1950s.").

to restrict coverage for liabilities arising out of gradual injury processes, albeit with little success.[65] As a result, beginning in the 1950s, many businesses, "particularly corporate insureds,"[66] began demanding the incorporation of "occurrence" language into their policies.[67] Thus, a third effect on the insurance market was that, in increasing numbers, these businesses obtained the broad general liability insurance coverage that they sought in London under the "umbrella" policy form, and (after 1960) the revised LRD 60 umbrella form.[68]

Beginning in the early 1960's, the domestic insurance industry made efforts to meet these perceived problems, and the competition from abroad, by revising the standard-form CGL policy to provide "occurrence-based" coverage rather than "accident-based" coverage. One article described the revision process as follows:

> During the period leading up to the promulgation of the 1966 standard form, the key committees of the Bureaus responsible for revising the CGL were the General Liability Rating Committee, the Joint Scope of Coverage Subcommittee, the Joint Forms Committee, and the Joint Drafting Committee. The Forms Committee and the Rating Committee were separate but co-equal entities, and a standard form could not be promulgated unless both the Forms and the Rating Committees were satisfied that it properly and effectively embodied the collective membership's joint indemnifying intent. The Forms Committee, made up of representatives of both Bureaus, was primarily responsible for the preparation of language that would accomplish the intended coverage, as well as advising the rating committee as to whether the intent would be accomplished.
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> The Joint Drafting Committee was the working committee of the Joint Forms Committee, and was responsible for the actual drafting, critique and analysis of language to accomplish the Bureaus' intent. The JDC was formally comprised of George Katz of the Aetna and Richard Schmalz of Liberty Mutual. Early on, however, they enlisted the informal assistance of Herb Schoen of

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[65] Rosenkranz, *supra* note 9, at 1246 (recognizing that "customers' demands for greater coverage" were one reason that the insurance industry switched to "occurrence-based" coverages).

[66] Randolph M. Fields, *Environmental Pollution and the CGL Policy: A Historical Reflection*, MEALEY'S LITIG. REP. - INS., Oct. 30, 1990, at 26.

[67] *Id.*; Sayler & Zolensky, *supra* note 28, at 4429; Rosenkranz, *supra* note 9, at 1246 n.50.

[68] Fields, *supra* note 26, at 38-39.

> the Hartford to help with the drafting process, and primarily with the trigger problem associated with the term "occurrence."
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> Ultimately, the Bureaus' respective Rating Committees would review the product produced by the Joint Forms Committee to ensure that it comported with the members' intent. These two entities would meet jointly as the Joint Scope of Coverage Committee.[69]

The end result of this process was the 1966 revision of the standard-form CGL policy. This revision deleted the "caused by accident" requirement of the NBCU's standard-form CGL policy, and instead provided coverage for bodily injury and property damage "caused by an occurrence."[70] "Occurrence," in turn, was defined by the new standard-form policy as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage that was neither expected nor intended from the standpoint of the insured."[71] Notably, this definition of "occurrence" itself illustrates that unexpected gradual injury processes may be "accidents": The 1966 definition of "occurrence" explicitly defines "accident" to include an "injurious exposure to conditions."[72]

The 1966 revision's express provision of coverage for liabilities arising out of gradual injury processes, including gradual pollution damage, was trumpeted by the insurance industry when the new policy language was introduced to the market. For example, Gilbert Bean, a former assistant secretary of Liberty Mutual Insurance Company, and member of the General Liability Rating Committee ("GLRC") that helped draft the 1966 revisions, explicitly described the scope of coverage that the new "occurrence-based" policy language provided for pollution claims: "Manufacturing risks producing insecticides, plant foods, fertilizers, weed killers, paints, chemicals, thermostats or other regulatory 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 included it.*"[73]

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[69] Sayler & Zolensky, *supra* note 28, at 4437-38 n.20 (1987).

[70] *Morton*, 629 A.2d at 836.

[71] *Morton*, 629 A.2d at 849 (quoting Ballard & Manus, *supra* note 6, at 624; and Reiter et al., *supra* note 9, at 1190); Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha, 882 P.2d 703, 717 (Wash. 1994); Rosenkranz, *supra* note 9, at 1246-47.

[72] *Morton*, 629 A.2d at 849 (quoting Ballard & Manus, *supra* note 6, at 624; and Reiter et al., *supra* note 9, at 1190).

[73] Gilbert L. Bean, New Comprehensive General and Automobile Program, The Effect on Manufacturing Risks (1965) (paper presented at Mutual Insurance Technical Conference (Nov. 15-18, 1965)) (emphasis added), *quoted in* Sayler & Zolensky, *supra* note 28, at 4432.

Bean also cited the following examples of liabilities covered under the 1966 policy:

> Coverage for gradual [bodily injury] or gradual [property damage] resulting over a period of time from exposure to the insured's waste disposal. Examples would be gradual adverse effect of smoke, fumes, air or stream pollution, contamination of water supply or vegetation. We are all aware of cases such as contamination of oyster beds, lint in the water intake of downstream industrial sites, the Donora, Pa. atmosphere contamination, and the like.[74]

Other GLRC members also recognized publicly that the revised policy was meant to cover long-term pollution exposures. Henry C. Mildrum, who was an employee of the Hartford Insurance Company as well as a member of the GLRC in 1966, gave the following illustration of the extent to which liabilities arising out of gradual pollution damage are covered under the 1966 CGL policy:

> Slow ingestion of foreign matter inhalation of noxious fumes or the discharge of corrosive material into the atmosphere or water courses are examples of exposure type situations . . . . Thus, if a building cannot be used because of the presence of noxious fumes from an insured's adjacent plant, claims for loss of use of such building are covered.[75]

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[74] Gilbert L. Bean, Summary of Broadened Coverage Under New CGL Policies with Necessary Limitation to Make This Broadening Possible (1966) (unpublished manuscript), *quoted in* Sayler & Zolensky, *supra* note 28, at 4438 n.34.

[75] H. Mildrum, Implications of Coverage for Gradual Injury or Damage (1965) (paper presented at Sheraton Boston Hotel (Nov. 11, 1965)), at 3-4.

Lyman J. Baldwin, Jr. an executive with the Insurance Company of North America, also represented that the new policy wording would permit coverage for liabilities arising out of gradual, unforeseen pollution:

> Let us consider how this [new policy] would apply in a fairly commonplace situation where we have a chemical manufacturing plant which during the course of its operations emits noxious fumes that damage the paint on buildings in the surrounding neighborhood. Under the new policy there is coverage until such time as the insured becomes aware that the damage was being done.

Lyman J. Baldwin, Jr. Address to American Society of Insurance Management, New Orleans (Oct. 20, 1965), *quoted in* George Pendygraft et al., *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 IND. L. REV. 117, 132 (1988)), and *quoted in* Reiter et al., *supra* note 9, at 1192-93 n.115. Mr. Baldwin also stated: "The term 'occurrence' has also been made to include 'injurious exposure to conditions' which eliminates the time element aspect of an accident. Thus, *the policy* again *more precisely*

Courts throughout the United States have, in a manner consistent with the expressed intent of the draftsmen of the 1966 revisions, interpreted CGL policies based on the 1966 revisions to provide coverage for unexpected and unintentional gradual injury processes, including pollution.[76] For example, in *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Insurance Co.*,[77] the policyholder was held vicariously liable for environmental cleanup costs under CERCLA after it inherited the "sole ownership of stock in a corporation which owned three wood preserving treatment plants."[78] The areas surrounding each plant had "significant environmental cleanup problems" resulting from the use of creosote and PCP at the plants and from "waste water discharge, chemical spills, and rainwater runoff."[79]

The policyholder sought coverage under fifteen general liability and fifteen excess liability insurance policies, all of which were "occurrence-based."[80] The Supreme Court of Kentucky recognized that an "occurrence" may include "damage arising over a period of time from continuous or repeated exposure to conditions," provided that the policyholder did not subjectively intend to cause the pollution damage at the sites.[81]

Federal courts applying Pennsylvania law also have recognized that CGL policies based on the 1966 revisions may provide coverage for gradual injury processes, including claims arising out of unforeseen, gradual

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states what has been a general interpretation of many underwriters for some time." *Id.* (emphasis added).

Similarly, NBCU officers made statements belying exclusion of gradual, unforeseen processes:

> Richard Elliott, the Secretary of the NBCU and a participant in many of the meetings leading up to promulgation of the '66 CGL, gave a speech in which he acknowledged coverage for "the many instances of injuries taking place over an extended period of time." As an example of such "instances," Elliott cited the "slow ingestion of foreign substances or inhalation of noxious fumes." Norman Nachman, the principal employee of the National Bureau responsible for recording the minutes of committee deliberations, used identical language in an article that he published in *The Annals*.

Sayler & Zolensky, *supra* note 28, at 4431 (footnotes omitted).

[76] *See, e.g., Queen City Farms*, 882 P.2d at 717.

[77] 814 S.W.2d 273 (Ky. 1991).

[78] *Id.* at 275.

[79] *Id.*

[80] *Id.* Apparently, the policies did not incorporate pollution exclusions.

[81] *Id.* at 278-79; *accord, e.g.*, Steyer v. Westvaco Corp., 450 F. Supp. 384, 390 (D. Md. 1978); Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1087 (Colo. 1991); Grand River Lime Co. v. Ohio Casualty Ins. Co., 289 N.E.2d 360, 365 (Ohio Ct. App. 1972); Boggs v. Aetna Casualty and Sur. Co., 252 S.E.2d 565, 567 (S.C. 1979).

pollution.[82] For example, in *Federal Insurance Co. v. Susquehanna Broadcasting Co.*,[83] a general liability policyholder sought coverage for gradual pollution damage at and around "dump sites" to which it sent wastes between 1975 and 1983.[84] Without analyzing the "occurrence" language in the policies in question, the district court determined that the policyholder's general liability insurance policies that did not incorporate qualified pollution exclusions provided coverage for the policyholder's liabilities arising out of such pollution damage.[85]

Thus, as courts and insurers have recognized since the introduction of the 1966 standard-form CGL policy wordings, the "occurrence-based" CGL policy language clearly permits coverage for liabilities arising out of unforeseen, gradual pollution damage. The possibility of such coverage soon caused alarm within the insurance industry, and spurred the development of the qualified pollution exclusion as a means to limit insurers' potential pollution liabilities. This article will next examine the drafting, regulatory approval, and introduction of the qualified pollution exclusion, and will show that insurers and their representatives repeatedly stated that the qualified pollution exclusion was intended only to clarify, but not to restrict, the coverage that was available for unforeseen, gradual pollution under the 1966 standard-form CGL policy wording. As a result, policyholders' reasonable expectations of coverage for liabilities arising out of unforeseen, gradual pollution may have remained largely unchanged, despite the incorporation of the qualified pollution exclusion into their policies.

B. The Development of the "Qualified Pollution Exclusion"

In the late 1960's, England's *Torrey Canyon* disaster and the United States' Santa Barbara oil blowout, along with increased public awareness regarding the dangers of pollution, indicated to the domestic insurance industry the tremendous potential magnitude of manufacturers', and thus

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[82] *See* ACandS, Inc. v. Aetna Casualty and Sur. Co., 764 F.2d 968, 973 (3d Cir. 1985) (finding coverage for asbestos bodily injury claims); Riehl v. Travelers Ins. Co., 772 F.2d 19, 23-24 (3d Cir. 1985) (finding a possibility of coverage for gradual pollution claim); J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 506 (Pa. 1993) (finding coverage for asbestos bodily injury claims).

[83] 727 F. Supp. 169 (M.D. Pa. 1989), *modified*, 738 F. Supp. 896 (M.D. Pa. 1990), *aff'd*, 928 F.2d 1131 (3d Cir.), *cert. denied*, 502 U.S. 823 (1991).

[84] *Id.* at 172 n.4.

[85] *Id.* at 175; *see also Diversified Indus.*, 884 F. Supp at 957 (citing *New Castle County v. Hartford Accident and Indem. Co.*, 933 F.2d 1162, 1197 (3d Cir. 1991); *Morton*, 629 A.2d at 849.

the insurance industry's, exposure to pollution damage claims.[86] At the March 17, 1970, meeting of the GLRC, the development of a "contamination or pollution endorsement" was formally authorized. The GLRC established a Joint Drafting Committee and instructed it to "consider the question and determine the propriety of an exclusion. . . having in mind that pollutant caused injuries were envisioned to some extent in the adoption of the current 'occurrence' basis of coverage, and some protection is afforded by way of the definition of this term."[87] The GLRC characterized the as-yet-inchoate pollution exclusion as a "clarification" of the coverage which was available for pollution claims under the 1966 revisions to the standard-form CGL policy.[88]

Francis X. Bruton, vice-president and counsel of Aetna Life and Casualty, and Bart Hall, an officer of the Hartford Insurance Group, composed the Insurance Rating Board's (the "IRB") Joint Drafting Committee for the then-inchoate qualified pollution exclusion, although the initial draft of the proposed exclusion was developed by the IRB's legal

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[86] *See* C.R.E. Bromwich, *Pollution and Insurance*, RISK MGMT., Apr. 1971, at 15; *accord*, *Diversified Indus.*, 884 F. Supp. at 957; *Morton*, 629 A.2d at 849-50; Ballard & Manus, *supra* note 6, at 624-25; Rosenkranz, *supra* note 9, at 1250-51. In a 1970 statement to the West Virginia Commissioner of Insurance regarding the qualified pollution exclusion, the NBCU's successor, the Insurance Rating Board (IRB) indicated that the insurance industry had not anticipated the tremendous potential magnitude of its exposure to pollution damage claims when it revised the standard form CGL policy in 1966:

> It has only been very recently that the public has become increasingly aware of the effects of the seriousness of contamination and pollution, and there has been a growing resentment of the failure to take steps to prevent it. The magnitude of the exposure and the extent of liability far exceeds anything that was expected under the present rate structure. Reinsurance contracts in many instances already exclude contamination or pollution, and in such instances this leaves the company without reinsurance coverage for large limits of liability. Also, not contemplated by the present rate structure is the real threat of class actions which could produce staggering losses never contemplated.

Letter from Graham V. Boyd, Jr., Assistant Manager, The Insurance Rating Board, to the Honorable Samuel H. Weese, Insurance Commissioner at the State of West Virginia 2 (July 31, 1970).

In contrast, by as early as 1959 or 1960, underwriters in the London Insurance Market became aware of the tremendous potential for losses that was presented by gradual pollution claims. To minimize that threat of loss, the NMA drafted a pollution exclusion, NMA 1333, which was adopted in 1961. *See* Anderson, *supra* note 4 at 15, 17. NMA 1333 was never accepted by policyholders and brokers, and thus fell into disuse. Presumably, prospective policyholders were unwilling to forego coverage for pollution claims as long as such coverage was provided by standard form coverages written by insurers in the United States. *See* Fields, *supra* note 26, at 46.

[87] Agenda and Minutes of the Meeting of the General Liability Rating Committees, Insurance Rating Board (Mar. 17, 1970), *quoted in Pollution Exclusion Dissected During Bruton Deposition*, MEALEY'S LITIG. REP. - INS., Feb. 27, 1990, at 17, 18.

[88] *Id.*

staff (Hall and Bruton prepared subsequent drafts of the exclusion). A version of the exclusion that Bruton formulated was eventually approved by the Joint Drafting Committee and was thereafter distributed to the members of the GLRC, which approved the exclusion.[89] The exclusion, as approved, provided:

> 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.[90]

Insurers today claim that at the time that the qualified pollution exclusion was drafted and incorporated into already issued CGL policies, Bruton, Hall, and much of the rest of the insurance industry understood and intended that the new exclusion would reduce significantly, if not eliminate entirely, coverage for gradual pollution claims.[91] In his January

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[89] *Pollution Exclusion Dissected*, *supra* note 87, at 20. For an explanation of the workings of the GLRC and the approval process for new policy language, see Ballard & Manus, *supra* note 6, at 625; see also *supra* note 69 and accompanying text.

[90] *Supra* notes 6 and 7 and accompanying text.

[91] Victor C. Harwood III et al., *The Frivolity of Policyholder Gradual Pollution Discharge Claims*, MEALEY'S LITIG. REP. - INS., August 27, 1991, at 19, 22-23; *Pollution Exclusion Dissected*, *supra* note 87, at 20-21. This claim is somewhat disingenuous. Until the mid-1970s, it was generally not known that widely used waste disposal methods, such as unlined "sanitary" landfills, could cause unforeseen, gradual pollution damage of the type that is at issue today in most environmental insurance coverage litigation. One court's description of the state of knowledge in 1970 regarding the detrimental environmental impact of landfills is illustrative:

> [W]hat is known about the environmental impact of landfills now, and what was known in 1968, are worlds apart . . . . In 1968, only one study existed concerning landfill leachate . . . . No mathematical models of leachate creation or migration existed, and no technology for leachate control had been developed . . . . Scientists did not start to understand the threat posed by leachate until the early 1970's . . . . The paucity of available data at that time is reflected in the fact that prior to 1974 no research had been done in the eastern United States that indicated that landfills above the water table would contaminate underlying aquifers . . . .
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> . . . [P]rofessionals believed that landfills purified themselves through a process of soil filtration . . . . [L]eachate migration . . . was not understood by either landfill operators or insurance companies in 1968.

New Castle County v. Continental Casualty Co., 725 F. Supp. 800, 803-04 (D. Del. 1989) (citations omitted), *aff'd in part, rev'd in part on other grounds*, 933 F.2d 1162 (3d Cir. 1991). It would thus appear that the qualified pollution exclusion was drafted to limit coverage for liabilities arising out of such "traditional" sources of pollution as smokestacks and wastewater

1990 deposition given in connection with over forty separate environmental coverage actions,[92] Bruton testified that he incorporated the "sudden and accidental" language into the qualified pollution exclusion to preclude general liability insurance coverage for any claims arising out of pollution damage, except for pollution damage that resulted from a "classical accident."[93]

C. *The Insurance Industry's Representations Regarding the Scope of the Qualified Pollution Exclusion*

Although some sectors of the insurance industry apparently believed that the qualified pollution exclusion would resolve their concerns over pollution liabilities, the exclusion raised another, wholly separate concern: how to convince consumers and state insurance regulators to permit the incorporation of the exclusion into existing CGL policies without their demanding a corresponding reduction in premiums paid.[94] A 1970 memorandum written by S. B. Guiney, who worked with Harold Bruton in Aetna's legal department, explicitly recognized this concern:

> Bert Hall of the Hartford and Frank Bruton of this Department have drafted, for use by IRB, an endorsement excluding liability for pollution. This endorsement will be announced by IRB and filed

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outfalls, where the releases of pollutants generally could not be said to be either "abrupt" or unforeseen by the insured. It would also appear that pollution damage from such sources as landfills, underground storage tanks, and lagoons (which is at issue in the bulk of environmental insurance litigation today) simply may not have been contemplated by the draftsmen of the qualified pollution exclusion in 1970. Ballard & Manus, *supra* note 6, at 627.

[92] *Pollution Exclusion Dissected*, *supra* note 87, at 17.

[93] Harwood, *supra* note 91, at 23 (citing Bruton deposition, 53:19-55:21, 170:3-10); *accord*, *Pollution Exclusion Dissected*, *supra* note 87, at 19. On further questioning, Bruton testified that he understood "classical accident" to mean a "sudden boom type accident," and that "boom" meant "instantaneous explosions." *Pollution Exclusion Dissected, supra* note 87, at 19.

[94] After the qualified pollution exclusion was approved by insurance industry organizations, it was submitted to insurance regulators in "most if not all of the states." Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831, 851 (N.J. 1993), *cert. denied*, 114 S. Ct. 2764 (1994); Sayler & Zolensky, *supra* note 28, at 4432 (stating that the submissions made to insurance regulators in New York, Ohio, and West Virginia were identical to one another). The Pennsylvania Insurance Commission, like its counterparts in the other states, is authorized to review and either approve or reject proposed terms and notes for insurance sold in Pennsylvania. See *infra* notes 133-39 and accompanying text (discussing the Pennsylvania Insurance Commissioner); *Morton*, 629 A.2d at 851 (discussing the powers of the New Jersey Department of Insurance and "assuming" that most other states "had in effect comparable regulatory provisions").

with the several states in a few days. There would seem to be industry public relations involved here, viz.:

> It may be claimed that the insurance industry is ducking its responsibility whereas the real purpose of the exclusion is to put the liability back where it belongs;
> there may be a hue and cry because there will be no reduction in premium, despite the fact that coverage would seem to be cut back; and,
> we don't want to concede that there is a cut back in coverage because this is tantamount to admitting that all such cases are now covered, whereas some of them may not be covered.[95]

1. Representations to State Insurance Regulators

To maximize and protect its premium income, the insurance industry embarked on a coordinated campaign to convince policyholders and state insurance officials that the qualified pollution exclusion would not reduce the coverage that was available for pollution claims under the 1966 standard-form CGL. The IRB and MIRB accordingly characterized the qualified pollution exclusion as a "clarification" of coverage, rather than a reduction in coverage, to the Insurance Commissioner of Pennsylvania, among others, in order to secure regulatory approval for the incorporation of the exclusion into already-issued CGL policies while avoiding a commensurate reduction in premiums for the restrictions in coverage that the qualified pollution exclusion was purportedly intended to effect.[96]

In its statement to the Insurance Commissioner of Pennsylvania, the IRB represented that:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so far as to

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[95] Memorandum from S.B. Guiney, Counsel Aetna Life and Casualty, to Paul B. Cullen, Assistant Vice President, Public Rel. & Adv., and J.F. Goyette, Manager, Educational Services, Public Rel. & Adv., Aetna Life and Casualty Co. (May 7, 1970).

[96] Continental Casualty Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 958 (E.D. Pa. 1995). The qualified pollution exclusion was added to standard form CGL policies in most states as a mandatory endorsement in 1970. After 1973, the exclusion was incorporated into the standard form CGL policy itself. *See* Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha, 882 P.2d 703, 718 (Wash. 1994).

> avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident[.][97]

That statement included three important representations and two glaring omissions. First, the IRB represented that the qualified pollution exclusion was merely a "clarification" of the scope of coverage already afforded for pollution claims under the 1966 standard-form general liability policy, which covered unforeseen, gradual pollution damage. Second, notwithstanding the qualified pollution exclusion, the IRB represented that coverage would be preserved for pollution damage that was caused by "accident" — which Pennsylvania courts had consistently construed to include long-term injuries, including pollution damage. Third, the IRB represented that the qualified pollution exclusion was intended to bar coverage only for deliberate or intentional pollution damage. The IRB's submissions to the Insurance Commissioner did not attempt to ascribe a temporal quality to the "sudden and accidental" exception to the qualified pollution exclusion; nor did those submissions represent that the qualified pollution exclusion was intended to be interpreted in a manner that would preclude coverage for pollution damage that was an unintentional result of the policyholder's ordinary business operations.

The IRB and MIRB submitted a similar (if not the same) statement to the insurance regulatory agencies in virtually every other state.[98] Whereas the Pennsylvania Insurance Department apparently accepted the insurance industry's initial representations regarding the qualified pollution exclusion at face value, other state insurance agencies did not; the IRB's deceptive strategy was laid bare by its further explanations to those agencies.

For example, the insurance industry proposed to add qualified pollution exclusion to policies written in favor of West Virginia, as well as Pennsylvania, insureds. The West Virginia Insurance Commissioner held a public hearing to determine whether excluding liability without rebating or reducing premiums was "inconsistent, ambiguous or misleading, or [would] . . . limit the overall insurance coverage to the extent that such coverage is no longer sufficiently broad to be in the public interest."[99] Based on the profuse assurances of the IRB and the insurers attending the hearing

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[97] Letter from Nicholas Pandullo, Insurance Rating Board, to the Honorable George F. Reed, Commissioner of Insurance of the Commonwealth of Pennsylvania (May 8, 1970), at 3.

[98] Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831, 851 (N.J. 1993), *cert. denied*, 114 S. Ct. 2764 (1994).

[99] S.H. Weese, Insurance Commissioner of West Virginia, Order, In re: "Pollution and Contamination" Exclusion Filings 2 (Aug. 19, 1970) (on file with authors).

that the proposed exclusion was only a "clarification" of the scope of coverage already available under the 1966 standard-form general liability policies,[100] the West Virginia Insurance Commissioner approved the qualified pollution exclusion, stating:

> (1) The said companies and rating organizations have represented to the Insurance Commissioner, orally and in writing, that the proposed exclusions . . . are merely clarifications of existing coverages as defined and limited in the definitions of the term "occurrence", contained in the respective policies to which such exclusions would be attached;
>
> (2) To the extent that said exclusions are mere clarifications of existing coverages, the Insurance Commissioner finds that there is no objection to the approval of such exclusions;
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> . . . .[101]

As the Supreme Court of New Jersey noted in *Morton*, the insurance regulators in several jurisdictions besides West Virginia[102] also "expressed concern"[103] over the qualified pollution exclusion. For example, in 1970, the Kansas Commissioner of Insurance asked the IRB to confirm that the standard-form "General-Automobile Liability policy now provides coverage for contamination and pollution."[104] The IRB responded in a manner that "did not attempt to explain or to disclose the full intended impact of the pollution-exclusion clause:"[105]

> It is our opinion that coverage for pollution or contamination is not provided under the present General-Automobile Liability policy because the damages can be said to be expected or intended, and thus are excluded by the definition of occurrence. It should be noted that the proposed endorsements will definitely clarify the situation.[106]

As in West Virginia, the approval of the qualified pollution exclusion by the Insurance Commissioner of Puerto Rico required a supplemental

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[100] Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493, 498-99 (W.Va. 1992).
[101] *Id.* at 499; Weese, *supra* note 99, at 3.
[102] 629 A.2d at 853-54 (discussing Georgia, Kansas, and Puerto Rico).
[103] *Id.* at 854.
[104] *Id.* (quoting a June 1970 letter from the Kansas Commissioner of Insurance to the IRB).
[105] *Id.*
[106] *Id.* (quoting the IRB's response to the Kansas Commissioner of Insurance).

submission from the IRB,[107] which shed "no light whatsoever on the restriction of coverage that the insurance industry intended to achieve through the pollution exclusion clause."[108] The submission read in part as follows:

> We certainly appreciate that where an insured acts in violation of the law, the policy does not provide coverage for the consequences of such acts. The exclusion is not aimed at taking care of such a situation. Rather, it is designed to clarify the policy as respects other situations where questions of intent might arise. Such questions usually arise when, with respect to a particular situation, the policy does not clearly spell out what is and is not covered in terms clearly understood by the insured or his representative. Relying solely upon the policy definition of occurrence which requires that the act causing damage must not be expected nor intended by the insured, might well cause dispute as to whether in fact the act was unexpected or unintended particularly in a fact situation involving a continuous course of action. This kind of situation is often very costly to both insureds and companies since many of them are brought into court to be resolved. All too often, the courts have been deciding such questions in favor of insureds, while strongly criticizing companies for not clearly spelling out intent in the policy. The courts are insisting that policies should clearly set forth intent. When, in the courts opinion, the policy does not, companies usually end up paying out large sums of money for damages resulting from situations wherein no coverage was ever intended and for which no premium was ever charged. Under such circumstances, we strongly believe that it is both necessary and desirable to clarify as many situations as possible so as to avoid any question of intent. This is precisely what our Contamination or Pollution Exclusion is designed to do.[109]

Similarly, in a supplemental submission to the Georgia Insurance Department regarding the qualified pollution exclusion, the IRB stated:

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[107] 629 A.2d at 854.

[108] *Id.*

[109] *Id.* (quoting the IRB's supplemental letter to the Insurance Commissioner of Puerto Rico).

> [T]he impact of the [qualified pollution exclusion] on the vast majority of risks would be no change. It is rather a situation of clarification . . . . Coverage for expected or intended pollution and contamination is not now present as it is excluded by the definition of occurrence. Coverage for accidental mishaps is continued . . . .[110]

A United States District Court in Georgia stated that the IRB's representations to the Georgia Insurance Department "downplayed the substantial effect the pollution clause would have on existing coverage in an effort to obtain approval for the clause's insertion into insurance policies."[111] In a 1990 deposition taken in connection with an environmental insurance coverage case, a former Superintendent of the New York State Department of Insurance summarized thus the insurance industry's efforts in 1970 as follows:

> [T]he drafting documents, *the internal* documents, speak of sudden in its temporal sense, and as accomplishing a serious cutback in coverage. Granted. I am not questioning the accuracy of anything in Mr. Bruton's affidavit as to what was going on. The filings with the states are completely inconsistent with that. And . . . do not disclose it, do not develop it, and in fact affirmatively maintain that we're just dealing with a clarification of the occurrence definition.[112]

Similarly the Underwriters at Lloyd's, London, also introduced a qualified pollution exclusion, known as NMA 1685,[113] into existing liability policies issued to United States policyholders in 1970, and, like their domestic counterparts, also failed to inform state insurance authorities of the full scope of the reduction in coverage that insurers today claim NMA 1685 was intended to accomplish. The Underwriters' submission to

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[110] *Id.* at 853 (quoting the IRB's supplemental letter to the Insurance Commissioner of Georgia).

[111] *Id.* (quoting Claussen v. Aetna Casualty & Sur. Co., 676 F. Supp. 1571, 1573 (S.D. Ga. 1987)).

[112] *Id.* at 855 (quoting Deposition Testimony of Richard E. Stewart, J.T. Baker, Inc. v. Aetna Casualty & Sur. Co., No. CV-4794-SSB (D.N.J. 1990)) (emphasis in original).

[113] NMA 1685 purports to bar coverage of any liability for bodily injury or property damage "caused by seepage, pollution, or contamination," except where "such seepage, pollution, or contamination is caused by a sudden, unintended, and unexpected happening during the period of this insurance." Anderson, *supra* note 4, at 15, 25 n.10 (quoting NMA 1685).

the Illinois state insurance regulator explained that NMA 1685 did not exclude "clean-up costs on an accident basis."[114] The Underwriters' submission to the Kentucky Insurance Commissioner was in all respects the same as its Illinois submission.[115]

2. *Representations to Consumers*

Even if state insurance regulators did not require a reduction in premiums that corresponded to the alleged reduction in coverage caused by the qualified pollution exclusion, the insurance industry apparently worried that such a reduction might nevertheless be demanded by consumers. Accordingly, insurers and insurance industry organizations made representations to the insurance market[116] regarding the meaning

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[114] Letter from Herbert C. Brook, Attorney in Fact, Underwriters at Lloyd's, London, to Hon. James Baylor, Illinois Director of Insurance (Feb. 27, 1970). Notably, under Illinois law, unexpected injuries caused by gradual exposure to a hazardous substance had been construed to be "accidents." Canadian Radium & Uranium Corp. v. Indemnity Ins. Co., 104 N.E.2d 250, 255 (Ill. 1952).

[115] *See* Letter from William T. Hockensmith, Attorney in Fact, Underwriters at Lloyd's, London, to Hon. Robert D. Preston, Commissioner, Kentucky Department of Insurance (Mar. 13, 1970). Under Kentucky law, the liability insurance policy term "accident" did not connote abruptness. *See* Travelers v. Humming Bird Coal Co., 371 S.W.2d 35, 38 (Ky. 1963) ("Where the accident is a process, how long . . . is not significant whether it takes three hours, three weeks or months.")

[116] Internal insurance industry communications regarding the qualified pollution exclusion also demonstrate an understanding of its effect that is contradictory to positions taken by insurance companies today.

For example, proposed 1978 revisions to the CGL policy would have revised the qualified pollution exclusion to bar coverage for pollution damage if the discharge giving rise to such damage was "expected or intended from the standpoint of the insured." *See* Bradbury, *supra* note 4, at 284 (quoting Letter from Graham v. Boyd, Jr., Manager, General Liability Division, Insurance Services Office, to Member of the General Liability Rules and Forms Committee (Sept. 28, 1978) (attaching revised draft of the standard form CGL policy with explanatory comments)). The comments that accompanied the proposed 1978 revision of the ISO's standard form CGL policy admitted both the possibility of coverage for unforeseen, gradual pollution damage under the qualified pollution exclusion as well as the inherent ambiguity of that exclusion. First, in the comments that were circulated with the 1978 proposed revision, ISO explained that the qualified pollution exclusion "was intended to continue prior coverage for 'damage . . . caused by contamination or pollution due to an accidental discharge,' and that '[t]he 1970 exclusion wording was developed on that basis and it was intended to serve merely as a clarification at that time.'" *Id.* (quoting the attachment to Boyd's Sept. 28, 1978 letter, at 38). Second, the comments demonstrated the ambiguity of the qualified pollution exclusion:

> The 1970 exclusion was developed at a time when there was increasing public awareness of a need for protection of the natural environment due to the damage caused by severe off-shore oil spills. The language which must have reflected the general attitude toward contamination and pollution and [sic] was worded in a very rigid way which literally can be interpreted to apply to many situations where this

of the qualified pollution exclusion. The representations made, both when the exclusion was introduced and periodically thereafter, were consistent with the representations made to the various state insurance commissions; thus, the insurance industry succeeded in securing the market's acceptance of the exclusion without creating a demand for a commensurate reduction in premiums.

In his address to the 1970 annual conference of the American Society of Insurance Management, the President of the Insurance Company of North America (INA) stated:

> INA will continue to cover pollution which results from an accidental discharge of effluents — the sort of thing that can occur when equipment breaks down.
>
> We will no longer insure the company which knowingly dumps its wastes. In our opinion, such repeated actions — especially in violation of specific laws — are not insurable exposures.[117]

Similarly, in July 1970, the American Insurance Association, a trade organization then having a membership of approximately 175 property and casualty insurers, represented that "[i]nsured companies would generally be considered covered [for pollution claims under their general liability insurance policies] if they could show continuing efforts to maintain compliance with local, state and federal pollution codes and standards," notwithstanding the incorporation of the qualified pollution exclusion into such policies.[118]

In 1971, Francis X. Bruton, the principal draftsman of the qualified pollution exclusion, described the effect of the exclusion as follows: "The *unless* clause of this exclusion in the opinion of the underwriters allows them to perform their traditional function as insurers of the unexpected event or happening and yet does not allow an insured to seek protection from his liability insurer if he knowingly pollutes."[119]

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exclusion was not intended to apply.

Id. (quoting attachment to Boyd's Sept. 28, 1978 letter, at 38-39).

[117] Charles K. Cox, Liability Insurance in the Era of the Consumer, Address Before the Annual Conference of the American Society of Insurance Management (Apr. 9, 1970), *quoted in* Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831, 850 (N.J. 1993), *cert. denied*, 114 S. Ct. 2764 (1994).

[118] J. INS., July-Aug. 1970, at 17, *quoted in* Reiter et al., *supra* note 9, at n.156.

[119] Francis X. Bruton, *Historical, Liability and Insurance Aspects of Pollution Claims*, 1971 A.B.A. SEC. PROC. INS. NEGL. & COMPENSATION L. 303, 311 (1971).

Even into the 1980's, members of the insurance industry continued to give pro-policyholder explanations of the meaning of the qualified pollution exclusion when doing so served their interests. For example, in a January 13, 1982, letter to the New York Insurance Department, a representative of the Travelers Insurance Companies stated:

> There is nothing in the term "sudden and accidental" which requires the elimination of gradually occurring events from the collective. A number of court decisions in many jurisdictions have essentially reached the same conclusion: there is nothing which prevents gradually occurring events from being considered to be "sudden and accidental" as long as there is no intent to cause injury or damages.[120]

Moreover, insurers have represented to courts that the qualified pollution exclusion preserves coverage for unforeseen gradual pollution on many occasions.[121]

III. Pennsylvania's Interpretation of the Qualified Pollution Exclusion

Notwithstanding the above history of the drafting and selling of qualified pollution exclusion, it is generally accepted that current Pennsylvania law interprets the exclusion as a bar to coverage for liabilities associated with pollution damage unless such damage arises out of an abrupt and accidental release. Accordingly, coverage for liabilities associated with gradual pollution damage is presumptively barred under CGL policies that incorporate the exclusion.[122]

In support of its current interpretation of the qualified pollution exclusion, the Pennsylvania Superior Court advances several rationales, two of which predominate. First, those decisions characterize the "sudden and accidental" exception to the exclusion as clear and unambiguous, and therefore do not consider evidence of the exclusion's drafting history and

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[120] Letter from Thomas A. Jackson, Secretary, Product Management Division, The Travelers, to Mark Presser, Associate Insurance Examiner, Property and Casualty Insurance Bureau, State of New York Insurance Department (Jan. 13, 1982).

[121] *See, e.g.*, Centennial Ins. Co. v. Lumbermens Mut. Casualty Co., 677 F. Supp. 342, 347-49 (E.D. Pa. 1987).

[122] *See* O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 629 A.2d 957 (Pa. Super. Ct. 1993), *appeal denied*, 642 A.2d 487 (Pa. 1994); Lower Paxton Township v. United States Fidelity & Guar. Corp., 557 A.2d 393 (Pa. Super. Ct.), *appeal denied*, 567 A.2d 653 (Pa. 1989); Techalloy Co. v. Reliance Ins. Co., 487 A.2d 820 (Pa. Super. Ct. 1984), *appeal denied* (Pa. 1985).

the regulatory approval process in interpreting the exclusion.[123] Second, the recent superior court decisions rest upon the doctrine of *stare decisis*; their precedential foundation is the superior court's 1984 opinion in *Techalloy Co. v. Reliance Insurance Co.*, which courts applying Pennsylvania law have followed consistently since 1984.[124]

As discussed more fully below, each of these rationales is flawed. First, when the meaning of insurance policy language is disputed, Pennsylvania law requires a court to examine evidence of the insured's reasonable expectations concerning the policy's coverage to determine whether the policy language is ambiguous.[125] Second, *Techalloy's* value as precedent is undermined by the superior court's failure to acknowledge prior Pennsylvania decisions, including one 1979 decision by the superior court itself, that interpreted the key policy term "sudden and accidental" to permit coverage for liabilities arising out of unforeseen, but gradual, injury processes, including liabilities arising out of unforeseen, gradual pollution damage.[126]

This part suggests two solutions to the ill-founded *Techalloy* decision and the case law that has accumulated around *Techalloy* since 1984. The first solution, based on the doctrine of regulatory estoppel, is to preclude insurers from advancing an interpretation of the word "sudden" that contradicts the 1970 representations of the insurance industry's designated agent to the Pennsylvania Insurance Commissioner regarding the qualified

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[123] See *infra* notes 239-56 and accompanying text.

[124] Since 1984, no court applying Pennsylvania law has permitted coverage for gradual, unforeseen pollution damage under a policy that incorporates the qualified pollution exclusion. Federal courts applying Pennsylvania law have followed the *Techalloy* and *Lower Paxton* courts' interpretation of the "sudden and accidental" exception. *See, e.g.*, Armotek Indus., Inc. v Employers Ins. of Wausau, 952 F.2d 756, 762 (3d Cir. 1991); Northern Ins. Co. of N.Y. v. Aardvark Assocs., Inc., 942 F.2d 189, 192-93 (3d Cir. 1991); Koppers Co. v. Aetna Casualty and Sur. Co., 840 F. Supp. 390, 394-95 (W.D. Pa. 1993); Gould, Inc. v. CNA, 809 F. Supp. 328, 333-37 (M.D. Pa. 1992); United States Fidelity & Guar. Co. v. Korman Corp., 693 F. Supp. 253, 259-61 (E.D. Pa. 1991); Federal Ins. Co. v. Susquehanna Broadcasting Co., 727 F. Supp. 169 (M.D. Pa. 1989), *as amended*, 738 F. Supp. 896 (M.D. Pa. 1990), *aff'd*, 928 F.2d 1131 (3d Cir.), *cert. denied*, 502 U.S. 823 (1991); Centennial Ins. Co. v. Lumbermens Mut. Casualty Co., 677 F. Supp. 342, 347-49 (E.D. Pa. 1987); American Mut. Liab. Ins. Co. v. Neville Chem. Co., 650 F. Supp. 929, 932-33 (W.D. Pa. 1987); Fisher & Porter Co. v. Liability Mut. Ins. Co., 656 F. Supp. 132, 140 (E.D. Pa. 1986); O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 629 A.2d 957 (Pa. Super. Ct. 1993), *appeal denied*, 642 A.2d 487 (Pa. 1994); *see also* General Ceramics, Inc. v. Firemen's Fund Ins. Cos., 66 F.3d 647, 652 (3d Cir. 1995) (recognizing that Pennsylvania's intermediate appellate courts have construed the qualified pollution exclusion to permit coverage for "continuous or repeated exposure to pollution that results in unexpected and unintended damage . . . only when the discharge is *abrupt* and unexpected") (emphasis in original).

[125] See *infra* notes 163-75 and accompanying text.

[126] See *infra* notes 176-238 and accompanying text.

pollution exclusion. The second solution is for Pennsylvania courts to re-evaluate the *Techalloy* interpretation of the qualified pollution exclusion in light of evidence of policyholders' reasonable expectations — evidence that was ignored in *Techalloy* and that continues to be ignored by courts applying Pennsylvania law.

A. The Doctrines of Regulatory Estoppel and Reasonable Expectations

In *Morton International, Inc. v. General Accident Insurance Co. of America*,[127] the Supreme Court of New Jersey concluded, as have courts applying Pennsylvania law since 1984, that the words "sudden and accidental" used in the qualified pollution exclusion are clear and unambiguous. Nonetheless, the *Morton* court held:

> Notwithstanding the literal terms of the standard pollution-exclusion clause, that clause will be construed to provide coverage identical with that provided under the prior occurrence-based policy, except that the clause will be interpreted to preclude coverage in cases in which the *insured* intentionally discharges a known pollutant, irrespective of whether the resulting property damage was expected or intended.[128]

The *Morton* court's holding had two bases. The first was "the estoppel doctrine in a regulatory context."[129] The court recognized that "[a]s a matter of equity and fairness, the insurance industry should be bound by the representations of the IRB, its designated agent, in presenting the pollution-exclusion clause to state regulators."[130] The second basis was

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[127] 629 A.2d 831 (N.J. 1993), *cert. denied*, 114 S.Ct. 2764 (1994).

[128] *Id.* at 875.

[129] *Id.*

[130] *Id.* The *Morton* court generally characterized the insurance industry's representations to state insurance regulators regarding the meaning of the qualified pollution exclusion as follows:

> Not only did the insurance industry fail to disclose the intended effect of this significant exclusionary clause, it knowingly misstated its intended effect in the industry's submission of the clause to state Departments of Insurance. Having profited from that nondisclosure by maintaining pre-existing rates for substantially-reduced coverage, the industry justly should be required to bear the burden of its omission by providing coverage at a level consistent with its representations to regulatory authorities.

Id. at 876.

Similarly, in Joy Technologies, Inc. v. Liberty Mutual Insurance Co., 421 S.E.2d 493 (W.Va. 1992), the Supreme Court of Appeals of West Virginia reviewed the circumstances surrounding the drafting of the qualified pollution exclusion and the representations made by the IRB and

the "doctrine of reasonable expectations." The court addressed this doctrine in these terms:

> [T]he industry's public statements contemporaneous with the drafting and submission of the pollution-exclusion clause suggested that its overriding purpose was to deny coverage to intentional polluters. Because the pollution-exclusion clause, after regulatory approval, was added as an endorsement to most standard CGL policies, the typical commercial insured may have had little, if any, awareness that the terms of CGL coverage had been changed, much less any "objectively-reasonable expectation" of the scope of the new coverage, except to the extent of an assumption that unchanged premiums ordinarily would be consistent with a continuing level of coverage. To the extent that in the early 1970s informed "reasonable expectations" of the scope of coverage of the pollution-exclusion clause existed, such expectations were those of state regulators that had reviewed the IRB memorandum and understood that coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident . . . . We are fully persuaded that the "reasonable expectations" of the New Jersey insurance regulatory authorities should be imputed to those insureds to whom CGL policies with standard pollution-exclusion clauses were issued after the clause had been approved on the basis of the IRB memorandum.[131]

As discussed below, each of the two bases relied on by the court in *Morton*, the doctrine of regulatory estoppel and the doctrine of reasonable expectations, has been recognized by the Supreme Court of Pennsylvania, and applies under Pennsylvania law.

MIRB to the West Virginia State Insurance Commissioner regarding the meaning of the exclusion. *See id.* at 498-99. Based on its review, the court stated:

> This Court has recognized that where a definite meaning has been ascribed to language used in an insurance policy, that meaning should be given to the language by the Courts. *Christopher v. United States Life Insurance Company in City of New York*, 145 W.Va. 707, 116 S.E.2d 864 (1960). In view of this, and in view of the fact that in the present case the insurance group representing Liberty Mutual unambiguously and officially represented to the West Virginia Insurance Commission that the exclusion in question did not alter coverage which included the injuries in the present case, this Court must conclude that the policies issued by Liberty Mutual covered pollution damage, even if it resulted over a period of time and was gradual, so long as it was not expected or intended.

421 S.E.2d at 499-500.

[131] *Morton*, 629 A.2d at 875 (citation omitted).

1. The Doctrine of Regulatory Estoppel

As the highest courts of West Virginia and New Jersey recognized in *Joy Technologies* and *Morton*, respectively, regulatory estoppel is a means of protecting both policyholders' reasonable expectations of coverage and the integrity of the insurance regulatory system. These concerns are equally as valid under Pennsylvania law as they are under the respective laws of New Jersey and West Virginia.

Pennsylvania's supreme court has recognized that the terms of insurance policies are "by and large dictated by the insurance company to the insured"[132] (aside from terms such as those establishing the limits of coverage), and thus cannot be negotiated by insureds to protect their own interests vis-a-vis their insurers. To protect their insurance-buying citizens, the states, including the Commonwealth of Pennsylvania, regulate the insurance industry.[133] The Pennsylvania Insurance Commissioner is thus authorized to act on the public's behalf to review, and either approve or reject, proposed terms[134] and rates[135] for insurance sold in Pennsylvania.[136] Policy terms that are not approved by the insurance commissioner are unenforceable against Pennsylvania policyholders.[137] Moreover, since 1947,[138] Pennsylvania's insurance statutes have specifically prohibited the

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[132] Brakeman v. Potomac Ins. Co., 371 A.2d 193, 196, 198 n.8 (Pa. 1977).

[133] *See, e.g.*, Collister v. Nationwide Life Ins. Co., 388 A.2d 1346, 1355 (Pa. 1978), *cert. denied*, 439 U.S. 1089 (1979).

[134] The Insurance Commissioner may reject proposed policy terms which are contrary to public policy. *See* INA Life Ins. Co. v. Commonwealth Ins. Dep't, 376 A.2d 670, 674 (Pa. Commw. Ct. 1977) (affirming Insurance Commissioner's order rejecting on public policy grounds standard life insurance policy forms which would have precluded payment of death benefits where death occurred more than 365 days after the accident causing injury). An insurer may not enforce a policy provision that is inconsistent with the public policy of the commonwealth. *See, e.g.*, Harleysville Mut. Casualty Co. v. Blumling, 241 A.2d 112, 115-16 (Pa. 1968) (rejecting automobile insurer's attempt to "avoid its statutorily imposed liability by its insertion into the policy of a liability limiting clause repugnant to the [uninsured motorists] statute").

[135] In reviewing the rates charged by insurers, the insurance commissioner is to consider the "character and extent of coverage" provided by the insurance in question. *See* 40 PA. STAT. ANN. § 1184(a) (1992 & Supp. 1995).

[136] 40 PA. STAT. ANN. § 477b (1992); 40 PA. STAT. ANN. §§ 1181-99 (1992 & Supp. 1995) (pertaining to casualty, surety, and title insurance), 1221-38 (1992 & Supp. 1995) (pertaining to fire and marine insurance), & 1261-64 (1992 & Supp. 1995) (pertaining to uniform accounts, records, and reports).

[137] *See* Hepler v. Liberty Mut. Fire Ins. Co., 13 Pa. D. & C.4th 528, 532 (C.P. Dauphin 1992) (determining, pursuant to 40 PA. STAT. ANN. § 477b, that an unapproved arbitration provision in an automobile insurance policy was void and unenforceable against the policyholder).

[138] The Casualty and Surety Rate Regulatory Act, Pub. L. No. 538, § 14 (1947) (codified as amended at 40 PA. STAT. ANN. §§ 1181-99 (1992 & Supp. 1995)).

knowing presentation to the insurance commissioner of misleading information that may affect rates or premiums.[139]

Because the IRB in 1970 presented the qualified pollution exclusion to the insurance commissioner as a "mere clarification" of the coverage available, rather than as the sweeping cutback in coverage that insurers have since contended was actually effected by the exclusion, the insurance commissioner was deprived of the opportunity to reduce the rates charged to Pennsylvania general liability insurance policyholders to levels commensurate with the reduced coverage insurers claim is available under policies incorporating the exclusion. Thus, the statutory scheme of regulation of insurance companies that the legislature enacted to protect Pennsylvania insurance policyholders from unfair insurer practices was thwarted. As a result, from 1970 to 1985, Pennsylvania general liability insurance policyholders paid for coverage for liabilities arising out of unforeseen, gradual pollution damage — coverage which has since been denied them under the superior court case law represented by *Techalloy* and *Lower Paxton*. This unwarranted denial of already purchased coverage may properly be remedied by holding insurers to the representations that their agent, the IRB, made to the Insurance Commissioner in 1970, and thereby construing the qualified pollution exclusion as a "clarification" of the coverage available before 1970, rather than as a reduction in coverage.

Under Pennsylvania law, an insurer may be estopped from denying coverage under a policy when its denial of coverage is inconsistent with a representation that it made to the policyholder regarding such coverage. Thus, for example, in *Barth v. State Farm Fire & Casualty Co.*,[140] the Superior Court of Pennsylvania determined that representations made by an insurer in an advertising brochure could vary the terms of a policy where the brochure included a schedule indicating that it was the basis for a contract with an effective date which was "weeks before any policy was sent to the insured"[141] and the brochure did not explicitly state that its terms were not policy terms,[142] provided that the insured reasonably relied upon the brochure.[143]

Where, however, representations are made to the commonwealth's commissioner of insurance, actual reliance by the policyholder need not be shown; an insurer may be estopped from denying coverage on a basis inconsistent with its representations to an official of the commonwealth,

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[139] 40 PA. STAT. ANN. § 1194 (1992).
[140] 257 A.2d 671 (Pa. Super. Ct. 1969).
[141] *Id.* at 675.
[142] *Id.*
[143] *Id.* at 676.

even without an explicit finding that the policyholder actually relied on those representations.[144] In *Superior Wall Products Co. v. Employers Liability Assurance Corp.*,[145] the superior court determined that the rupture of a hot water tank was a "sudden and accidental tearing asunder" within the meaning of a boiler and machinery insurance policy,[146] and that the boiler and machinery insurer was estopped from denying coverage because the rupture of the tank was the result of a gradual rusting process:

> We do not think [the insurer] has any right to contend that the bursting out was due to the fact the tank had been weakened through the accumulation inside of rust barnacles. Defendant, through its expert inspectors, had examined that tank every year and by their favorable reports had caused the Commonwealth of Pennsylvania to issue licenses for the operation and use of the tank by [the insured] for each year from 1947 down to the date of the accident [in 1954].[147]

The *Superior Wall Products* holding is consistent with other Pennsylvania authority which recognizes that in subsequent litigation a party may be estopped from taking a legal position which is inconsistent with prior representations that it made to a government official. Such authority does not require a showing of actual reliance by the other party to the litigation to permit the estoppel.[148]

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[144] In *Morton*, the Supreme Court of New Jersey determined that the doctrine of regulatory estoppel was properly applied in this context, even absent actual reliance by the policyholder, because the state insurance regulators essentially stood in place of policyholders:

> The industry's presentation and characterization of the standard pollution-exclusion clause to state regulators constituted virtually the only opportunity for arms-length bargaining by interests adverse to the industry, insureds having virtually no choice at all but to purchase the industry-wide standard CGL policy. Accordingly, we deem appropriate construing the pollution-exclusion clause in a manner consistent with the objectively-reasonable expectations of the New Jersey and other state regulatory authorities, because only those regulatory authorities were presented with an opportunity to disapprove the clause.

Morton, 629 A.2d at 848.

[145] 142 A.2d 410 (Pa. Super. Ct. 1958).

[146] *Id.* at 412-13.

[147] *Id.* at 413.

[148] An analogous line of authority developed under federal intellectual property law also demonstrates that there are instances where public policy dictates that estoppel may be applied, even without a showing of reliance by the party claiming estoppel.

In a patent infringement suit, the patent holder can be estopped from taking positions on the scope of its patent that contradict representations that the patent holder made to the Patent and Trademark Office (PTO) while seeking approval of its patent application in the patent

For example, in *Lyons v. Benney*,[149] the receiver of an insolvent bank brought suit on a note executed in favor of the bank. The maker of the note, G. A. Benney, argued that he was not liable on the note because of an understanding between him, the bank, and a former vice-president of the bank that the note was signed only as an accommodation to the bank and that the bank's vice-president, rather than Benney, should be held liable on it.[150] The Supreme Court of Pennsylvania explained the implicit substance of Benney's defense:

> Benney made and delivered his note to the bank in furtherance of [a] scheme to deceive the bank examiner, under a promise made to him by the bank that he would not be held liable upon the obligation. He agreed that it should appear as one of the assets of the institution, for the purpose of deceiving those whose duty it was to examine them . . . .[151]

The supreme court acknowledged the "general rule" that "the receiver of an insolvent corporation has no greater rights than those possessed by the Corporation itself, and a defendant in a suit brought by him may take advantage of any defense that might have been made if the suit had been

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prosecution process. This estoppel is known as "prosecution history estoppel" or "file wrapper estoppel." *See* Summa v. E.C.P. Energy Conservation Prods., Inc., 5 U.S.P.Q. (BNA) 2d 1891, 1893 (S.D.N.Y. 1987) ("The terms 'file wrapper', 'prosecution history' and 'file history' refer to the record of correspondence between the patent seeker and the Patent Office"). "The essence of prosecution history estoppel is that a patentee should not be able to obtain, through litigation, coverage of subject matter relinquished during prosecution." Haynes Int'l, Inc. v. Jessop Steel Co., 8 F.3d 1573 (Fed. Cir. 1993), *modified*, 15 F.3d 1076 (Fed. Cir. 1994). For purposes of this analogy, it is important to note that, to invoke prosecution history estoppel, the defendant in the patent infringement suit need not show reliance on the patent holder's representations to the PTO. General Instrument Corp. v. Hughes Aircraft Co., 399 F.2d 373, 385-86 (1st Cir. 1968) (considering file wrapper estoppel even though doctrine was not argued to or applied by the district court). As one commentator notes, "It is particularly difficult to picture the large number of alleged infringers sifting through the patent office files and being misled by applicants' statements contained in those records." Joseph J. Dvorak, *That Perplexing Problem - The Doctrine of File Wrapper Estoppel*, 50 J. PAT. OFF. SOC'Y 143, 144 (1968). Another commentator has concluded that "[a]ny 'reliance' in prosecution history estoppel is a presumed one on the part of 'reasonable competitors.'" DONALD S. CHISUM, PATENTS § 18.05[1] (1993 & Supp. 1994). *See also* Lemelson v. United States, 752 F.2d 1538 (Fed. Cir. 1985) (courts should consider prosecution history in interpreting the claims, whether or not the parties expressly rely on it).

Moreover, courts presume that the PTO examiner who allowed the patent claim relied on the applicant's representations and amendments unless the written record indicates otherwise. *See* Slater Elec. Inc. v. Thyssen-Bornemisza, Inc., 650 F. Supp. 444, 455 n.10 (S.D.N.Y. 1986).

[149] 79 A. 250 (Pa. 1911).

[150] *Id.* at 250-51.

[151] *Id.* at 251.

brought by the corporation before its insolvency."[152] However, the court declined to apply that rule in favor of Benney, determining instead that "[n]either the law nor good conscience"[153] would permit Benney to take advantage of his putative defense to the note:

> [O]ne who voluntarily gives his obligation to a bank for the purpose of taking up another obligation, and of being exhibited as one of its assets to a supervising officer of the government having supervision and control of its affairs, is estopped to deny want of consideration upon the insolvency of the bank, when a receiver brings an action upon the note for the benefit of the creditors of the institution.[154]

Similarly, in *First National Bank of Bangor v. Beck*,[155] Beck agreed to make a note in favor of the bank to prevent the bank's liquidation by the comptroller of the currency, provided that the bank's other directors also made similar contributions to the bank's capital.[156] Although not all of the other bank directors actually made such contributions, the bank represented that they had in a report made to the comptroller of the currency.[157] That report did not inform the comptroller of the currency that Beck's contribution was conditional; indeed, it indicated that Beck's contribution had already been made to the bank.[158] When the bank's successor brought suit on Beck's note several years later, Beck raised failure of consideration as a defense.[159] The supreme court ruled that "[h]aving made such representation of facts, [and] obtained action on faith of their existence, the principles of estoppel prohibit the defendant from now saying that the facts were not as he represented them to be."[160] Beck was, accordingly, held liable on the note.[161]

Therefore, under Pennsylvania law, insurers can, and should, be held to the promises they made to officials of the Commonwealth regarding the

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[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] 188 A. 909 (Pa. 1937).
[156] *Id.* at 909.
[157] *Id.* at 910.
[158] *Id.*
[159] *Id.* at 909.
[160] 188 A. at 912.
[161] *Id.*

intended effect of the qualified pollution exclusion, and are estopped from denying coverage on a basis inconsistent with such promises.[162]

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[162] In anticipation of policyholders' regulatory estoppel argument, insurers have obtained affidavits from at least two officials who worked at the Pennsylvania Insurance Department in 1970; these affidavits allege that the Pennsylvania Insurance Department was not misled by the IRB's submissions regarding the qualified pollution exclusion. *See* Affidavit of John J. Sheehy (Jan. 31, 1994) (on file with authors); Affidavit of Richard W. Simpson (Oct. 22, 1993) (on file with authors). The Sheehy and Simpson affidavits, however, should not undermine policyholders' ability to have the doctrine of regulatory estoppel applied in the context of environmental insurance coverage cases and thereby have insurers held to the IRB's statements to the Insurance Commissioner regarding the intended effect of the qualified pollution exclusion because, under Pennsylvania law, a court may not "explore the mental processes of administrative officials," especially when the official volunteers "a revelation of his mental processes." Brady v. Commonwealth Bd. of Chiropractic Examiners, 471 A.2d 572, 578 (Pa. Commw. Ct. 1984), *appeal dismissed*, 483 A.2d 1376 (Pa. 1984); *accord* Commonwealth v. Public Utils. Comm'n, 331 A.2d 598, 600-01 (Pa. Commw. Ct. 1975); *see also* United States v. Morgan, 313 U.S. 409, 422 (1941) (applying same rule under federal law). That prohibition is consistent with the general rule of Pennsylvania insurance law that "the uncommunicated subjective intent of one party to an insurance policy is immaterial to the interpretation of the policy," Little v. MGIC Indem. Corp., 836 F.2d 789, 792 n.2 (3d Cir. 1987) (citing Celley v. Mut. Benefit Health & Accident Ass'n, 324 A.2d 430, 435 (Pa. Super. Ct. 1974)); *but cf.* Bensalem Township v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1308-12 (3d Cir. 1994) (finding, despite the apparent absence of any evidence of the insured's communication of its subjective intent regarding the scope of the coverage that it desired to purchase, that the doctrine of reasonable expectations recognized under Pennsylvania law permits an insured to escape the effect of the purportedly clear and unambiguous language of a policy exclusion if the insured, "as a result of the insurer's either actively providing misinformation about the scope of coverage provided by a policy or passively failing to notify the insured of changes in the policy, receives something other than what it thought it purchased"), *id.* at 1312; Collister v. Nationwide Life Ins. Co., 388 A.2d 1346, 1353 (Pa. 1978) (finding, despite the apparent absence of any evidence of the insured's communication of its subjective intent regarding the scope of the coverage that it desired to purchase, that the doctrine of reasonable expectations permitted a finding of coverage despite the express language of the insurance contract, and stating that "regardless of the ambiguity, or lack thereof, inherent in a given set of insurance documents . . . the public has a right to expect that they will receive something of comparable value in return for the premium paid"), *cert. denied*, 439 U.S. 1089 (1979), and with the Pennsylvania Supreme Court's determination that an insurer's attempt to bolster its proffered interpretation of purportedly clear and unambiguous insurance policy language with testimony provided by "industry spokesmen" regarding the meaning of such language was unpersuasive, Pennsylvania Mfrs. Ass'n Ins. Co. v. Aetna Casualty & Sur. Ins. Co., 233 A.2d 548, 550-51 (Pa. 1967).

Even putting aside the propriety of using such affidavits to influence courts' constructions of the qualified pollution exclusion as an evidentiary matter, the Sheehy and Simpson Affidavits are of questionable reliability. The insurers' affiant Sheehy explicitly averred that he has *no* recollection of the IRB's 1970 submission regarding the qualified pollution exclusion. See Sheehy Affidavit, *supra*, at ¶ 2. Moreover, the averments made in the Sheehy and Simpson affidavits are controverted; a contemporary of Sheehy and Simpson at the Pennsylvania Department of Insurance, Richard J. Schultz, Jr. has sworn out an affidavit in which he alleges that the department was indeed misled by the IRB's statements regarding the qualified pollution exclusion. *See* Affidavit of Richard J. Schultz, Jr. ¶ 3 (June 24, 1994) (on file with authors).

2. *The Doctrine of Reasonable Expectations*

The second basis upon which the *Morton* court rested its decision, the doctrine of reasonable expectations, is well-established under Pennsylvania law. Indeed, the Supreme Court of Pennsylvania has used the reasonable expectations of the insured as a lodestar in interpreting the meaning of controverted insurance policy language.

In interpreting insurance policies, Pennsylvania courts must "examine the dynamics of the insurance transaction to ascertain . . . the reasonable expectations of the consumer."[163] Moreover, the supreme court has recognized that "[t]he reasonable expectations of the insured are the focal point in reading the contract language."[164] As the opinion in *Collister* makes clear, this focus is not merely a tool for contract construction, but is a necessary judicial mindset:

> Courts should be concerned with assuring that the insurance purchasing public's reasonable expectations are fulfilled. Thus, regardless of the ambiguity, or lack thereof, inherent in a given set of insurance documents (whether they be applications, conditional receipts, riders, policies, or whatever), the public has a right to expect that they will receive something of comparable value in return for the premium paid. *Courts should also keep alert to the fact that the expectations of the insured are in large measure created by the insurance industry itself.*[165]

Thus, courts applying Pennsylvania law have used the reasonable expectations of the insured to defeat the express language of insurance policies, especially in cases where an insurer attempts "to abuse [its] position vis-a-vis [its] customers."[166]

By admonishing courts to look to "the dynamics of the insurance transaction" and to "insurance documents" other than the policy itself, and

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[163] Collister v. Nationwide Life Ins. Co., 388 A.2d 1346, 1353 (Pa. 1978).

[164] Koenig v. Progressive Ins. Co., 599 A.2d 690, 691-92 (Pa. Super. Ct. 1991) (citing *Collister*, 388 A.2d at 1353), *appeal denied*, 611 A.2d 712 (Pa. 1992); *cf.* Totedo v. Bankers Life & Casualty Co., 670 F. Supp. 148, 149 (W.D. Pa. 1987) ("The reasonableness of the expectations of the insured must be evaluated according to the sophistication of the average policy holder, not one conversant with the many volumes of Couch on Insurance.").

[165] *Collister*, 388 A.2d at 1353-54 (emphasis added).

[166] Bensalem Township v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1309-11 (3d Cir. 1994) (discussing Pennsylvania cases).

by recognizing that insureds' reasonable expectations are to a large degree created by the insurance industry, the supreme court's decision in *Collister* implicitly rejects the "four corners doctrine" and confirms that an insuance policyholder may introduce extrinsic evidence to prove that disputed policy language is unclear or ambiguous.[167] As a former Justice of the Pennsylvania Supreme Court has recognized, the clarity or ambiguity of policy language often cannot be determined from the "four corners" of the policy alone because insurance policies "are ordinarily 'clear' and 'unambiguous,' if at all, only to underwriters, statisticians or actuaries who have expert knowledge in the evaluation and classification of risks."[168] Similarly, the Supreme Court of Pennsylvania has stated:

> A court must be careful not to "retire into that lawyer's Paradise where all words have a fixed, precisely ascertained meaning; where men may express their purposes, not only with accuracy, but with [fullness]; and where, if the writer has been careful, a lawyer, having a document referred to him, may sit in his chair, inspect the text, and answer all questions without raising his eyes."[169]

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[167] Steuart v. McChesney, 444 A.2d 659 (Pa. 1982), has been cited to support the proposition that a court may not consider evidence of the drafting history of the qualified pollution exclusion because a court must determine that contract language is ambiguous before admitting any extrinsic evidence of the parties' intent. *See, e.g.*, Lower Paxton Township v. United States Fidelity and Guar. Co., 557 A.2d 393, 402 n.5 (Pa. Super. Ct.), *appeal denied*, 567 A.2d 653 (Pa. 1989). However, although *Steuart* held that extrinsic evidence may not be used to vary or contradict the meaning of contract language which is clear and unambiguous, 444 A.2d at 661, it also recognized that "whether the language of an agreement is clear and unambiguous may not be apparent without cognizance of the context in which the agreement arose." *Id.* at 662. Indeed, in determining that the contract language at issue in *Steuart* was not ambiguous, the supreme court resorted to extrinsic evidence twice: First, the court found that there was no more precise language than that actually used in the contract at issue, 444 A.2d at 663 ("A more clear and unambiguous expression . . . would be onerous to conceive."). Second, the court consulted a scholarly work's definitions of the language at issue, *id.* at 664 n.3 (citing JOHN BAKER OPDYCKE, MARK MY WORDS, A GUIDE TO MODERN USAGE AND EXPRESSION 568-69 (1940)). Accordingly, policyholders should be permitted to introduce the evidence of the drafting history of the qualified pollution exclusion that is described above in Section II of this article. *Cf.* Continental Casualty Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 959 (E.D. Pa. 1995) (finding that a policyholder was permitted to introduce evidence of the drafting history of the qualified pollution exclusion and of the regulatory approval process to support a counterclaim of fraudulent misrepresentation against its CGL insurer based on that history and process).

[168] *Standard Venetian*, 469 A.2d at 570 (Hutchinson, J., concurring).

[169] *In re* Estate of Breyer, 379 A.2d 1305, 1309 n.5 (Pa. 1977) (quoting JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 428 (1898), *as quoted in* 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 535 n.16 (1960)).

Accordingly, to determine whether insurance policy language is ambiguous, a court applying Pennsylvania law "must consider the actual words of the agreement themselves, as well as any alternative meanings offered by counsel, and extrinsic evidence offered in support of those alternative meanings."[170]

Courts applying Pennsylvania law have looked to several different types of extrinsic evidence to determine whether policy language is ambiguous, including dictionary definitions of the policy language,[171] and the constructions that appellate courts in Pennsylvania[172] and other jurisdictions[173] have given such language. The Superior Court of Pennsylvania has also recognized that "[t]he mere fact" that a number of appellate courts have reached "directly contrary conclusions" concerning the meaning of "almost identical policy provisions, itself creates the inescapable conclusion that the provision in issue is susceptible to more than one interpretation."[174] Similarly, the superior court has found that, in considering whether insurance policy language is ambiguous, a "court may consider 'whether alternative or more precise language, if used, would have put the matter beyond reasonable question.'"[175]

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[170] St. Paul Fire and Marine Ins. Co. v. Lewis, 935 F.2d 1428, 1431 (3d Cir. 1991).

[171] *See, e.g.*, McMillan v. State Mut. Life Assurance Co. of Am., 922 F.2d 1073, 1076 (3d Cir. 1990) (applying Pennsylvania law); Hamilton Bank v. Ins. Co. of N. Am., 557 A.2d 747, 751 (Pa. Super. Ct. 1989); Ranieli v. Mutual Life Ins. Co. of Am., 413 A.2d 396, 400 (Pa. Super. Ct. 1979).

[172] *See, e.g.*, O'Brien Energy Systems, Inc. v. American Employers' Ins. Co., 629 A.2d 957, 962-64 (Pa. Super. Ct. 1993), *appeal denied*, 642 A.2d 487 (Pa. 1994).

[173] *See, e.g.*, United Servs. Auto Ass'n v. Elitzky, 517 A.2d 982, 986-87 (Pa. Super. Ct. 1986), *appeal denied*, 528 A.2d 957 (Pa. 1987); Cohen v. Erie Indem. Co., 432 A.2d 596, 599 (Pa. Super. Ct. 1981).

[174] *Cohen*, 432 A.2d at 599 (Pa. Super. Ct. 1981); *accord, e.g.*, United Servs., 517 A.2d at 986-87; *but see* Lower Paxton Township v. United States Fidelity and Guar. Co., 557 A.2d 393, 400-1 n.4 (Pa. Super. Ct.), *appeal denied*, 567 A.2d 653 (Pa. 1989) (declining to follow *Cohen* in the context of the qualified pollution exclusion in light of the court's finding that "those courts that have eliminated a temporal quality from the meaning of 'sudden' have ascribed an unreasonable meaning to an unambiguous provision").

[175] Celley v. Mutual Benefit Health & Accident Ass'n, 324 A.2d 430, 434 (Pa. Super. Ct. 1974) (quoting Kook v. American Sur. Co. of N.Y., 210 A.2d 633, 638 (N.J. Super. Ct. 1965) (citation omitted); *see also* McMillan v. State Mut. Life Assurance Co. of Am., 922 F.2d 1073, 1077 (3d Cir. 1990) ("An insurer's failure to utilize more distinct language which is available reinforces a conclusion of ambiguity under Pennsylvania law.").

B. Pre-Techalloy Constructions of the Policy Term "Sudden and Accidental"

Prior to the decision of the Pennsylvania Superior Court in *Techalloy*, Pennsylvania law was among the most developed in the country on the meaning of the key policy term "sudden and accidental." As will be discussed,[176] seven decisions focused on that language; in each, the court upheld policyholders' reasonable expectations that the policy term "sudden and accidental" permits coverage for liabilities arising out of damage which is unforeseen and gradual and found in favor of coverage for the policyholder in that case.

1. In the Context of the Qualified Pollution Exclusion

The "sudden and accidental" exception to the qualified pollution exclusion was first interpreted by a Pennsylvania court in the 1975 case *West Bradford Township v. Nationwide Insurance Co.*[177] In *West Bradford*, piles of road salt that the policyholder maintained on its property "were inundated with rain waters."[178] The rain "dispersed and released the salt into the underground water table, thereby polluting [a neighbor's] well."[179] The neighbor made a claim on the policyholder for damage to his "well, water supply and other equipment."[180]

The policyholder submitted a notice of claim to its liability insurer, but the insurer denied coverage based on the policy's qualified pollution exclusion.[181] Subsequently, the policyholder sought a declaratory judgment that would require the insurer to "defend and adjust" the neighbor's claim.[182]

The court of common pleas ruled for the policyholder.[183] The court recognized that the policy was to be construed against the insurer, and accordingly defined the key policy term "sudden and accidental" in a coverage-promoting manner.[184] Relying on the revised Fourth Edition of *Black's Law Dictionary*, the court defined "sudden" to mean, "happen-

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[176] See *infra* notes 177-238 and accompanying text.
[177] 75 Pa. D. & C.2d 771 (C.P. Chester 1975).
[178] *Id.* at 771.
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] 75 Pa. D. & C.2d at 722.
[183] *Id.* at 773.
[184] *Id.* at 772-73 (citing Galligan v. Arovitch, 219 A.2d 463 (Pa. 1966)).

ing without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen; unprepared for,"[185] and "accidental" to mean, "happening by chance or unexpectedly."[186] Because the court found "no evidence of any intent whatsoever on the part of the [policyholder] to cause the dispersal or release of the salt into the underground water table," and because there was "no evidence presented that the [policyholder] could have foreseen or anticipated such an occurrence," the release was "sudden and accidental" within the meaning of the exception to the policy's qualified pollution exclusion.[187]

The interpretation of the "sudden and accidental" exception to the qualified pollution exclusion was not revisited by a Pennsylvania court until December 1977, in *Aronson Associates Inc. v. Pennsylvania National Mutual Casualty Insurance Co.*[188] *Aronson* involved a policyholder's petition for a declaratory judgment that its liability insurer was obligated to indemnify expenses that it incurred to investigate, contain, remediate, and prevent gasoline contamination of ground water and surface water.[189] The opinion describes the circumstances of the release:

> Between January 27, 1977 and February 15, 1977, a large quantity of gasoline escaped from one of [several large petroleum storage underground piping. The break in the pipe was caused by extremely cold weather conditions experienced by the nation at that time. The loss of product was not discovered until the tank was nearly emptied.[190]

After it discovered that gasoline had escaped into the environment, the policyholder notified the Pennsylvania Department of Environmental Resources of the leak.[191] The Department of Environmental Resources required the policyholder to investigate and remediate the gasoline contamination on its own property to prevent injury to downstream water users.[192] The policyholder did so, and presented a claim for its expenses

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[185] *Id.* at 773 (quoting BLACK'S LAW DICTIONARY 1600 (4th ed. 1968)).
[186] *Id.* (quoting BLACK'S LAW DICTIONARY 31 (4th ed. 1968)).
[187] *See id.*
[188] 14 Pa. D. & C.3d 1 (C.P. Dauphin 1977), *aff'd*, 422 A.2d 689 (Pa. Super. Ct. 1979).
[189] *Id.* at 3-4.
[190] *Id.* at 3.
[191] *Id.*
[192] *Id.*

to its liability insurer under both a "general—automobile" policy and a "commercial umbrella" policy.[193] The insurer denied coverage on several bases, including the qualified pollution exclusions in both policies.[194] The policyholder subsequently brought its declaratory judgment action.[195]

In interpreting the "sudden and accidental" exception to the policies' respective qualified pollution exclusions, the *Aronson* court recognized that undefined policy terms "must be interpreted in their 'usual, ordinary and popular sense.'"[196] In contrast to the *West Bradford* court, which consulted a legal dictionary's definitions of "sudden" and "accidental,"[197] the *Aronson* court looked to case law for definitions of "accident": "An accident has generally been defined to be an 'occurrence which proceeds from unknown cause or which is the unusual effect of a known cause and hence unexpected and unforeseen.'"[198] "Casualty" and "misfortune," the court continued, are terms synonymous with "accident."[199] The court did not define the policy term "sudden."[200]

Although the *Aronson* court found that the release of gasoline "was not detected for a short period of time and undoubtedly was not instantaneous,"[201] it recognized that "the cracking of the underground pipe, which released the fuel, was a 'sudden' event within the ordinary meaning given to that term and constituted an 'accident' within the meaning of the case law that it had cited."[202] Accordingly, the policies' qualified pollution exclusions did not bar coverage for the costs of investigating and remediating the escaped gasoline.[203]

Aronson was affirmed on appeal by the Pennsylvania Superior Court.[204] The interpretation of the "sudden and accidental" exception to the qualified pollution exclusion by the court of common pleas in *Aronson* has never been distinguished, overruled, or criticized by a Pennsylvania appellate court, or by a federal court applying Pennsylvania law.

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[193] 14 Pa. D. & C.3d at 4.

[194] *Id.* at 4.

[195] *Id.* at 3.

[196] *Id.* at 8 (citing M. Schnoll & Son, Inc. v. Standard Accident Ins. Co., 154 A.2d 431 (Pa. Super. Ct. 1959)).

[197] See *supra* notes 183-84 and accompanying text.

[198] *Aronson*, 14 Pa. D. & C.3d at 8 (quoting Morelli v. Aetna Casualty and Sur. Co., 31 Pa. D. & C.2d 424, 426 (C.P. Chester 1963)).

[199] *Id.* (citing Springfield Township v. Indemnity Ins. Co. of N. Am., 64 A.2d 761 (Pa. 1949)).

[200] *Id.* at 8-9.

[201] *Id.* at 8.

[202] *Id.* at 8.

[203] *Id.* at 10.

[204] 422 A.2d 689 (Pa. Super. Ct. 1979) ("The Decree is affirmed on the Opinion of Judge Caldwell as reported in 99 Dauphin 446 (1977).").

In 1982, another pro-policyholder ruling on the qualified pollution exclusion was handed down by a court of common pleas. In *Lehigh Electric & Engineering Co. v. Selected Risks Insurance Co.*,[205] the Luzerne County Court of Common Pleas denied a liability insurer's preliminary objections to a policyholder's complaint for declaratory judgment; the court's opinion summarized the allegations of the complaint:

> On or about March 15, 1981, and on various other occasions, a sudden and accidental spillage of polychlorinated biphenyl (PCB) fluid resulted when unknown persons overturned and disturbed various electrical apparatus and equipment stored on the [policyholder's] property. As a result of the spillage, it is alleged that the Insureds have been and will be required to expend sums in an effort to clear up the spillage in order to prevent and mitigate the occurrence of damage to the property and persons of others.[206]

The insurer's preliminary objections asserted that coverage for such alleged releases was barred by the qualified pollution exclusion and Owned Property Exclusion in the policy at issue.[207] The court consulted only case law to determine the meaning of the disputed policy language, and stated that "*Aronson* is both persuasive and controlling on the question of coverage."[208] Following *Aronson* and *Leebov v. United States Fidelity & Guaranty Co.*,[209] the court rejected the insurer's assertion, stating that it was "satisfied, on the basis of the cited decisions, that the policy here involved can provide coverage in a case where the proof establishes that the spillage was 'sudden and accidental . . . .'"[210] It is significant that, although the court did not explicitly base its ruling on the ambiguity of the policy's qualified pollution exclusion or its owned property exclusion,[211] the court rejected the insurer's contention that those exclusions were "neither ambiguous nor equivocal."[212]

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[205] 30 Pa. D. & C.3d 120 (C.P. Luzerne 1982).
[206] *Id.* at 122.
[207] *Id.* at 121.
[208] *Id.* at 123.
[209] 165 A.2d 82 (Pa. 1960).
[210] *Lehigh Electric*, 30 Pa. D. & C.3d at 127.
[211] *Id.* at 127-28.
[212] *Id.* at 128.

2. *Outside the Context of the Qualified Pollution Exclusion*

As shown above, until at least 1982, Pennsylvania courts construed the "sudden and accidental" exception to the qualified pollution exclusion to permit coverage for pollution damage that occurred gradually, but was unforeseen and unexpected by the policyholders. Such decisions are consistent with other decisions by Pennsylvania courts that construed the policy term "sudden and accidental" as it appeared in other policy provisions.

The insurance policy term "sudden and accidental" was interpreted by a Pennsylvania court for the first time in *Tennant v. Hartford Steam Boiler Inspection & Insurance Co.*[213] In *Tennant*, the Supreme Court of Pennsylvania found that a river steamboat's wheel shaft cracked as a result of "the stresses and strains incident to the landing"[214] of the boat, and determined that the cracking of the shaft was "sudden and accidental" within the meaning of a machinery insurance policy's definition of "accident."[215] The supreme court did not, however, venture into the "abrupt" versus "unforeseen" controversy that surrounds the "sudden and accidental" language today, and its determination is consistent with either interpretation of that phrase: The cracking of the wheel shaft may have been "sudden and accidental" because it happened abruptly, or, alternatively, because the cracking of the shaft was unforeseen by the policyholder.[216]

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[213] 40 A.2d 385 (Pa. 1944).

[214] *Id.* at 387.

[215] *Id.*

[216] *Id.* at 386 (noting that there was nothing unusual about the boat's operation prior to the cracking of the shaft).

Baldt Incorporated v. American Universal Insurance Co., 549 F. Supp. 955, 957 (E.D. Pa. 1985), which interpreted a "sudden and accidental" exception to a liability insurance policy's "own products" exclusion, is similarly inconclusive regarding the definition of "sudden and accidental." In *Baldt*, the district court determined, without explanation, that the separation of three chains on three separate days during "storm tensioning" and the separation of a fourth chain while it was being hauled were all "sudden and accidental." *See id.* at 957. As in *Tennant*, the *Baldt* court's interpretation of "sudden and accidental" is consistent with either the "abrupt" or the "unforeseen" meaning of "sudden and accidental": The separations of the chains may have been "sudden and accidental" because they were abrupt, or, alternatively, because they were unforeseen by the policyholder. Inexplicably, the *Baldt* court cited no Pennsylvania case law construing the policy term "sudden and accidental," such as Cyclops Corp. v. Home Insurance Co., 352 F. Supp. 931 (W.D. Pa. 1973), which interpreted "sudden and accidental" to mean "unforeseen"; or Techalloy Co. v. Reliance Insurance Co., 489 A.2d 820 (Pa. Super. Ct. 1984), *appeal denied* (Pa. 1985), which has been understood to equate the meanings of "sudden" and "abrupt." Lower Paxton Township v. United States Fidelity & Guar. Corp., 557 A.2d 393, 399 (Pa. Super. Ct.), *appeal denied*, 567 A.2d 653 (Pa. 1989).

The "abrupt" versus "unforeseen" controversy that was sidestepped by the *Tennant* court was first confronted by a court applying Pennsylvania law in the 1973 case *Cyclops Corp. v. Home Insurance Co.*[217] In *Cyclops*, the policy term "sudden and accidental" was construed in a coverage-enhancing manner by a federal district court approximately eleven years before the superior court's *Techalloy* decision.

Cyclops involved a claim made by a policyholder under a boiler and machinery policy that also provided business interruption coverage;[218] the policyholder's steelmaking operations were interrupted for approximately nine days when an electric motor, which formed a part of those operations, "went into severe vibrations which necessitated a shut-down for fear that it would destroy itself, and dismantling to determine the cause of the vibration."[219] Inspection of the motor revealed that "the key on the shaft (axle) to which the spider (wheel) was affixed so that the two would rotate together was loose and therefore the connection between the shaft and the spider was loose."[220] The boiler and machinery insurer's expert gave an opinion that the loose key was "caused by an improper fit at the time of manufacture," and that this loose fit caused "progressive wear and tear between the spider and the shaft which gradually increased the vibrations until the time of shut-down."[221]

The policy at issue in *Cyclops* provided coverage for losses that resulted from business interruption "caused solely by an Accident . . . to an object . . . ."[222] The policy defined "accident" to mean "the sudden and accidental damage to an object or part thereof,"[223] but that definition excluded such events as "[d]epletion, deterioration, corrosion, or erosion of material"[224] or "[w]ear and tear."[225]

It is worth noting that the *Cyclops* court stated expressly that it would not construe policy language "most strongly against the insurer,"[226] as was the general rule under Pennsylvania law,[227] because the "sudden and accidental" language was included in a policy endorsement for which the policyholder had paid an additional premium, and thus was "what the

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[217] 352 F. Supp. 931 (W.D. Pa. 1973).
[218] *Id.* at 932-33.
[219] *Id.* at 933.
[220] *Id.*
[221] *Id.* at 934.
[222] 352 F. Supp. at 932.
[223] *Id.* at 932-33.
[224] *Id.* at 933.
[225] *Id.* at 932-33.
[226] *Id.* at 933.
[227] *See, e.g.*, Miller v. Boston Ins. Co., 218 A.2d 275, 277 (Pa. 1966).

parties bargained for."[228] Nevertheless, the court determined that the damage to the policyholder's electric motor was "sudden and accidental,"[229] and that the policyholder's business interruption losses were covered by the policy.[230] The court found that the "natural, plain, and ordinary" meaning of "sudden" was "unexpected and unforeseen,"[231] and that the "natural, plain, and ordinary" meaning of "accidental" was "happening by chance."[232]

The term "sudden and accidental" was also interpreted by a court of common pleas, in the context of a claim under a fire insurance policy, in *Biddle v. Home Mutual Insurance Co. of Pennsylvania*.[233] In *Biddle*, the policyholder's house and its contents were damaged by smoke and soot, which "permeated" the house "on or about December 15, 1975." The policy at issue provided coverage for "direct loss to the property covered caused by . . . [s]udden and accidental damage from smoke . . . ."[234]

Like the *Cyclops* and *West Bradford* courts, the *Biddle* court defined "sudden" and "accidental" by reference to *Black's Law Dictionary*. "Sudden" was defined as "[h]appening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen; unprepared for"; and "accidental" meant "[h]appening by chance, or unexpectedly; taking place not according to [the] usual course of things; casual; fortuitous."[235] Applying these definitions, the court held that it was "abundantly clear" that these damages were "sudden and accidental,"[236] even though the "specific cause" of the smoke "was not established."[237] Accordingly, the court ruled that the policy did provide coverage for the smoke damage.[238]

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[228] *Cyclops*, 352 F. Supp. at 933.

[229] *Id.* at 937.

[230] *Id.*

[231] *Id.* at 934-35 (citing New England Gas & Elec. Ass'n v. Ocean Accident & Guar. Corp., 116 N.E. 2d 671, 680, 681 (Mass. 1953); Foble v. Knefely, 6 A.2d 48, 53 (Md. 1939); and unspecified editions and pages of WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY and BLACK'S LAW DICTIONARY).

[232] *Id.* at 935 (citing Mutual Accident Ass'n v. Barry, 131 U.S. 100, 121 (1889); Foble v. Knefely, 6 A.2d 48, 53 (Md. 1939); and unspecified editions and pages of WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY and BLACK'S LAW DICTIONARY).

[233] 8 Pa.D. & C.3d 601 (C.P. Montgomery 1978).

[234] *Id.* at 602.

[235] *Id.* at 603 (quoting an unspecified page and edition of BLACK'S LAW DICTIONARY). The *Biddle* court also looked to case law for evidence of the meaning of "accident." *Id.* at 603-04 (quoting Cooper v. Foremost Ins. Co., 17 Chester 327, 328-29 (C.P. Chester 1969)).

[236] *Id.* at 604.

[237] *Id.*

[238] *Id.*

Thus, beginning with *Tennant* in 1944 and extending at least to *Lehigh Electric* in 1982, courts applying Pennsylvania law construed the policy term "sudden and accidental" to permit insurance coverage for unforeseen, gradual damage. Two points about these cases stand out. First, none of these cases accepted the proposition that "sudden" could reasonably mean "abrupt" only. Second, each of the cases that construed the "sudden and accidental" exception to the qualified pollution exclusion permitted coverage for unforeseen, gradual pollution damage, where such damage was at issue. Thus, in 1984, when *Techalloy* was decided by the superior court, CGL policyholders may have reasonably expected that the qualified pollution exclusion would permit coverage for liabilities arising out of unforeseen, gradual pollution damage. Unfortunately for those policyholders, the court in *Techalloy* ignored the case law and other evidence of policyholders' reasonable expectations discussed above, and thereby frustrated policyholders' reasonable expectations of coverage for such liabilities.

C. Techalloy and its Progeny

The meaning of the "sudden and accidental" exception to the qualified pollution exclusion was at issue before the superior court for the second time[239] in *Techalloy Co. v. Reliance Insurance Co.*[240] In *Techalloy*, the superior court determined that discharges of tricloroetheline (TCE)[241] that "occurred on a 'regular or sporadic basis from time to time during the past 25 years'"[242] could not possibly be "sudden,"[243] although they might have been "accidental."[244]

In reaching that determination, the court in *Techalloy* did not consider any extrinsic evidence of the meaning of the policy term "sudden and accidental," apparently because the policyholder did not offer any alternative to the insurer's interpretation of the qualified pollution exclusion.[245] As the court noted, the policyholder offered "no alterna-

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[239] The superior court faced that issue for the first time in connection with the insurer's appeal in Aronson Associates Inc. v. Pennsylvania National Mutual Casualty Insurance Co, 422 A.2d 689 (Pa. Super. Ct. 1979).

[240] 487 A.2d 820 (Pa. Super. Ct. 1984), *appeal denied* (Pa. 1985).

[241] *Id.* at 822.

[242] *Id.* at 827 (quoting from the complaint of plaintiff Peterman).

[243] *Id.* at 826-27.

[244] *Id.* at 826.

[245] *Id.* at 827. Rather than argue that the qualified pollution exclusion could reasonably be interpreted to provide coverage for the pollution claims against it, the policyholder in *Techalloy* argued that the court was precluded from making a coverage determination because the factual

tive interpretation of 'sudden and accidental' which would render it ambiguous and capable of our interpretation."[246] Thus, the superior court did not distinguish, criticize, or overrule such case law as *West Bradford*, *Aronson*, *Lehigh Electric*, *Biddle*, and *Cyclops*. Nor did it examine the multiple dictionary definitions of the policy terms "sudden" and "accidental," as had the courts in *West Bradford, Cyclops, and Aronson*. Further, the *Techalloy* court did not consider the drafting history of the qualified pollution exclusion and the representations that the insurance industry made the Pennsylvania Insurance Commissioner and others regarding the intended effect of that exclusion.[247] Thus, the policyholder's failure to proffer a reasonable alternative meaning of "sudden" and evidence to support that meaning forced the *Techalloy* court to rely solely on the meaning of the "sudden and accidental" exception advanced by the insurer; unsurprisingly, that meaning admitted neither the ambiguity of the policy term nor the possibility of coverage for the gradual pollution damage at issue in *Techalloy*.

In the superior court's next decision regarding the "sudden and accidental" exception to the qualified pollution exclusion, *Lower Paxton Township v. United States Fidelity & Guaranty Corp.*,[248] the court built upon the questionable precedent of *Techalloy*. Ironically, although the policyholder in *Lower Paxton* proffered an interpretation of the "sudden and accidental" exception that supported coverage,[249] its efforts were frustrated by the precedent precipitated by Techalloy's earlier failure to offer such a reasonable alternative.[250] In *Lower Paxton*, the court determined that *Techalloy's* interpretation of the "sudden and accidental" exception governed, stating:

> Any other interpretation of the policy is blatantly unreasonable. To read "sudden and accidental" to mean only unexpected and

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record was incomplete. *Id.* at 826. This argument was doomed to failure: Under Pennsylvania law, an insurer's duty to defend is governed by the allegations of the complaint, and is to be determined from those allegations. *See* Gedeon v. State Farm Mut. Auto. Ins. Co., 188 A.2d 320, 321-22 (Pa. 1963).

[246] *Techalloy*, 487 A.2d at 827.

[247] "Courts that have construed 'sudden' to have a temporal meaning . . . have tended to look only at the literal language of the clause, while ignoring its regulatory history." Sosnow, *supra* note 9, at 258 n.55.

[248] 557 A.2d 393 (Pa. Super. Ct.), *appeal denied*, 567 A.2d 653 (Pa. 1989).

[249] *Id.* at 398-99. The interpretation of the qualified pollution exclusion that was proffered by the policyholder in *Lower Paxton* was the same interpretation that the superior court affirmed in *Aronson*. See *supra* notes 194-200 and accompanying text.

[250] *See id.* at 398 (citing *Techalloy* in support of the proposition that "Pennsylvania precedent on this issue . . . is consistent with the view that the pollution exclusion is not ambiguous").

> unintended is to rewrite the policy by excluding one important pollution coverage requirement—abruptness of the pollution discharge. The very use of the words "sudden *and* accidental" (emphasis added) reveal a clear intent to define the words differently, stating two separate requirements. Reading "sudden" in its context, i.e. joined by the word "and" to the word "accident", the inescapable conclusion is that "sudden", even if including the concept of unexpectedness, also adds an additional element because "unexpectedness" is already expressed by "accident". This additional element is the temporal meaning of sudden, i.e. abruptness or brevity. To define sudden as meaning only unexpected or unintended, and therefore as a mere restatement of accidental, would render the suddenness requirement mere surplusage.[251]

It is difficult to give credence to the court's contention in *Lower Paxton* that "[a]ny other interpretation of the policy is blatantly unreasonable"[252] in light of the superior court's own affirmance of such an interpretation in *Aronson*.[253] Moreover, the *Lower Paxton* court violated the rules of policy interpretation by rewriting the policy's qualified pollution exclusion as "abrupt or brief and accidental,"[254] and by failing to consider extrinsic evidence offered by the policyholder in support of its proffered interpretation of the exclusion.[255]

Thus, prior to the superior court's 1984 decision in *Techalloy*, Pennsylvania CGL policyholders had a reasonable expectation that the "sudden and accidental" exception to the qualified pollution exclusion would permit coverage for liabilities arising out of gradual, but unforeseen, pollution damage. Such reasonable expectations may have been based on Pennsylvania case law and the insurance industry's representations regarding the qualified pollution exclusion, as well as on the common, ordinary meanings of the words "sudden" and "accidental." The superior court's decision in *Techalloy* (and its subsequent decisions to give *Techalloy* controlling

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[251] *Lower Paxton*, 557 A.2d at 402.

[252] *Id.*

[253] *Supra* note 196 and accompanying text.

[254] Courts are not to rewrite, or inject language into, policies under the guise of interpreting them. *See, e.g.*, Stout v. Universal Underwriters Ins. Co., 467 A.2d 18, 21 (Pa. Super. Ct. 1983). The *Lower Paxton* court rewrote the policy at issue by injecting concepts of "abruptness" and "brevity" that were not clearly and unambiguously written into the policy. *See* 557 A.2d at 402.

[255] *See Lower Paxton*, 557 A.2d at 402 n.5 (refusing to consider the drafting history of the pollution exclusion because the exclusion was "unambiguous on its face" and because the drafting history was "dehors the record"). The court did consider the extrinsic evidence offered by the insurer, namely, the superior court's decision in *Techalloy*. *See id.* at 398-99.

precedential value)[256] failed to acknowledge those reasonable expectations as required by Pennsylvania law. By ignoring those reasonable expectations, the superior court frustrated them completely.

D. Central Dauphin

In 1994, the Supreme Court of Pennsylvania was poised to undo the damage that *Techalloy* and its progeny inflicted on Pennsylvania CGL policyholders' reasonable expectations of coverage for liabilities arising out of unforeseen, gradual pollution damage under policies incorporating the qualified pollution exclusion. This opportunity was created by the supreme court's decision to hear a CGL policyholder's appeal in the case *Central Dauphin School District v. Pennsylvania Manufacturer's Ass'n Insurance Co.*[257]

In *Central Dauphin*, the Dauphin County Court of Common Pleas (the same court that decided *Aronson*) followed *Techalloy* and *Lower Paxton* in denying liability insurance coverage to the Central Dauphin School District for costs incurred to remediate pollution damage resulting from a slow leak in the underground fuel oil storage tank, or the underground pipes associated with that tank, at the school district's Middle Paxton Elementary School.[258] Despite the apparently firm legal ground upon which the school district's insurer appeared to stand, the school district persisted in its attempt to secure coverage. It appealed the court of common pleas' summary judgment for the insurer to the superior court, which affirmed the decision of the lower court,[259] and then filed a petition for allowance of appeal with the Supreme Court of Pennsylvania.

By order dated May 16, 1994, the supreme court granted allocatur in the school district's appeal with respect to three enumerated issues:

> 1. Should insurers be permitted to violate insurance regulatory laws by enforcing a policy exclusion in a manner different than was represented to gain approval for the exclusion's use?

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[256] *See* O'Brien Energy Systems, Inc. v. American Employers' Ins. Co., 629 A.2d 957 (Pa. Super. Ct. 1993) (following *Techalloy's* construction of the qualified pollution exclusion), *appeal denied*, 642 A.2d 487 (Pa. 1994); *Lower Paxton*, 557 A.2d 393 (Pa. Super. Ct.), *appeal denied*, 567 A.2d 653 (Pa. 1989).

[257] 16 Pa. D. & C.4th 289 (C.P. Dauphin 1992), *aff'd*, 636 A.2d 1206 (Pa. Super. Ct. 1993), *allocatur granted*, 642 A.2d 482 (Pa. 1994).

[258] 16 Pa. D. & C.4th at 290.

[259] 636 A.2d 1206 (Pa. Super. Ct. 1993).

2. Is the phrase "sudden and accidental", as contained in the insurance policy's pollution exclusion, ambiguous and required to be construed in favor of the insured?
3. Should summary judgment for the insurer have been denied where unresolved issues of material fact existed regarding whether the release of fuel oil constituted a "sudden and accidental" event within the meaning of the insurance policy's pollution exclusion?[260]

One of the school district's insurers deprived the supreme court of its opportunity to decide those issues by paying the school district approximately $276,000 to settle its $126,000 coverage claim arising out of pollution damage at the Middle Paxton Elementary School,[261] and thereby removed the case from the supreme court's docket.[262] As a result, Pennsylvania CGL policyholders' reasonable expectations of coverage for claims arising out of unforeseen, gradual pollution damage under policies incorporating the qualified pollution exclusion continue to be frustrated.

Nevertheless, the supreme court's order granting allocatur in *Central Dauphin* demonstrates not only that the proper interpretation of the qualified pollution exclusion remains an open question under Pennsylvania

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[260] Order, Central Dauphin School Dist. v. Pennsylvania Mfrs. Ass'n Ins. Co. (No. 552, M.D. Allocatur Docket 1993) (May 16, 1994) (on file with authors).

[261] The school district also collected $100,000 from another of its insurers for a different pollution incident. The "Final Settlement Agreement and Release Between Central Dauphin School District and Pennsylvania Manufacturer's Association Insurance Company" and "Site Release and Settlement Agreement" between Central Dauphin School District and Maryland Casualty Company and its subsidiary The Assurance Company of America were obtained by (and are on file with) the authors of this article by a request made pursuant to Pennsylvania's Right to Know Act, 65 PA. STAT. §§ 66.1-66.4 (1959 & Supp. 1995).

The insurance industry has succeeded in manipulating the common law by having unfavorable decisions depublished and by paying settlements to policyholders, even after insurance companies' victories in court, so as to prevent policyholders from appealing (and presumably appellate courts from reversing) pro-insurer decisions. *See* Philip Carrizosa, *Making the Law Disappear: Appellate Lawyers Are Learning to Exploit the Supreme Court's Willingness to Depublish Opinion*, CAL. LAW., Sept. 1989, at 65; Janet Elliot, *For $300K, Environmental Test Case Evaporates*, TEX. LAW., May 31, 1993, at 1; Stacy Gordon, *Vanishing Precedents: Policyholders Can Get Better Deal - If Rulings Are Erased*, BUS. INS., June 15, 1992, at 1; Roger Parloff, *Rigging The Common Law*, AM. LAW., March 1992, at 76; *see also* Intel Corp. v. Hartford Accident & Indem. Co., 692 F. Supp. 1171, 1192 n.32 (N.D. Cal. 1988) (describing similar insurer activity in the environmental insurance coverage case Bankers Trust Co. v. Hartford Accident and Indem. Co., 518 F. Supp. 371, *order vacated*, 621 F. Supp. 685 (S.D.N.Y. 1981)).

[262] Presumably, after settlement, one or more of the parties moved to dismiss the appeal pursuant to PA. R. APP. P. 1972. That dismissal was not reported by the supreme court.

law, but also that the *Lower Paxton* court's determination that evidence of the exclusion's drafting history is irrelevant[263] was incorrect.[264] As some commentators have noted, courts that consider the drafting history of the qualified pollution exclusion tend to interpret it in accordance with the representations which were made to state regulators to gain their approval for the exclusion.[265] Pennsylvania CGL policyholders may thus continue to hold out hope that the supreme court will secure for them the coverage for gradual, but unforeseen, pollution damage that was promised by the insurance industry in 1970.

IV. Conclusion

Despite three relatively recent (and wrongly decided) opinions by the Superior Court of Pennsylvania to the contrary, Pennsylvania law requires that the qualified pollution exclusion be construed consistently with the insurance industry's 1970 representations to the Pennsylvania Insurance Commissioner regarding the intended effect of that exclusion. Such an interpretation will fulfill the reasonable expectations of policyholders and uphold the public policy requiring truthfulness in representations to officials of the Commonwealth.

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[263] *Lower Paxton*, 557 A.2d at 402 n.5.

[264] For the supreme court to determine whether insurers should be "permitted to violate insurance regulatory laws by enforcing a policy exclusion in a manner different than was represented to gain approval for the exclusion's use," *Central Dauphin*, *supra* note 254 and accompanying text, it would necessarily have to consider the history surrounding the drafting and regulatory approval of the qualified pollution exclusion.

[265] *See, e.g.*, Sosnow, *supra* note 9, at 258 n.56.