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Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion

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INTRODUCTION

As federal, state, and local governments have increased enforcement of rigorous environmental laws, such as the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA" or "Superfund"), the Resource Conservation and Recovery Act ("RCRA"), and numerous state analogs, potential environmentally-related liabilities have increased dramatically. The vast majority of these laws spread costs among commercial entities and other users of land without regard to ordinary notions of causation or fault. Consequently, liability for environmental hazards often falls on parties who have never handled hazardous materials or who have handled their chemicals and waste in a responsible manner. Companies that hired reputable haulers to take their waste to licensed recyclers or disposal facilities,[1] companies that purchased businesses that properly sent waste to landfills,[2] landowners whose underground storage tanks have leaked without their knowledge,[3] and landowners who discover pollution on their property caused by adjacent or former landowners can all be held liable for the stagger-

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1 *See, e.g.*, Travelers Indem. Co. v. Dingwell, 884 F.2d 629, 631 (1st Cir. 1989); Centennial Ins. Co. v. Lumbermens Mut. Casualty Co., 677 F. Supp. 342 (E.D. Pa. 1987); Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co., 17 Ohio App. 3d 127, 477 N.E.2d 1227 (Ct. App. 1984).

2 *See, e.g.*, New York v. SCA Servs., 83 Civ. 6402 P.N.L., 1983 Hazardous Waste Lit. Rep. 4527 (complaint filed Aug. 29, 1983 S.D.N.Y.).

3 *See, e.g.*, C.L. Hauthaway & Sons Corp. v. American Motorists Ins. Co., 712 F. Supp. 265 (D. Mass. 1989); Shapiro v. Public Serv. Mut. Ins. Co., 19 Mass. App. Ct. 648, 477 N.E.2d 146, *review denied*, 395 Mass. 1105, 482 N.E.2d 328 (1985); Aronson Assocs. v. Pennsylvania Nat'l Mut. Casualty Ins. Co., 99 Dauph. 446, 14 Pa. D. & C.3d 1 (Ct. C.P. 1977), *aff'd*, 272 Pa. Super. 606, 422 A.2d 689 (Super. Ct. 1979).

ing costs of environmental remediation.[4]

As both the range of activities giving rise to environmental liability and the cost of cleanup has increased, liability insurance coverage has become critical to the economic stability of many businesses. Since 1966, most businesses have purchased comprehensive general liability ("CGL") insurance policies wbich provide protection against liability arising from "occurrences" during the policy period.[5] Because companies and individuals are now being held liable for environmental problems that originated six, ten, or twenty years ago, insureds are looking to the CGL insurance policies that they purchased in past years and demanding that the insurers who issued those policies defend and indemnify them against environmental claims.[6]

CGL policies issued between 1973 and 1985 generally contain an exclusion of coverage for discharges, dispersals, releases, and escapes (collectively "releases") of pollutants that are not "sudden and accidental." Insurers and insureds quarrel over the meaning of the phrase "sudden and accidental," the scope of the policy provision in which it is found (designated in most policies as exclusion "f"), and the relationship between exclusion "f" and related provisions in the standard form CGL policy. Such disputes have produced a mammoth amount of litigation in virtually every state in the country. However, over a decade of litigation has done little to clarify the scope of coverage for environmental incidents or the meaning of "sudden and accidental" in CGL policies.[7] In fact, peculiar

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4 *See, e.g.*, United States Fidelity & Guar. Co. v. Korman Corp., 693 F. Supp. 253 (E.D. Pa. 1988) (insured developer sued by condominium purchasers upon discovery that contamination had leached from adjacent landfill); Summit Assocs. v. Liberty Mut. Fire Ins. Co., 229 N.J. Super. 56, 550 A.2d 1235 (App. Div. 1988) (insured liable for unknown sewage treatment activities of previous municipal landowner); Powers Chemco., Inc. v. Federal Ins. Co., 144 A.D.2d 445, 533 N.Y.S.2d 1010 (App. Div. 1988) (insured liable for waste buried by previous landowner), *aff'd*, 74 N.Y.2d 910, 548 N.E.2d 1301, 549 N.Y.S.2d 650 (1989); *see also* Evans v. Aetna Casualty & Surety Co., 107 Misc. 2d 710, 435 N.Y.S.2d 933 (Sup. Ct. 1981) (insured liable to government for cleanup of gasoline spill caused by vandals).

5 Pre-1966 policies generally provided coverage for "accidents," a term not defined in those policies. Discussion of pre-1966 policies is beyond the scope of this Article, except to provide background for the development and interpretation of the "occurrence-based" policies in effect between 1970 and 1985. *See infra* Section II(B)(1).

6 Occurrence-based policies provide what is sometimes called "prospective coverage"; if damage or injury occurs during the policy period, the insurer is obligated to provide coverage regardless of when a claim may be brought against the insured.

7 As the court in Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co., 668 F. Supp. 1541, 1549-50 (S.D. Fla. 1987) aptly noted:

> [T]here is a plethora of authority [on exclusion "f"] from jurisdictions throughout the United States which, depending on the facts presented and the allegations of the underlying complaints, go "both ways" on the issues presented today. The cases swim the reporters like fish in a lake. The Defendants would have this Court pull up its line with a trout on the

applications of logic and an overgeneralized approach to precedent in a number of decisions have compounded the confusion.

This Article presents a multifaceted analysis of the "sudden and accidental" standard form pollution exclusion in an effort to derive a common sense, workable interpretation of the exclusion, and to identify the types of pollution "occurrences" that should and should not be covered by CGL policies. The analysis is subdivided into three sections. Section I examines the respective meanings of the words "sudden" and "accidental" and their contextual meaning in the phrase "sudden and accidental." Section II examines an insured's reasonable expectations of coverage under exclusion "f", the historical development and use of the clause by the insurance industry, and the objectives of state insurance regulators who approved the exclusion. Section III analyzes the history of judicial interpretations of exclusion "f" and the proliferation of approaches and holdings throughout the past decade.

I

THE MEANING OF "SUDDEN AND ACCIDENTAL": THE LANGUAGE AND ITS USE

Exclusion "f" of the standard form CGL policy that was widely issued between 1973 and 1985 states that:

> This insurance does not apply . . . (f) 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 water course or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*[8]

Stated simply, the policy provides coverage for bodily injury or property damage due to a sudden and accidental release of pollutants. The debate over the scope of the "sudden and accidental" exception to exclusion "f" has taken a number of forms. Generally, however, insurers contend that any event which does not end quickly cannot be sudden and accidental, and insureds argue that an event which they did not intend and of which they had brief or no notice is a sudden and accidental event, regardless of its duration.

A. The Word "Sudden"

The phrase "sudden and accidental" is not defined in the stan-

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hook, and argue that the lake is full of trout only, when in fact the water is full of bass, salmon and sunfish too.

8 *See, e.g.*, Insurance Services Office ("ISO") form GL 00 02, Ed. 01-73 (emphasis added).

dard form CGL policy, nor are the words "sudden" or "accidental." As a rule, in the absence of a specific definition in a policy, the terms of an insurance contract are interpreted in accordance with the plain, ordinary, and commonly understood meaning of the language employed.[9]

Dictionaries list the primary definitions of "sudden" as "happening without warning," "unforeseen," "not prepared for," "unexpected," and, in some cases, "abrupt." The word "sudden" is derived from the past participle of the Latin word "subire," meaning "to come up, occur unexpectedly."[10] Thus, the root meaning of the word implies nothing about the duration of an event. Some dictionaries do not define "sudden" in terms of duration at all; others list duration-related definitions as secondary.[11]

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9 *See, e.g.*, Claussen v. Aetna Casualty & Surety Co., 676 F. Supp. 1571 (S.D. Ga. 1987); Lansco, Inc. v. Department of Envtl. Protection, 138 N.J. Super. 275, 350 A.2d 520 (Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *certification denied*, 73 N.J. 57, 372 A.2d 322 (1977).

10 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 2284 (1986).

11 Readily available dictionaries define "sudden" as follows:

WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY, UNABRIDGED (2d ed. 1983):

1. happening without previous notice; coming or appearing unexpectedly; not foreseen or prepared for; as, a *sudden* emergency.
2. done, coming, or taking place quickly or abruptly; hasty . . .

Syn.—unanticipated, unexpected, unlooked-for.

THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 1066 (1982):

occurring or come upon or made or done unexpectedly or without warning, abrupt, abnormally rapid, hurried, (*sudden need, fear; a sudden resolve, departure, change, turn of the wrist, bend in the road . . .*)

THE AMERICAN HERITAGE DICTIONARY (2d college ed. 1982):

1. Happening without warning; unforeseen: *a sudden storm.*
2. Characterized by hastiness; abrupt; rash: *a sudden departure.*
3. Characterized by rapidity; quick; swift.

THE ILLUSTRATED HERITAGE DICTIONARY AND INFORMATION BOOK(1977):

1. Happening without warning; unforeseen.
2. Characterized by hastiness; abrnpt; rash.
3. Characterized by rapidity; quick; swift. . .

THE OXFORD ENGLISH DICTIONARY (2d ed. 1989):

A. adj. 1.a. Of actions, events, conditions:
Happening or coming without warning or premonition; taking place or appearing all at once. In some contexts the implication is rather "Unexpected, unforeseen, unlooked-for", or "Not prepared or provided for".
b. Of emotions, impulses, etc.
c. Of a turning etc.: Abrupt, sharp . . .
3.a. Performed or taking place without delay; speedy; prompt, immediate. . . .
b. *sudden death* (slang): (a) a single toss used to decide an issue; hence in *Lawn Tennis*, a game played to break a tie; also in general sporting use . . . designating an additional competition or period of extra time in which the first to concede a game or score is immediately eliminated . . . .
4.a. Of persons: Swift in action, quick to perform, prompt, expeditious . . . .
8. Brief, momentary, lasting only a short time.

Thus, dictionaries support insureds' position that "happening without warning" or "unexpected" is the primary definition of "sudden." However, "sudden" and "unexpected" are not interchangeable in all circumstances. For example, a tidal wave may be predicted in advance (*i.e.*, be expected) and yet strike suddenly. Conversely, the transformation of an ugly baby into a beautiful adult may occur unexpectedly, but normally would not be described as sudden. To be sudden, an event must begin abruptly, or, at least, be experienced as having begun abruptly.[12] In other words, the event or condition did not exist one moment and does exist in the next moment.

This temporal element of "sudden" is so basic and capable of such broad application that it is often ignored or dismissed as inconsequential by parties and courts interpreting liability policies. Failure to understand this element has led some insureds to argue that the commonly understood meaning of "sudden" has no temporal element.[13] Courts that have not carefully considered the temporal nature of "sudden" have confused it with brevity and have asserted that an event which does not end quickly cannot be sudden.[14] Certainly some "sudden" events do end quickly, due to the physical properties of the activity, such as a "sudden shot." However, a shot into the air could still be described as a "sudden shot" although the bullet might travel for miles and an indeterminate period of time. The dictionaries' various illustrations of sudden events are not

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THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (2d ed. 1987):

> 1. happening, coming, made, or done quickly,without warning, or unexpectedly: *a sudden attack.*
> 2. occurring without transition from the previous form, state, etc.; abrupt: *a sudden turn.*
> 3. impetuous; rash.

BLACK'S LAW DICTIONARY 1284 (5th ed. 1979):

> Happening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen; unprepared for (citation omitted).

12 In common usage, people use the word "sudden" to describe an event or condition they experience as beginning abruptly. *See e.g.*, Claussen v. Aetna Casualty & Surety Co., 259 Ga. 333, 335, 380 S.E.2d 686, 688 (1989) ("Suddenly, it's spring.").

13 Insureds have apparently argued that the term "sudden" need not have a temporal element. *See, e.g.*, Benedictine Sisters of St. Mary's Hosp. v. St. Paul Fire & Marine Ins. Co., 815 F.2d 1209, 1211 (8th Cir. 1987); United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co., 693 F. Supp. 617, 620-21 (M.D. Tenn. 1988), *aff'd*, 875 F.2d 868 (6th Cir. 1989); Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co. of N.Y., 218 N.J. Super. 516, 535-36, 528 A.2d 76, 86 (App. Div. 1987).

14 *See, e.g.*, C.L. Hauthaway & Sons Corp. v. American Motorists Ins. Co., 712 F. Supp. 265, 268 (D. Mass. 1989); Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 702 F. Supp. 1317, 1326-27 (E.D. Mich. 1988); Fischer & Porter Co. v. Liberty Mut. Ins. Co., 656 F. Supp. 132, 140 (E.D. Pa. 1986); Diamond Shamrock Chems. Co. v. Aetna Casualty & Surety Co., No. C-3939-84, 1988 HAZARDOUS WASTE LIT. REP. 12,045 (N.J. Super. Ct. 1988), *rev'd*, 231 N.J. Super. 1, 554 A.2d 1342 (App. Div. 1989).

events that necessarily end quickly. For example, *Webster's New Twentieth Century Dictionary, Unabridged* illustrates the meaning of sudden with the phrase "sudden emergency."[15] A sudden emergency is one which arises abruptly and unexpectedly. The duration of the emergency is irrelevant to the concept.[16] A "sudden need" begins abruptly but need not end quickly.[17] Similarly, a "sudden attack," "sudden fear," and "sudden resolve" may be of long or short duration.[18] Compare a "sudden recognition" of an old schoolmate that may continue for one's lifetime with a "sudden explosion" lasting less than a minute, and a "sudden heat wave" which could last one day or several weeks.[19] In common usage, a "sudden" event is one which begins abruptly or without previous notice, irrespective of whether the duration of that event is short or long.

B. The Word "Accidental"

Dictionaries typically define the word "accidental" as "arising from or produced by extrinsic, secondary, or additional causes or forces."[20] Other common definitions include "occurring sometimes with unfortunate results by chance alone," "unpredictable," and "happening or ensuing without design, intent, or obvious motivation." Synonyms include "fortuitous," "adventitious," "contin-

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15 See definition provided in WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY, UNABRIDGED, *supra* note11.

16 *Black's Law Dictionary* describes the critical elements of a sudden emergency in its definition of the "sudden emergency doctrine":

> When a person finds himself confronted with a sudden emergency . . . such person has the legal right to do what appears to him at the time he should do . . . to avoid any injury, and if he does so act, he will not be deemed to have been negligent even though it might afterwards be apparent that some other course of action would have been safer. Under sudden emergency doctrine, one placed in position of sudden emergency or peril other than by his own negligence, is not held to same degree of care and prudence as one who has time for thought and reflection.

BLACK'S LAW DICTIONARY 1284 (5th ed. 1979) (citations omitted). The term "sudden" as used in the doctrine of "sudden emergency" necessarily refers to situations that begin abruptly or are perceived abruptly, and are unanticipated, rather than to emergencies that end quickly. In fact, if such situations ended quickly, no rationale would explain the "sudden emergency" doctrine; it is because a sudden emergency appears *not* to be fleeting, and triggers an immediate response, the negligence standard of care is relaxed.

17 *See supra* note 11.

18 *See supra* note 11. Other common examples include "sudden change of heart," "sudden lapse in judgment," and "sudden memory loss."

19 This analysis also applies when "sudden" is used to modify an object rather than an event. For example, a "sudden turn in the road" or "sudden drop-off" in terrain refers to geographic features which have abrupt starting points. A sudden turn need not end quickly or turn back; a sudden drop-off need not immediately rise again. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 2284 (1986): "[T]his ridge forms an important and [sudden] break between the land of abundant ground water . . . and the dry land." (quoting P.E. James).

20 *See, e.g., id.*

gent," "casual," and "incidental."[21]

These definitions indicate that the word "accidental" may be used to describe both unexpected events and unintended, fortuitous, chance events that are highly foreseeable.[22] For example, a person may walk carefully down a paved road carrying a covered pail and trip, accidentally spilling the pail's contents. In this case, the word "accidental" conveys an element of unexpectedness. On the other hand, if the person runs down a gravel path when the sun is in his eyes with a full, uncovered pail, a spill should not be unexpected although it could be described as accidental. The context in which the word is used dictates whether "accidental" simply means fortuitous, or whether it describes an event that is both fortuitous and unexpected.

C. "Sudden and Accidental"

As demonstrated above, the word "sudden" and the word "accidental" may each be used to describe both expected and unexpected events. The words "sudden" and "accidental," then, could be used together to describe an event that begins abruptly and is fortuitous, whether or not the event is expected. As noted above, however, both words are commonly used to describe events that are unexpected, and, as one court noted, "the phrase 'sudden and accidental' should be construed in its entirety, without undue reliance upon discrete definitions."[23] When combined as a phrase in the "sudden and accidental" exception to the pollution exclusion, the words suggest that coverage is provided for, and limited to, releases of pollutants that begin abruptly, are fortuitous, and that arise without warning, or unexpectedly.

D. Clearing Muddy Waters

The linguistic analysis of "sudden and accidental" highlights two misconceptions that have been a source of conflict between insureds and insurers. The first misconception involves the temporal

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21 *Id.* Other dictionary definitions include WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 49 (1986):

> 1. arising from extrinsic causes: incidental, nonessential
> 2. (a) occurring unexpectedly or by chance, (b) happening without intent or through carelessness and often with unfortunate results.

BLACK'S LAW DICTIONARY 15 (5th ed. 1979) (citations omitted):

> Happening by chance, or unexpectedly; taking place not according to usual course of things; casual; fortuitous.

22 *See* Primm v. State Farm Fire & Casualty Co., 426 So. 2d 356, 359-60 (La. Ct. App. 1983), in wbich the court noted that the word "accident" may describe an event which is "unexpected *or* an event happening by chance."

23 Colonie Motors, Inc. v. Hartford Accident & Indem. Co., 145 A.D.2d 180, 182, 538 N.Y.S.2d 630, 632 (App. Div. 1989).

element of "sudden;" the second involves the relationship between the words "sudden" and "gradual."

1. *The Temporal Element of "Sudden" Clarified:* Claussen v. Aetna Casualty & Surety Co.

Many courts have foundered on the misperception that a definition of "sudden" that excludes the concept of brevity contains no temporal element.[24] Some courts have held that "sudden" needs no temporal element.[25] Others have rejected this position as counterintuitive and have concluded that a sudden event must end quickly. Both positions are based on the erroneous assumption that "ending quickly" is the only possible temporal component of "sudden."

In August 1989, the Georgia Supreme Court specifically addressed the temporality of the term "sudden" as used in exclusion "f".[26] In *Claussen v. Aetna Casualty & Surety Co.*, the court construed the meaning of "sudden," determining that its primary definition is "unexpected."[27] The court also acknowledged that "abrupt" is a definition of "sudden" in some dictionaries, and a common use of the word. The court then explained:

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24 *See, e.g.*, United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31, 34 (6th Cir. 1988); C.L. Hauthaway & Sons Corp. v. American Motorists Ins. Co., 712 F. Supp. 265, 268 (D. Mass. 1989); Avondale Indus., Inc. v. Travelers Indem. Co., 697 F. Supp. 1314, 1317 (S.D.N.Y. 1988); United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co., 693 F. Supp. 617, 621 (M.D. Tenn. 1988), *aff'd*, 875 F.2d 868 (6th Cir. 1989); United States Fidelity & Guar. Co. v. Korman Corp., 693 F. Supp. 253, 260-61 (E.D. Pa. 1988); Fischer & Porter Co. v. Liberty Mut. Ins. Co., 656 F. Supp. 132, 140 (E.D. Pa. 1986).

A particularly bold example of this position, frequently cited by insurers, is the federal district court's comment in Claussen v. Aetna Casualty & Surety Co., 676 F. Supp. 1571, 1580 (S.D. Ga. 1987):

> The word sudden was intended by the industry to have its usual temporal meaning, and a reasonable insured with any degree of common sense would assume the word to have that usual meaning. Only in the minds of hypercreative lawyers could the word "sudden" be stripped of its essential temporal attributes. (citations omitted)

On appeal, the Eleventh Circuit certified the interpretation of exclusion "f" to the Georgia Supreme Court, which rejected the position expressed in the district court's opinion. Claussen v. Aetna Casualty & Surety Co., 259 Ga. 333, 380 S.E.2d 686 (1989). The Georgia Supreme Court's rejection of the district court's position may dampen insurers' enthusiasm for this particular quotation.

25 *See, e.g.*, Broadwell Realty Serv. v. Fidelity & Casualty Co. of N.Y., 218 N.J. Super. 516, 530-31, 528 A.2d 76, 83 (App. Div. 1987).

26 *Claussen*, 259 Ga. 333, 380 S.E.2d 686. The plaintiff, Henry Claussen, owned land that the City of Jacksonville, Florida had contracted to use as a landfill. For six years, the city dumped industrial and chemical waste on the land and then returned the land to Claussen. Following the return of the land, the federal Environmental Protection Agency brought a claim against Claussen. Claussen's insurer declined to provide coverage on the ground that the discharge of waste had not been sudden and accidental.

27 *Id.* at 335.

> [O]n reflection one realizes that, even in its popular usage, "sudden" does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death. Even when used to describe the onset of an event, the word has an elastic temporal connotation that varies with expectations: Suddenly, it's spring.[28]

The court held that the commonly understood temporal element of "sudden" is an abrupt or unexpected onset, not brevity.

While the Georgia Supreme Court's reasoning in *Claussen* is certainly not unprecedented,[29] it is perhaps the most explicit and thoughtfully reasoned analysis of the temporal element of the word "sudden" since exclusion "f" was inserted into the standard form CGL policy. *Claussen* may well mark the beginning of an end to the confusion on the temporality issue.

2. *"Sudden" Is Not the Opposite of "Gradual": Eliminating a False Dichotomy*

Insurance companies frequently argue that "sudden" and "gradual" are antonyms, so that a gradual release cannot be sudden.[30] However, "sudden" and "gradual" are not always, or even typically, mutually exclusive adjectives. The word "gradual" means "arranged in grades or degrees," "proceeding by steps or degrees," and "moving, changing, or developing by fine, slight, or often imperceptible degrees."[31] Accordingly, "sudden" and "gradual" are antonyms only when they are used to describe a process or progression, as in the sentence, "Hostility between the countries escalated suddenly and not gradually." In this context, "sudden" describes the rapidity of a process.

However, as discussed above, "sudden" is rarely used to describe a process. It is most commonly used to describe the unanticipated onset of an event or condition, as in a "sudden ambush" or a "sudden turn in the road."[32] Thus, "sudden" and "gradual" can be used together to describe distinct aspects of a single event, as when

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28 *Id.*

29 The Claussen court's analysis was foreshadowed in several pre-1966 "accident" cases in which courts defined accidents as "sudden, unexpected, unintended events" and found incidents of varying duration to be accidents. *See infra* notes 51-52. A federal district court in Massachusetts has also defined the temporal element of "sudden" in terms of an abrupt onset. *See* Fireman's Fund Ins. Co. v. RTE Corp., Nos.85-2842-Y & 83-3882-Y, 1986 HAZARDOUS WASTE LIT. REP. 9,835, at 9,839 (D. Mass. Sept. 5, 1986) (transcript of bench order).

30 *See* C.L. Hauthaway & Sons Corp. v. American Motorists Ins. Co., 712 F. Supp. 265, 268 (D. Mass. 1989).

31 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 985 (1986). "Gradual" comes from the Latin root meaning "step," or "degree."

32 *See supra* Section 1(A).

an event progresses gradually after its sudden onset.[33] For example, a sudden illness may gradually worsen or subside. A sudden fire may gradually spread or gradually abate. A release of pollutants, like a fire, may have an abrupt and unexpected onset and, therefore, be "sudden," and then progress or spread by imperceptible degrees, so that it could also be described as gradual.

Furthermore, it is important to note that exclusion "f" refers to the *release* of pollutants, and not to events preceding or the damage following a release.[34] Thus, an abruptly beginning release caused by the natural, progressive corrosion of an underground tank is a sudden release.[35] Similarly, a sudden release may cause gradual property damage. In *Traveler's Indemnity Co. v. Dingwell*,[36] the court recognized that a sudden release of pollutants may gradually permeate the ground. In short, exclusion "f" refers to a release, not to its cause or the ensuing property damage, and a sudden release may progress gradually.

II

THE FUNCTION OF "SUDDEN AND ACCIDENTAL": BUSINESS AND REGULATORY PERSPECTIVES

A. An Insured's Reasonable Understanding of "Sudden and Accidental" Coverage

Comprehensive general liability policies are designed to cover almost any manner of liability arising in connection with the operation of a business. In purchasing CGL insurance, a business buys security against unknown liabilities, paying in advance for protection that it may never need.[37] Once the insured tenders its premium, it depends on the insurer to provide the agreed-upon protection.[38] If the insurer refuses to defend and indemnify its insured against alleged liability, it may be too late for the insured to obtain other insurance protection, since insurance companies generally insure risks, not liabilities.[39]

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33 *See supra* note 10. Courts that accept the sudden-gradual dichotomy have not acknowledged that they have adopted a secondary rather than primary meaning for "sudden." *See C.L. Hauthaway*, 712 F. Supp. at 268.

34 *See supra* text accompanying note 8 for the text of exclusion "f".

35 Shapiro v. Public Serv. Mut. Ins. Co., 19 Mass. App. Ct. 648, 477 N.E.2d 146, *review denied*, 395 Mass. 1105, 482 N.E.2d 328 (1985); *see also* New Eng. Gas & Elec. Ass'n v. Ocean Accident & Guar. Corp., 330 Mass. 640, 116 N.E.2d 671 (1953) (finding that the undetected deterioration of a turbine over an eleven month period did not prevent its eventual rupture from being characterized as "sudden").

36 414 A.2d 220, 224 (Me. 1980).

37 ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW 627-46 (student ed. 1988).

38 W. David Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1, 3-11 (1975).

39 *See* R. KEETON & A. WIDISS, *supra* note 37, at 592-94.

The CGL form policy generally offered by domestic insurers is a standard form drafted by the Insurance Services Office ("ISO") and its predecessor organizations.[40] ISO is an insurance industry trade association that, among other things, develops standard form insurance policies and secures regulatory approval for their issuance on behalf of its member or "subscriber" companies.[41] The insured, dealing with a broker and not directly with an insurer, typically has no input in drafting the terms of the contract. In some cases, an insured does not even see the contract until after it has paid the premium.[42] Accordingly, where an insurance contract's terms are susceptible to more than one interpretation, courts generally construe policy language in accordance with the reasonable coverage expectations of an insured.[43]

As previously noted, a business purchases CGL coverage largely to protect against unexpected and unknown losses which may threaten its financial survival.[44] An interpretation of "sudden and accidental" that provides protection against abrupt, unexpected pollution events, and excludes from coverage pollution events which the insured expects or intends, is consistent with a reasonable insured's business goals in purchasing CGL insurance.[45]

On the other hand, an insured typically would not expect liability coverage to depend on the *duration* of an occurrence. Insurance policies are classified by the *types* of risks being transferred to the

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40 *See infra* notes 50-57 and accompanying text.

41 Currently, more than 1,400 companies participate in the IS0 trade organization. Virtually every major American insurance company that issues general liability insurance uses or follows basic ISO form policy language.

42 Slawson, *supra* note 38, at 12.

43 *See, e.g.*, Shapiro v. Public Serv. Mut. Ins. Co., 19 Mass. App. Ct. 648, 651, 477 N.E.2d 146, 149, *review denied*, 395 Mass. 1105, 482 N.E.2d 328 (1985); Farm Family Mut. Ins. Co. v. Bagley, 64 A.D.2d 1014, 409 N.Y.S.2d 294 (App. Div. 1978).

The principle of construing ambiguous provisions against an insurer should be distinguished from the doctrine of "reasonable expectations." A term or phrase may be ambiguous because it is indefinitely expressed, has a double meaning, or is doubtful or uncertain. Continental Casualty Co. v. Borthwick, 177 So. 2d 687, 690 (Fla. Dist. Ct. App. 1965). Under the reasonable expectations doctrine, by contrast, a court will construe a policy in accordance with the reasonable expectations of the insured, even if the terms of the policy are not ambiguous. *See* R. KEETON & A. WIDISS, *supra* note 37, at 627-46; Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981).

44 It contravenes public policy to insure against liability for intentional losses. *See, e.g.*, Industrial Sugars, Inc. v. Standard Accident Ins. Co., 338 F.2d 673, 676 (7th Cir. 1964); R. KEETON & A. WIDISS, *supra* note 37, at 518-24.

45 A specific exclusion for expected losses is also consistent with other types of policies. For example, a standard fire insurance policy "general exclusion" excludes damage caused by "[the insured's] neglect to use all reasonable means to save and preserve property at and after a loss, or when property is endangered by a Peril Insured Against." ISO Basic Form DP-1, Ed. 1-77.

insurer, not on the duration of potential accidents.[46] Moreover, an insured would not logically believe that its protection hinged on an accident's duration, because such coverage would provide whimsical protection instead of the business security sought by the CGL purchaser. Just as one would not envision that coverage under a homeowner's policy for damage from a burst pipe would depend on whether the pipe burst when one happened to be home and could quickly shut off the water, a business person with an underground storage tank system would not expect insurance protection to be available only if a tank tightness test happened to have been performed within minutes after a release commenced, or if a tank happened to be nearly empty at the time a leak developed so that the release would end quickly. Furthermore, unexpected, accidental releases which continue undetected for a period of time often give rise to the most catastrophic business liabilities, and thus constitute the events against which an insured most needs and seeks protection.

It is also worth noting that the inclusion of the term "dispersal" among the types of pollution events for which coverage is available under the "sudden and accidental" exception would indicate to an insured that coverage must include events that continue for a period of time. A dispersal is "the process of spreading from one place to another."[47] "Spread" means "to open or expand over a larger area."[48] A dispersal of pollutants requires some period of time during which the pollutants expand over a large area. Accordingly, the inclusion of the term "dispersal" among the list of pollution incidents for which there is "sudden and accidental" coverage would logically lead an insured to believe that quick termination is not required for an event to be sudden and accidental.[49]

B. The Insurers' Reasonable Understanding of "Sudden and Accidental" Coverage

1. *The History of "Sudden and Accidental" as an Insurance Concept*

Beginning in the 1940s, the basic provisions of CGL insurance policies were drafted on an insurance industry-wide basis by two organizations working together. These organizations were the National Bureau of Casualty Underwriters ("NBCU"), consisting of employee-representatives of stock insurance companies, and the

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46 R. KEETON & A. WIDISS, *supra* note 37, at 18-19; *see also* Robert N. Sayler & David M. Zolensky, *Pollution Coverage and The Intent of the CGL Drafters: The Effect of Living Backward, Mealey's Litigation Rep.—Insurance* 4425, 4431 (1987).

47 WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 365 (1988).

48 *Id.* at 1142.

49 *See* Farm Family Mut. Ins. Co. v. Bagley, 64 A.D.2d 1014, 409 N.Y.S.2d 294 (App. Div. 1978) (discussing "dispersal" of pesticide spray onto neigbboring lands).

Mutual Insurance Rating Bureau ("MIRB"), consisting of employee-representatives of mutual insurance companies.

Before 1966, CGL policies typically covered liability "caused by accident." These policies are referred to as "accident" policies. A typical accident policy contained an insuring agreement such as the following:

> [The insurer agrees with the insured] to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to or destruction of property, including loss of use thereof, *caused by accident*.[50]

The standard form "accident" policy did not define "accident." An accident, within the meaning of an "accident" policy, came to be defined by many courts as an "unintended, sudden, unexpected event."[51] This definition did include ongoing events.[52] "Accident" policies excluded risks an insured voluntarily assumed by contract and damage that the insured expected[53] or intentionally incurred.

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50 Moffat v. Metropolitan Casualty Ins. Co. of N.Y., 238 F. Supp. 165, 167 (M.D. Pa. 1964) (emphasis added).

51 *See, e.g.*, Geddes & Smith v. Saint Paul Mercury Indem. Co., 51 Cal. 2d 558, 334 P.2d 881 (1959) (malfunctioning of defective doors which occurred over period of a few days to six months constituted "sudden" accidents); Moore v. Fidelity & Casualty Co. of N.Y., 140 Cal. App. 2d 967, 972, 295 P.2d 154, 158 (App. Ct. 1956) (lint blown from laundromat over time clogged drains in neighbor's gutters, causing water damage to neighbor's premises which constituted "accident," defined by court as "a casualty—something out of the usual course of events and which happens suddenly and unexpectedly and without any design of the person injured"); Taylor v. Imperial Casualty & Indem. Co., 82 S.D. 298, 302, 144 N.W.2d 856, 858 (1966) (unintended escape and seepage of gasoline from underground storage tank constituted accident, defined as "undesigned, sudden, and unexpected event").

52 Anchor Casualty Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949) (when oil blew from well onto surrounding properties over a fifty hour period, damage was covered under accident policy); *Moffat*, 238 F. Supp. 165 (liability resulting from long-term burning of coal mining wastes not excluded from accident policy); Employers Ins. Co. of Ala. v. Rives, 264 Ala. 310, 87 So. 2d 653 (1955) (continuous act not exempt from classification as accident because it extends for long period of time); White v. Smith, 440 S.W.2d 497, 510 (Mo. Ct. App. 1969) ("[t]he accident mentioned in the policy need not be a blow but may be a process," (quoting Travelers v. Humming Bird Coal Co., 371 S.W.2d 35, 38 (Ky. 1963)); McGroarty v. Great Am. Ins. Co., 36 N.Y.2d 358, 329 N.E.2d 172, 368 N.Y.S.2d 485 (1975) (property damage taking place over course of several months constituted an "accident"); Wolk v. Royal Indem. Co., 27 Misc. 2d 478, 210 N.Y.S.2d 677 (App. Term 1961) (harm resulting from construction of golf course may be "accidental"); Lancaster Area Refuse Auth. v. Transamerica Ins. Co., 437 Pa. 493, 263 A.2d 368 (1970) (harm caused by negligent landfill operation could be caused by accident within meaning of insurance policy).

53 The majority of jurisdictions that have addressed the meaning of "expected" in the context of liability insurance have held that the term "expected" means a high degree of certainty or probability. City of Carter Lake v. Aetna Casualty & Surety Co., 604 F.2d 1052 (8th Cir. 1979) (applying Iowa law, court found that damage due to original failure of city's pumps not "expected" even if reasonably foreseeable); Vanguard Ins. Co. v. Cantrell, 18 Ariz. App. 486, 503 P.2d 962 (Ct. App. 1972) (insured robber's warning shot that struck store clerk not an "expected" harm); Farmers Auto. Ins. Ass'n v.

In 1966, the "accident" policy was revised to cover the insured's liability for injuries caused by an "occurrence" rather than by "accident."[54] The text of a typical "occurrence" policy provided:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of (A) bodily injury or (B) property damage . . . caused by an occurrence . . . .

"Occurrence" was defined as:

> an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

The 1966 CGL revision served at least three purposes. First, it explicitly recognized that coverage was provided for all accidents so long as the insured did not expect or intend to cause damage.[55] Second, the 1966 form clarified that covered property damage must be "neither expected nor intended from the standpoint of the insured" since a number of earlier court decisions had held that "accidental" should be construed from the perspective of the injured party.[56] Finally, the phrase "neither expected nor intended" was moved from an exclusion clause in the policy to a coverage provision, which allowed insurers to argue that the insured, not the insurance company, had the burden of showing that it did not intend or expect damage.

By the late 1960s and early 1970s, the public had become increasingly aware that even legal industrial waste disposal practices

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Medina, 29 Ill. App. 3d 224, 226, 329 N.E.2d 430, 432 (1975) (" 'expected' has been judicially construed to mean a high degree of certainty"); Patrons-Oxford Mut. Ins. Co. v. Dodge, 426 A.2d 888, 892 (Me. 1981) (injury not "expected" unless actor "subjectively foresaw [it] as practically certain"); State Farm Fire & Casualty Co. v. Muth, 190 Neb. 248, 252, 207 N.W.2d 364, 366 (1973) (the term "expected" carries a "high degree of certainty"); Poston v. United States Fidelity & Guar. Co., 107 Wis. 2d 215, 320 N.W.2d 9 (Ct. App. 1982) (insured's conviction for splashing gasoline on and burning victim not sufficient to support summary judgment that he "expected or intended" injury).

54 The 1966 occurrence policy form was drafted as a joint project of the NBCU and MIRB.

55 The industry-wide organizations drafting the standard-form CGL policy apparently wished to confirm that coverage would be provided for ongoing events. It was believed that these changes would standardize court coverage decisions and claims handling procedures. *See* Norman Nachman, *The New Policy Provisions for General Liability Insurance*, 18 THE ANNALS 197, 199-200 (1965); Roland J. Wendorff, *The New Standard Comprehensive General Liability Insurance Policy*, 1965-1966 A.B.A. SEC. INS., NEGLIGENCE & COMPENSATION LAW 250.

56 *See, e.g.*, Anchor Casualty Co. v. McCaleb, 178 F.2d 322, 324 (5th Cir. 1949); Maryland Casualty Co. v. Pioneer Seafoods Co., 116 F.2d 38, 40 (9th Cir. 1940); Moore v. Fidelity & Casualty Co. of N.Y., 140 Cal. App. 2d 967, 972, 295 P.2d 154, 158 (App. Ct. 1956); *cf. infra* Section III(D).

could result in serious environmental damage and present a health threat.[57] In 1970, the insurance drafting organizations resurrected the pre-1966 "accident" concept in an effort to eliminate coverage for damages caused by intentional discharges occurring in the ordinary course of business. The drafting organizations began the process of securing regulatory approval for what was to become the standard form CGL policy exclusion "f".

2. *Exclusion "f": The Drafting and Regulatory Approval Process*

In the late 1960s, the NBCU became known as the Insurance Rating Board ("IRB"). The IRB, together with the MIRB, developed the standard form language of exclusion "f".[58] The MIRB and IRB operated through committees, which developed proposed policy language. The members of the committees tended to be composed of executive employees of larger insurance companies. Many small and medium-sized companies not affiliated with a large company also used the standard forms but did not participate in drafting the forms and were largely unaware of the deliberations of the committees responsible for drafting particular policy provisions. However, MIRB and IRB member companies that did not participate in the drafting process periodically received circulars or bulletins from the drafting organizations which informed them of the status of the drafting process or requested input on various proposed provisions.[59]

In addition to drafting exclusion "f" and the other revisions to the 1973 CGL policy form,[60] the MIRB and IRB sought and obtained regulatory approval of the revisions on behalf of their member companies. As part of the regulatory approval process, the IRB and MIRB submitted explanatory memoranda to state insurance

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57 For example, in 1968, Japan's Chisso Corporation was forced to cease two decades of discharges to Minimata Bay, a major fishing area, after the toxic outflows were found responsible for causing a large number of severe deformities among the dense local population. The first personal injury liability decisions were reached in the early 1970s, focusing international attention on the situation. *See* BUS. WK., June 27, 1977, at 38; Wash. Post, Apr. 18, 1987, at A12; Reuters North European Servs., Sept. 6, 1982.

58 *See* Broadwell Realty Serv. v. Fidelity Guar. & Casualty Co. of N.Y., 218 N.J. Super. 516, 532-33, 528 A.2d 76, 84-85 (App. Div. 1987); Sayler & Zolensky, *supra* note 46.

59 In the early 1970s, the IRB and MIRB merged to form the Insurance Services Office ("ISO"), which continues to revise and seek approval for standard policy provisions. The ISO maintains records of the deliberations of its drafting committees, including the views of individual members. The ISO's archives also contain numerous bulletins, transcripts, speeches and other explanatory material compiled in the course of developing policy changes.

60 In 1973, the definition of "occurrence" in the standard form CGL policy was changed from "injurious exposure to conditions" in order to emphasize that coverage was afforded for "continuous or repeated exposure to conditions."

commissions in 1970. The standard explanatory memorandum on exclusion "f" stated in pertinent part:

> 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 as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident. . . .[61]

This explanatory memorandum, ostensibly provided to assist insurance commissioners in understanding the purpose and scope of exclusion "f", was a paradigm of ambiguity. It correctly noted that the definition of "occurrence" already excluded from coverage damages that were expected or intended by the insured. The memorandum then stated that exclusion "f" was meant to clarify the fact that expected or intended pollution-caused injuries were excluded from coverage. This explanation seemed to ignore the fact that exclusion "f" refers to releases of pollutants, and not to the damages or injuries caused by such releases.[62]

The IRB, MIRB and a number of their member companies submitted additional information and explanations in a number of states at the request of the state insurance commissioners. The most substantial record of the insurers' representations was compiled in West Virginia, where public hearings were held to determine whether exclusion "f" was "inconsistent, ambiguous or misleading, or deceptively affect[ed] the risk purported to be assumed in the general coverage of the contract, or if such forms limit[ed] the overall insurance coverage to the extent that such coverage [was] no longer sufficiently broad to be in the public inter-

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61 Insurance Rating Board, Submission to Ins. Comm'r of W. Va. (May 18, 1970); *see also* Insurance Rating Bd., Submission to Kansas Ins. Dep't (May 18, 1970); Mutual Ins. Rating Bureau, Submission to Ins. Dep't of N.Y. (July 29, 1970); Insurance Rating Bd., Submission to Ohio Ins. Dep't (May 8, 1970).

62 Agenda and Minutes of the Meeting of the General Liability Governing Committee of the Insurance Rating Bd. (Mar. 17, 1970). The MIRB memorandum appears to use the words "pollution or contamination" to refer to a release or discharge of pollutants, rather than to the damage caused by the release, although the latter is the more common meaning. If the words "release, dispersal, discharge or escape" had been substituted for the words "pollution or contamination" throughout the explanatory memorandum, it would accurately describe exclusion "f":

> Coverage for releases, dispersals, discharges or escapes is not provided in most cases because damages [resulting from the discharges, dispersal, release or escape] can be said to be expected or intended and are thus excluded by the definition of occurrence. . . . [Exclusion "f"] clarifies this situation so as to avoid any question of intent. Coverage is continued for *releases, dispersals, discharges or escapes* that caused injuries when the *release, dispersal, discharge or escape* results from an accident. (emphasis added)

est."[63] At the West Virginia hearing, the MIRB maintained that exclusion "f" was merely intended to clarify the term "occurrence."[64] Following the hearing, the West Virginia Insurance Commissioner approved exclusion "f" in a written order that explicitly stated that the Insurance Commission had relied on the insurance industry's representations that coverage would continue to be provided for unintended pollution.[65]

The explanatory memorandum and the statements made to insurance commissions suggest that the insurance industry assumed that environmental damage could be foreseen and thus presumed to result from *any* discharge of pollutants. This assumption generated a great deal of confusion in cases where an insured intentionally discharged waste or chemical-containing material into soil or water but with no intention or expectation that its actions would cause environmental damage.

In summary, the intent of the drafters of exclusion "f" is far from obvious. The explanation of the intended scope of the exclusion provided by insurance companies is particularly murky with respect to whether the industry intended exclusion "f" to apply to unintentional releases or simply to unintentional damages. However, one fact emerges clearly from the drafting history of exclusion "f": In 1973, when it was approved, both insurers and regulatory officials focused on intent as the factor that would determine whether coverage would be provided under exclusion "f".[66] No one suggested that exclusion "f" was drafted or approved in order to limit coverage to accidental releases of short duration.[67]

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63 *Pollution and Contamination Exclusion Filings*, Admin. Hearing n.70, W. Va. Ins. Dep't (June 26, 1970) (Notice of Administrative Hearing).

64 Letter from the Mutual Insurance Rating Bureau to the West Virginia Insurance Department (July 30, 1970) [hereinafter "1970 Letter"]; Letter from the Mutual Insurance Rating Board to the West Virginia Insurance Department (July 31, 1970).

65 The West Virginia Insurance Commissioner's order stated in pertinent part:

> (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 definition of the term "occurrence," contained in the respective policies to which said exclusions would be attached;
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> (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. . . .

In re Pollution and Contamination Exclusion Filings, W. Va. Ins. Dep't, Order, at 3 (Aug. 19, 1970) (emphasis added).

66 For a more complete description of exclusion "f" drafting history, see Sayler & Zolensky, *supra* note 46; *see also* United States Fidelity & Guar. Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 535 N.E.2d 1071, 1075-76 (App. Ct. 1989); Broadwell Realty Serv. v. Fidelity & Casualty Co. of N.Y., 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987).

67 Because exclusion "f" was presented as essentially a clarification of existing pol-

C. Regulatory Goals of Environmental Insurance

The public and regulatory objective of general liability insurance is to transfer the risk of certain types of business-related losses that could threaten insureds' viability.[68] In other words, from a public and regulatory point of view, CGL insurance is desigued to promote business stability.

At the same time, the types of losses that insurance covers must be limited so that insurance companies survive and can continue to serve their function of providing economic stability to their insureds. Generally, the limitations on insurance coverage fall into two categories: expected losses and intentional losses. Expected losses frequently are not covered by insurance because they are more like business expenses than true risks; these losses can be predicted and calculated in the course of responsible business planning efforts. Intentional losses also are not true risks because the insured has the ability to avoid them. Furthermore, public policy forbids the transfer of liability for certain intentional losses.[69]

An interpretation of exclusion "f" which provides coverage for unanticipated and unintended releases of pollutants is consistent with well-settled insurance risk transfer principles and the twin goals of encouraging responsible business practices and providing business stability. Thus, it is not surprising that the adoption of exclusion "f" was promoted by the insurance industry, the regulatory community, the public, and was even legislatively mandated by the State of New York.[70]

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icy coverage, rather than as a coverage reduction, no reduction in premium rates was required.

68 R. KEETON & A. WIDISS, *supra* note 37, at 1-14.

69 *Id.* at 8-10, 518-45.

70 A 1971 New York amendment required policies issued to commercial or industrial enterprises to contain the standard form "Contamination or Pollution Exclusion." N.Y. INS. LAW § 46(13)-(14) (McKinney 1972). In Niagara County v. Utica Mut. Ins. Co., 80 A.D.2d 415, 439 N.Y.S.2d 538 (App. Div. 1981), the court reviewed the legislative history of New York's law requiring the inclusion of exclusion "f", noting:

> [T]he addition of subdivisions 13 and 14 to section 46 of the Insurance Law was calculated to buttress New York's strict environmental protection standards. These standards could be undermined if commercial enterprises were able to purchase insurance to protect themselves from liability arising from their pollution of the environment. "For example, a polluting corporation might continue to pollute the environment if it could buy protection from potential liability for only the small cost of an annual insurance premium, whereas, it might stop polluting, if it had to risk bearing itself the full penalty for violating the law."

Niagara County, 80 A.D.2d at 418, 439 N.Y.S.2d at 540 (quoting New York Legis. Ann. 353-54 (1971)); *see also* Allstate Ins. Co. v. Klock Oil Co., 73 A.D.2d 486, 487-88, 426 N.Y.S.2d 603, 604 (1980).

Similarly, the MIRB stated to the West Virginia Insurance Commission that "[i]t is in the public interest that willful pollution of any type be stopped in order to protect the ecological balance." 1970 Letter, *supra* note 64.

Conversely, interpreting exclusion "f" to exclude coverage for unexpected and unintentional releases that do not end quickly or instantaneously would not serve either regulatory or public policy goals.[71] Such insurance would not provide business stability because an insured could not effectively transfer the risk of unknown potential liabilities if coverage were dependent on the chance immediate discovery or brevity of a release. Moreover, as previously noted, the undetected continuing releases are often the most economically destabilizing. It is against these events that the insured needs greatest protection.

Finally, an interpretation of exclusion "f" which excludes coverage for unexpected and unintentional releases that are not short-lived does not serve any social purpose. Coverage would be provided randomly. Furthermore, if coverage is limited to instantaneous events, responsible companies who become liable for environmental incidents they did not expect or intend may be driven into bankruptcy. This would remove responsible businesses from the market and saddle taxpayers with the cleanup costs.[72]

D. Clearing Muddy Waters

Understanding the genesis of the insurance industry's use of the phrase "sudden and accidental" and the history of the drafting and approval of exclusion "f" helps to clarify and place in context three coverage controversies. They are: (1) the relationship between "sudden" and "accidental"; (2) the relationship between exclusion "f" and the definition of "occurrence"; and (3) the relationship between coverage provided by the CGL policy and that provided by environmental impairment liability policies.

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71 The evolution of environmental regulations makes quite clear that some transfer of risk serves the public's best interest. For example, the EPA issued regulations in 1982 requiring treatment, storage, and disposal facilities to carry insurance or some other means of responding to potential liability. 42 U.S.C.A. § 9608 (West 1989). In the 1988 Amendments to the Resource Conservation and Recovery Act, RCRA Subtitle I § 9003(c)(6), 42 U.S.C. § 6991b(c)(6), Congress mandated that owners and operators of underground storage tanks be required to demonstrate the financial ability to undertake corrective action and compensate third parties for inquiries in the event of release of hazardous substances or petroleum. In 1989, the EPA issued financial responsibility requirement regulations governing owners and operators of petroleum underground storage tanks. 40 C.F.R. §§ 280.90-280.112 (1989). The EPA has explicitly recognized that most owners and operators will need to rely on insurance to meet their regulatory obligations. 53 Fed. Reg. 43,325 (Oct. 26, 1988).

72 Some commentators have theorized that the unavailability of coverage may even provide a disincentive for a firm to act in an environmentally responsible fashion. *See, e.g.*, Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, 602 (1983) (authored by Palma J. Strand). ("A corporation will be indifferent between enormous liability and lesser liability if *both* would bankrupt it." (emphasis in original)).

1. *The Relationship Between "Sudden" and "Accidental"*

Insurance companies frequently contend that "sudden" must be defined as "instantaneous" because otherwise "sudden" would be synonymous with or subsumed by the term "accidental."[73] However, this argument fails to acknowledge the history of the use of the word "sudden" in connection with general liability policies. For forty years before the development of exclusion "f", "sudden" was used by courts to define and describe covered "accidents."[74] Accordingly, the insurance industry was well aware that "sudden" could be encompassed by "accidental." Moreover, when exclusion "f" was adopted, there was substantial case law describing events of varying duration as "sudden accidents."[75]

The argument that contract principles require separate and discrete meanings for "sudden" and "accidental" also disregards the fact that "sudden" and "accidental" work together as a phrase. As discussed in Section I, the phrase "sudden and accidental" suggests that a covered release must be "unexpected," a meaning which is not essential to a definition of either the word "accidental" or the word "sudden."[76] The phrase "sudden and accidental" in exclusion "f" is grammatically parallel to the "neither expected nor intended" phrase in the definition of "occurrence," suggesting that the limitation on releases of pollutants in the former parallels the limitation on damages in the latter. Courts considering the definition of "occurrence" have generally construed "neither expected nor intended from the standpoint of the insured" without dissecting the phrase. Rather than analyzing each element of the phrase to ensure that the terms "intended" and "expected" have fully distinct functions, courts have concentrated on determining whether the insured's conduct fell within the overall purpose of the clause.[77] Nothing about

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73 *See, e.g.*, Becker Elec. Mfg. Corp. v. Granite State Ins. Co., No. 86-CV-1294 (N.D.N.Y. June 12, 1989); C.L. Hauthaway & Sons Corp. v. American Motorists Ins. Co., 712 F. Supp. 265 (D. Mass. 1989).

74 *See supra* notes 50-57 and accompanying text. Boiler and machinery insurance policies also explicitly cover accidents defined as "sudden and accidental" breaking of machinery. Courts have recognized that boiler and machinery coverage depends on the unexpectedness of the breakdown, not how long it took. *See, e.g.*, New Eng. Gas & Elec. Ass'n v. Ocean Accident & Guar. Corp., 330 Mass. 640, 116 N.E.2d 671 (1953).

75 *See supra* note 52 and accompanying text.

76 *See supra* Section I.

77 Several courts have found no meaningful difference between the terms "expected" and "intended" in the definition of occurrence. *See, e.g.*, Grange Mut. Cas. Co. v. Thomas, 301 So. 2d 158, 159 (Fla. Dist. Ct. App. 1974); Patrons-Oxford Mut. Ins. Co. v. Dodge, 426 A.2d 888, 891 (Me. 1981); Hanover Ins. Co. v. Newcomer, 585 S.W.2d 285, 288 (Mo. Ct. App. 1979); State v. Glens Falls Ins. Co., 137 Vt. 313, 317, 404 A.2d 101 (1979); Poston v. United States Fidelity & Guar. Co., 107 Wis. 2d 215, 221, 320 N.W.2d 9, 12 (Wis. Ct. App. 1982); *see also* Annot., *Construction and Application of Provision*

exclusion "f" warrants a different approach.[78]

2. *The Relationship Between Exclusion "f" and "Occurrence"*

As noted above, exclusion "f" focuses on whether a *release* of pollutants is unexpected and unintended, whereas the definition of "occurrence" focuses on whether property *damage* is unexpected and unintended.[79] By limiting coverage to sudden and accidental releases, the insurance industry eliminated coverage for intentional releases of pollutants that were not intended to cause harm. Examples of "occurrences" that would be excluded from coverage by exclusion "f" include discharges of partially treated chemicals into waterways, underground injection wells used by insureds for waste disposal in accordance with applicable laws, and unsecured land disposal. When defined to require an abruptly beginning, unexpected, and unintended release, the "sudden and accidental" exception to exclusion "f" eliminates intentional or expected releases from insurance coverage, whether or not the insured expects bodily injury or property damage to result. This constitutes a significant limitation on the scope of coverage for pollution occurrences.

3. *Sudden and "Non-Sudden" Insurance*

Insurance companies have argued that "sudden and accidental" coverage must be limited to instantaneous events because ongoing events can be covered by the "non-sudden" insurance offered in an environmental impairment liability ("EIL") policy. At the time that the "sudden and accidental" language was drafted, however, the EIL policy had not yet been developed and the concept of a "non-sudden" release did not exist. In fact, there was no such word as "non-sudden"[80] until the insurance industry coined the term in 1974 when EIL insurance was introduced.[81] EIL coverage did not become generally available until 1982, and even then such policies

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of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured, 31 A.L.R.4th 957 § 4[a].

78 Indeed, the pollution exclusion is full of words that have supportive, overlapping meanings. *See* "discharge, dispersal, release, or escape"; "smoke, vapors, . . . fumes, . . . or gases"; and "irritants, contaminants, or pollutants" in text accompanying note 8, *supra*.

79 *See supra* notes 50-66 and accompanying text; *see also* Claussen v. Aetna Casualty & Surety Co., 259 Ga. 333, 380 S.E.2d 686 (1989) (holding that the pollution exclusion clause of a comprehensive general liability policy did not preclude coverage for contamination caused by discharge of pollutants over extended period of time).

80 None of the dictionaries cited *supra* note 11 list "non-sudden" as a word.

81 The claims-made EIL form was introduced to insurance commissions in 1982 as a type of policy that would enable insurers to charge premiums that were in line with their then current estimated environmental losses.

did not define "non-sudden."[82]

The EIL policy is designed specifically to transfer the risk of losses relating to pollution, but the scope of coverage available under the EIL policy is much more limited than that provided by a CGL policy. The EIL is a "claims-made" policy which provides insurance only for third party claims brought against the insured during the policy period.[83] In contrast, the CGL occurrence-based policy protects the insured against liability for bodily injury or property damage occurring during the policy period regardless of when claims are brought.

In 1980, shortly after the development of the EIL policy, and concurrent with its becoming widely available, ISO proposed that the sudden and accidental exception to exclusion "f" be removed and exclusion "f" reworded so as to exclude all pollution-related liability. Insurance commissioners were informed that companies seeking pollution liability coverage would be offered a companion EIL policy that covered both sudden and non-sudden releases.[84] Neither the policy nor ISO defined "sudden" or "non-sudden."

Thus, the EIL policy was designed to provide insurance protection for environmental losses and to obviate the need for insurance companies to provide coverage under future CGL policies. Additionally, in some instances EIL policies relieved the loss potential of previously issued CGL policies by providing overlapping coverage for claims brought against the insured during an EIL period for property damage that had occurred during a previous CGL period. Perhaps the insurance industry did not intend the EIL policy to revise the scope of protection given in previously issued CGL policies. However, it quickly became insurance industry practice to refer to ongoing releases as gradual and "non-sudden," implying that sudden losses could not be ongoing.[85]

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82 In 1976, Congress enacted RCRA, 42 U.S.C. §§ 6901-6991 which empowered EPA to issue regulations requiring "proof of financial responsibility" as a condition of granting permits to land disposal facilities. After extensive consultation with the insurance industry, EPA issued regulations requiring proof of coverage for sudden and non-sudden releases from owners and operators of landfills and surface impoundments. 40 C.F.R. § 264.147 (1988).

83 *See* standard form EIL Policy, ISO Form GL 00 29 (Ed. Jan. 1983) (text of earlier version of policy quoted *supra* text accompanying note 8).

84 *See* ISO Circular CML-81-142 (August 17, 1981).

85 By 1988, the vast majority of insurance companies that had been writing EIL coverage had either ceased doing so or were writing coverage in only a few states. As of July 1989, only seven companies continued to write such coverage. JEFFREY L. LEITER, UNDERGROUND STORAGE TANKS (1988 & Supp. 1989). The lack of available environmental impairment coverage prompted the EPA to postpone the effective date of its 1988 regulatory requirement that underground storage tank owners and operators demonstrate their financial ability to sustain a one million dollar environmental loss, as most small and medium sized companies or dealers depend on insurance to provide such

In summary, the development of the EIL policy and the coining of the word "non-sudden" were part of an insurance industry effort to develop a policy that would provide environmental protection on a more confined and calculable basis than the prospective coverage offered under the occurrence-based CGL policies. The EIL policy legitimately serves two purposes: First, it may assume some of the burden from the CGL policy to cover an entire loss where overlapping coverage exists; second, it provides the sole protection available for property damage occurring after 1985, when the absolute pollution exclusion was inserted into standard form CGL policies. Clearly, the insurance industry has the right to develop new policies and, with regulatory approval, to revise policy forms that are not profitable. However, the language in EIL policies developed by the insurance industry drafting organization in the 1980s should not be used to re-interpret the "sudden and accidental" exception to exclusion "f" which was written, approved and, in many cases, sold almost a decade before.

III

INTERPRETATIONS OF "SUDDEN AND ACCIDENTAL": THE JUDICIAL HISTORY OF EXCLUSION "F"

In the decade following the introduction of exclusion "f" into the standard form CGL policy, courts unanimously held that unexpected, unintended, abruptly beginning releases were "sudden and accidental" within the meaning of exclusion "f". The reasoning that supported the early decisions was not always well articulated, however, and, beginning in 1982, a few courts began to merge the "sudden and accidental" limitation on releases in exclusion "f" with the "neither expected nor intended" limitation on damage found in the definition of "occurrence." The trend culminated in several decisions which held that exclusion "f" simply restated the damage limitation contained in the definition of "occurrence."

This expansive reading was followed by a judicial backlash beginning in late 1983 in which a number of courts held that the "sudden and accidental" exception to exclusion "f" restricted coverage to instantaneous events. As the law grew more uncertain, a few courts sought an "objective" meaning of "sudden" by resorting to a "point-of-view" analysis that had been widely rejected a century ago. This Section summarizes the critical exclusion "f" decisions from 1975 to the present to provide an understanding of the evolu-

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protection. Many states have been forced to create their own funds, supported by gasoline taxes, to provide an alternative where insurance remains unavailable. *Id.* § 700, 65-71.

tion of insurers' and insureds' positions, and to suggest a coherent path for future interpretation.

A. The *Lansco* Line of Cases: "Sudden and Accidental" Means "Unexpected and Unintended"

In 1975, *Lansco, Inc. v. Department of Environmental Protection*[86] first addressed the applicability of exclusion "f". Lansco sued its insurers in connection with its liability for the cleanup of an oil spill caused by vandals who opened an above-ground oil storage tank valve, allowing 14,000 gallons of oil to flow onto Lansco's property and into the Hackensack River. Lansco's comprehensive general liability insurer denied coverage, claiming that "the occurrence was neither sudden nor accidental within the meaning of the exclusion ["f"]."[87] In interpreting exclusion "f", the court noted that the dictionary defines "sudden" as "happening without previous notice or on very brief notice; unforeseen; unexpected; unprepared for," and "accidental" as "happening unexpectedly or by chance; taking place not according to usual course."[88] The court found that Lansco did not expect or intend the release, and thus found it to be sudden and accidental.

The *Lansco* court's interpretation of exclusion "f" focused on whether an event which was not accidental from the perspective of the vandals could be covered as "sudden and accidental."[89] Because exclusion "f" does not address the point of view issue, the court examined the definition of "occurrence" which, like exclusion "f", uses the "accident" concept. The definition of "occurrence" explicitly refers to the insured's point of view, and the court therefore applied the same perspective to exclusion "f". Since the release was "sudden and accidental" from Lansco's perspective, coverage was afforded.

It is worth noting that the *Lansco* court did not equate the definition of "occurrence" with exclusion "f". Indeed, the court's conclusion that the oil spill was not expected by Lansco indicates that the court focused on whether the *release* was unexpected and unintended by Lansco, and not simply on whether the ensuing damage met the definition of "occurrence."[90]

Two years later, in *Aronson Associates v. Pennsylvania Mutual Na-*

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86 138 N.J. Super. 275, 350 A.2d 520 (Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977).

87 *Id.* at 281, 350 A.2d at 523.

88 *Id.* at 282, 350 A.2d at 524.

89 *Id.*, 350 A.2d at 524.

90 *Id.*, 350 A.2d at 524.

tional Casualty Insurance Co.,[91] a Pennsylvania court addressed exclusion "f" in the context of an insured's liability for the eighteen-day seepage of fuel from an underground pipe that had cracked during unusually cold weather. The court defined "accident" as an "occurrence . . . which proceeds from an unknown cause or which is the unusual effect of a known cause and hence unexpected and unforeseen."[92] While noting that the release continued undetected for a period of time, the court concluded that the cracking of the underground pipe was a sudden event within the ordinary meaning of the term and constituted an accident.[93] The court clearly focused on the "sudden and accidental" nature of the release, and not simply on the resulting damage.

In 1978, in *Farm Family Mutual Insurance Co. v. Bagley*,[94] a New York appellate court interpreted the scope of exclusion "f" in the context of an insured's liability for damage caused by a pesticide product that the insured had intentionally sprayed on his crops but which had accidentally dispersed onto neighboring vineyards. As in *Lansco* and *Aronson*, the court defined "sudden" as unexpected and "accidental" as unusual or unintentional. The court distinguished the insured's intentional discharge onto his own land from the unexpected, unusual, and unforeseen dispersal of the pesticide by high winds onto the neighbor's land. Although the initial discharge of pesticides had been intentional, the insurer's motion for summary judgment was denied because the dispersal onto neighboring lands could have been sudden and accidental.[95]

Five additional cases addressed the issue in 1980 and 1981: *Allstate Insurance Co. v. Klock Oil Co.*,[96] *Travelers Indemnity Co. v. Dingwell*,[97]

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91 99 Dauph. 446, 14 Pa. D. & C.3d 1 (Ct. C.P. 1977), *aff'd*, 272 Pa. Super. 606, 422 A.2d 689 (Super. Ct. 1979).

92 *Id.* at 451, 14 Pa. D. & C.3d at 8 (quoting Morelli v. Aetna Casualty & Surety Co., 31 Pa. D. & C.2d 424, 426 (1963)).

93 *Id.*, 14 Pa. D. & C.3d at 8.

94 64 A.D.2d 214, 409 N.Y.S.2d 294 (App. Div. 1978).

95 The court noted that the insured did not intend to disperse pesticides so as to cause damage to the neighbor's land. *Id.*, 409 N.Y.S.2d at 296.

96 73 A.D.2d 486, 426 N.Y.S.2d 603 (App. Div. 1980). The insured was sued by adjacent landowners for gasoline contamination alleged to be emanating from its underground storage tank. Allstate disclaimed coverage on the ground that the alleged gasoline release was not "sudden and accidental." The court noted that exclusion "f" reflected New York's public policy of encouraging a cleaner environment by eliminating the opportunity for industry to insure against pollution-based liability. *Id.* at 487-88, 426 N.Y.S.2d at 604. Additionally, the court found that an allegation of negligent installation or maintenance of an underground storage tank would not preclude coverage where the escape of gasoline was neither expected nor intended. The court explicitly noted that a release could be sudden and accidental although undetected for a substantial period of time. *Id.* at 488, 426 N.Y.S.2d at 605.

97 414 A.2d 220 (Me. 1980). The insured was sued in a declaratory judgment action by three of its CGL insurers in connection with allegations by local residents that

Evans v. Aetna Casualty & Surety Co.,[98] *Barmet of Indiana, Inc. v. Security Insurance Group*,[99] and *Niagara County v. Utica Mutual Insurance Co.*[100] With the exception of *Niagara County*, each case's analysis of exclusion "f" centered on whether there was an unintended and unanticipated release.

In *Niagara County*, the court noted that state law required the inclusion of exclusion "f" in all commercial and industrial liability policies, and examined the legislative purpose underlying the rule. The court concluded that exclusion "f" was designed to exclude coverage only for "actual polluters."[101] As a practical matter, the reasoning of *Niagara County* is generally consistent with that of the other cases because "actual polluters" are insureds who intentionally release pollutants. Insureds who do not expect or intend to release pollutants would be covered by the "sudden and accidental" exception under either the *Lansco* or *Niagara County* standards.

Dingwell's reckless storage or disposal of hazardous substances had contaminated their wells.

The court found that the underlying complaint obligated Dingwell's insurers to defend because "[t]he class action plaintiffs, at this point, have no way of knowing how the toxic wastes entered the ground. There may have been either intentional dumping or burial or unintentional spills, leaks, or other accidents." *Id.* at 224-25. Although the court noted that "sudden and accidental" was not necessarily synonymous with "unexpected and unintended," it did not articulate any distinction. The court emphasized that a sudden release could result in gradual permeation of the ground and water table, stating that exclusion "f" limits coverage to "sudden and accidental" releases, but does not require that all of the damage resulting from the release occur instantaneously. *Id.*

98 107 Misc. 2d 710, 435 N.Y.S.2d 933 (Sup. Ct. 1981). The plaintiff sued its insurer after being held strictly liable for a release of gasoline from its tank farm. The release occurred after vandals broke a lock and opened a valve on a storage tank, releasing more than 18,000 gallons into the ground. Without much explanation, the court held that the release was sudden and accidental, relying on *Klock Oil*, 73 A.D.2d at 488, 426 N.Y.S.2d at 604. *Evans*, 107 Misc. 2d at 113, 435 N.Y.S.2d at 936.

99 425 N.E.2d 201 (Ind. Ct. App. 1981). *Barmet* was the first case to hold that an insured's release did not fall within the "sudden and accidental" exception to exclusion "f". Barmet was sued for a highway fatality caused by a gas cloud which had escaped from Barmet's plant and settled over the road, obscuring visibility. The court noted that, although the malfunctioning of Barmet's pollution control system and the escape of the gas may not have been intended, it occurred on a regular and frequent basis and could not be considered unexpected. *Id.* at 203.

100 80 A.D.2d 415, 439 N.Y.S.2d 538 (App. Div. 1981), *appeal dismissed*, 54 N.Y.2d 608, 427 N.E.2d 1191, 443 N.Y.S.2d 1030 (1981). *Niagara County* was an action brought in connection with the Love Canal litigation by the municipality that had purchased land on which Hooker Chemical Company had dumped its waste. The court found that exclusion "f" did not bar coverage for the municipality because the municipality had not caused the pollution and the exclusion was intended to discourage "active polluters."

101 *Id.* at 418, 439 N.Y.S.2d at 540.

B. The *Jackson Township* Gloss: Equating "Sudden and Accidental" Releases with "Unexpected and Unintended" Damages

In 1982, in *Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co.*,[102] the New Jersey Superior Court went beyond previous case law and found that exclusion "f" was simply a restatement of the definition of "occurrence" and, therefore, any event which resulted in unexpected and unintended *damages* would be covered.[103] The court found that the disposal of waste at the township's landfill, from which chemicals escaped into the ground, was sudden and accidental because the ensuing damages were unexpected and unintended. The court relied on a comment by insurance scholar Rowland Long written the year exclusion "f" was introduced,[104] and interpreted the *Klock*, *Bagley*, *Niagara County*, and *Barmet* decisions to support the proposition that exclusion "f" would bar coverage only if the damages resulting from an event were expected or intended.[105]

Although the *Jackson Township* court's interpretation of exclusion "f" as a mere clarification of the definition of "occurrence" comports with the explanation of exclusion "f" first offered by the insurance industry, it is not the most logical reading of the policy language. The court could have reached the same result by following *Lansco* and determining that there had been a sudden and accidental (*i.e.*, unexpected and unintended) release or dispersal of pollutants from the landfill into the surrounding environment.

In the two years following *Jackson Township*, several courts followed its example, holding that exclusion "f" precluded coverage only where pollution damages (as opposed to releases) were intended or expected by the insured.[106] Other courts continued to follow the rationale of *Lansco*, basing coverage decisions on whether the insured expected or intended the alleged discharge.[107]

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102 186 N.J. Super. 156, 451 A.2d 990 (Law Div. 1982).

103 *Id.* at 164, 451 A.2d at 994.

104 In 3 ROWLAND LONG, LAW OF LIABILITY INSURANCE APP. 58 (1973) Long wrote: "Exclusion (f) is new. It eliminates coverage for damages arising out of pollution or contamination, where such damages appear to be expected or intended on the part of the insured and hence are excluded by the definition of occurrence."

105 *Jackson Township*, 186 N.J. Super. at 160-66, 451 A.2d at 992-95.

106 *See* Pepper Indus., Inc. v. Home Ins. Co., 67 Cal. App. 3d 1012, 134 Cal. Rptr. 904 (1977); United States Aviex Co. v. Travelers Ins. Co., 125 Mich. App. 579, 336 N.W.2d 838 (Ct. App. 1983).

107 *See, e.g.*, Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984); American States Ins. Co. v. Maryland Casualty Co., 587 F. Supp. 1549 (E.D. Mich. 1984); CPS Chem. Co. v. Continental Ins. Co., 199 N.J. Super. 558, 489 A.2d 1265 (Law Div. 1984); Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co., 17 Ohio App. 3d 127, 477 N.E.2d 1227 (Ct. App. 1984).

Commentators believed that *Jackson Township* sounded a death knell for exclusion "f".[108] However, the expansive reading of coverage afforded by that opinion and its strained characterization of preceding decisions instead prompted a backlash. Courts rejecting the proposition that exclusion "f" simply repeated the limitations already imposed by the term "occurrence" now began to rule that exclusion "f" was far more restrictive than any court, commentator, or the insurance industry itself had suggested when exclusion "f" was introduced into the standard policy.

C. The *Peerless* Backlash: Constricting the Meaning of "Sudden and Accidental"

In 1985, with courts already divided between those that construed exclusion "f" to preclude coverage for all expected or intended releases and those that interpreted exclusion "f" to be no more limiting than the definition of "occurrence," a new fault line appeared in the case law. In *Techalloy Co. v. Reliance Insurance Co.*,[109] a Pennsylvania court suggested that duration was relevant to whether a release of pollutants was sudden and accidental.

When chemicals used by Techalloy were discovered in local wells, residents sued the company, alleging that it recklessly dumped or stored its chemicals. Techalloy's insurer, Reliance, denied coverage on the ground that the suit did not allege a sudden and accidental discharge, and refused to defend Techalloy. Techalloy successfully defended itself against the local residents, and then sued Reliance to recover its defense costs.[110]

In granting Reliance's motion for summary judgment, the court concluded that:

> [a]t best, Techalloy could prove that the discharge was accidental. That alone, however, would not substantiate [its] position since the language of the policy unambiguously states that there will be no coverage for toxic discharge into the environment unless that discharge is both sudden *and* accidental. . . . [T]he allegations were directly the opposite, identifying the source of the problem as contamination which occurred on a "regular or sporadic basis from time to time during the past 25 years."[111]

Although the court's conclusion that releases occurring over several years could not have been sudden might have rested on a belief that

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108 *See, e.g.*, Michael Rodburg & Robert Chester, *Beyond The Pollution Exclusion: Emerging Parameters of Insurance Coverage for Superfund Liability*, 10 CHEM. WASTE LIT. REP. 30, 32 (1985).

109 338 Pa. Super. 1, 487 A.2d 820 (Super. Ct. 1984).

110 *Id.* at 5, 487 A.2d at 822-23.

111 *Id.* at 13, 487 A.2d at 826-27 (emphasis in original).

the ongoing releases were anticipated by Techalloy, the factual record before the court suggests that the court interpreted "sudden" to require an event of short duration.

The insured's failure to present the existing precedent pertaining to exclusion "f" may partly account for the court's divergence from a more straightforward analysis in *Techalloy*. The court noted that Techalloy had addressed the pollution exclusion only by citing a footnote in a non-environmental pollution case involving exposure by the insured's employee to toxic substances in the course of his employment.[112] The court further noted that Techalloy had not offered any interpretation of "sudden and accidental" which would render it ambiguous and capable of interpretation in favor of the insured.[113]

No reported decision followed the *Techalloy* decision in 1985.[114] In 1986, however, the Supreme Court of North Carolina held that exclusion "f" barred coverage for events that were not instantaneous, based on a rationale that would become one of the insurance companies' major exclusion "f" arguments through the end of the 1980s. In *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*,[115] the insured, a waste hauler, was alleged to be liable for damage that occurred after wastes it had transported to a landfill escaped into the environment. The court recoguized that the "occurrence" on which the coverage dispute focused was not the routine dumping but the unintended, unexpected leaching of contaminants from the landfill into the groundwater.[116] The court also stated that an "occurrence" could be either an unexpected and unintended event *or* an intentional event which resulted in unexpected and unintended damages.[117] However, the court then contradicted

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112 *Id.* at 15, 487 A.2d at 826. *Techalloy* cited C.H. Heist Caribe Corp. v. American Home Assurance Co., 640 F.2d 479 (3d Cir. 1981) (court unable to determine from the complaint whether an alleged discharge was accidental, and therefore refused to grant the insurers' motion for summary judgment).

113 *Techalloy*, 338 Pa. Super. at 15, 487 A.2d at 827.

114 The decisions in Payne v. United States Fidelity & Guar. Co., 625 F. Supp. 1189, (S.D. Fla. 1985), and United States Fidelity & Guar. Co. v. Armstrong, 479 So. 2d 1164 (Ala. 1985) followed the established construction that coverage would be afforded for unexpected and unintended releases or discharges.

115 315 N.C. 688, 340 S.E.2d 374 (1986).

116 *Id.* at 696, 340 S.E.2d at 380.

117 *Id.* at 695, 340 S.E.2d at 379. For example, if a person with homeowner's insurance intentionally throws a baseball and breaks a window, the court will look to whether the insured intended to break the window in determining coverage. If that insured lights his curtains on fire and his house burns down, however, the court will assume from the nature of the act that damage was expected. *Compare* Quincy Mut. Fire Ins. Co. v. Abernathy, 391 Mass. 81, 469 N.E.2d 797 (1984) (although policyholder intended to throw projectile, coverage is not precluded when resulting damage to car passenger was unintended) *with* Newton v. Krasnigor, 404 Mass. 682, 687-88, 536 N.E.2d 1079, 1082 (1989) (deliberate setting of fire by insured with intent to cause some damage, but not

its statement that an intentional event which resulted in unexpected damages could be an "occurrence," and instead asserted that "occurrence relates to . . . whether or not [an event] was intentional or expected."[118] This inconsistency led the court to conclude that, to avoid redundancy, a "sudden and accidental" release must be instantaneous.[119] The court's misconstruction of "occurrence," and its resulting conclusion that "sudden and accidental" means instantaneous, provided a legal foothold for the insurers' argument that sudden events must end quickly.

D. Stirring Muddy Waters: The Reemergence of the "Point-of-View" Debate

Following *Peerless*, courts have completely broken ranks. From 1986 on, a number of courts (often upon the invitation of insureds or insurers) have incorrectly cited and mischaracterized the holdings and reasonings of the over one hundred decisions that have interpreted exclusion "f". Insureds and insurers have selected freely from the array of decisions to find support for their chosen positions, often driving courts to seek shelter in what they perceive to be a "majority view" or "recent trend." Recently, some insurers have taken advantage of the confused state of the case law to reopen the argument that coverage should be based upon the knowledge and conduct of persons not related to the insured.[120]

As previously noted, under CERCLA and most state environmental liability statutes, an insured can be held liable for environmental damage that occurs at a location remote from the insured's property or which results from activities or conditions beyond the insured's control or knowledge.[121] An insured may be held liable under CERCLA for damage to a location to which the insured did not even know its waste had been taken.[122] In cases such as these, some insurers have argued that if *anyone* expected or intended to release the pollutants for which the insured is seeking liability protection, including vandals or other persons over whom the insured has no control, exclusion "f" bars coverage.[123]

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necessarily the specific damage that actually resulted, bars coverage under the occurrence definition).

118 *Peerless Ins. Co.*, 315 N.C. at 699, 340 S.E.2d at 382.

119 *Id.*, 340 S.E.2d at 382.

120 See *supra* notes 89-90 and accompanying text for a discussion of *Lansco*.

121 *See supra* notes 1-4 and accompanying text.

122 *See, e.g.*, Polaroid Corp. v. Travelers Indem. Co., No. 88-5207 (Mass. Super. Ct., summary judgment motion filed Mar. 24, 1989) (insured allegedly liable for damage to environment in towns to which its waste was illegally shipped without insured's consent and contrary to disposal receipts given to insured by disposer).

123 *See* United States Fidelity & Guar. Co. v. Korman Corp., 693 F. Supp. 253 (E.D. Pa. 1988); Centennial Ins. Co. v. Lumbermens Mut. Casualty Co., 677 F. Supp. 342

In *Powers Chemco, Inc. v. Federal Insurance Co.*,[124] the insured discovered hazardous materials that had been buried on its land years earlier by a former landowner.[125] Powers Chemco thereafter entered a consent decree with the New York State Department of Environmental Conservation and agreed to clean up the property. Powers Chemco's insurer took the position that the discharges were not sudden and accidental because the former owner had intended to bury the waste on the property. The Court of Appeals of New York agreed, upholding the Appellate Division opinion which stated: "The relevant factor is not whether the policyholders anticipated or intended the resultant injury or damage, but whether the toxic material was discharged into the environment unexpectedly and unintentionally or knowingly and intentionally."[126]

Holding that an insured's protection could be eliminated by the intentional activities of an unrelated third party runs contrary to eighty years of insurance case law.[127] As early as 1891, courts rejected arguments that policies for injuries caused by "accident" or "accidental means" do not cover damage caused by unrelated third parties' intentional actions. For example, in *Ripley v. Railroad Co.*,[128] the court rejected an insurer's claim that no "accident" had occurred when the insured was intentionally attacked and killed by highwaymen. The court noted:

> Perhaps, in a strict sense, any event which is brought about by design of any person is not an accident, because that which has accomplished the intention was not strictly an accident. Yet I am persuaded this contract should not be interpreted so as thus to limit its meaning; for the event took place unexpectedly, and without design on [the insured's] part. It was to him a casualty, and in the more popular and common acceptation, [an] "accident."[129]

(E.D. Pa. 1987); and Powers Chemco, Inc. v. Federal Ins. Co., 144 A.D.2d 445, 533 N.Y.S.2d 1010 (App. Div. 1988).

124 144 A.D.2d 445, 533 N.Y.S.2d 1010 (App. Div. 1988), *aff'd*, 74 N.Y.2d 910, 548 N.E.2d 1301, 549 N.Y.S.2d 650 (1989).

125 144 A.D.2d at 445, 533 N.Y.S.2d at 1010.

126 144 A.D.2d at 446, 533 N.Y.S.2d at 1101 (quoting Technicon Elec. Corp. v. American Home Assurance Co., 141 A.D.2d 124, 144, 533 N.Y.S.2d 91, 103-04 (App. Div. 1988)).

127 Although the *Powers Chemco* decision appears to severely limit coverage where a party other than the insured is aware of activities leading to a pollution event, the breadth of the *Powers Chemco* decision is uncertain. The U.S. Court of Appeals for the Second Circuit, in Avondale Indus. v. Travelers Indem. Co., 887 F.2d 1200 (2d Cir. 1989), *reh'g denied*, 894 F.2d 498 (2d Cir. 1990), held that an insured that sent its waste to a Superfund site would not be denied coverage under exclusion "f". The court stated that it did not believe that New York's highest court would bar coverage to insureds who had disposed of their waste lawfully. *See also* Annot., 49 A.L.R.3d 673 (citing cases).

128 (W.D.. Mich. 1870), *reprinted in* 2 Bigelow, *Reports of the Life & Accident Insurance Cases*, 738 (1872).

129 *Id.*; *see also* Richards v. Travelers Ins. Co., 89 Cal. 170, 26 P. 762 (1891) (rejecting

Nothing in the history of the CGL policy indicates that the insurance industry intended to make a dramatic break with traditional insurance principles when exclusion "f" was adopted. In the pre-1966 "accident" policies, some courts had found the term "accident" to be ambiguous and construed the term from the point of view of the victim or third-party claimant,[130] but no courts suggested interpreting the event from an unrelated third party's perspective where an insured was alleged to be strictly liable for a third party's misconduct. The CGL policy language was revised by the insurance industry in 1966 to establish that accidents were to be construed from the insured's point of view. In proposing exclusion "f", the insurance industry's drafting organization stated that the exclusion clarified the scope of coverage provided in the former version of the policy.[131]

Moreover, the revised policy itself does not suggest that exclusion "f" should be construed from a point of view different from that applied to its other provisions. The definition of "occurrence" contained in the standard form CGL policy expressly states that damage resulting from an "accident" is to be viewed from the insured's standpoint.[132] Exclusion "f" repeats the word "accident" in its adjectival form. There is no indication that exclusion "f" or any part of exclusion "f" should be interpreted from a different perspective. The holding in *Powers Chemco* contravenes long-established principles of insurance construction, and contradicts the single explicit reference to point of view in the CGL policy. Not surprisingly, the vast majority of courts have rejected such an interpretation.

CONCLUSION

Insurance companies, businesses, and courts have become embroiled in lengthy, complex, and exceedingly expensive battles over the meaning of the "sudden and accidental" exception to the standard form CGL policy's exclusion "f", utilizing resources that could be spent responding to environmental damage. Despite the apparent simplicity of the phrase "sudden and accidental" and the words' frequent use in every day conversation, courts have encountered dif-

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insurer's argument that estate of deceased not entitled to recover under policy covering injuries caused by accidental means where insured had been intentionally struck and pushed off elevated sidewalk by assailant).

130 *See supra* note 56.

131 *See supra* notes 50-57 and accompanying text.

132 *See* Anchor Casualty Co. v. McCaleb, 178 F.2d 322, 324 (5th Cir. 1949); *compare* Ashland Oil, Inc. v. Miller Oil Purchasing Co., 678 F.2d 1293, 1320 (5th Cir. 1982) (intentional discharge by chemical waste disposal company constituted an occurrence where policy did not indicate point of view and resulting damage was unforeseen and unexpected by the damaged party).

ficulty articulating and applying the common meaning of "sudden and accidental" in the insurance context.

Claussen v. Aetna Casualty & Surety Co. represents an important step in moving toward a common sense judicial construction of the "sudden and accidental" exception to the pollution exclusion. *Claussen*'s articulation of the temporality associated with "sudden" as an event's abrupt or unexpected onset may guide other courts toward an understanding of "sudden and accidental" which coincides with the goals and purposes of comprehensive general liability protection policies issued between 1973 and 1985.

The limited pollution exclusion was developed, approved, and included in the comprehensive general liability policy to limit pollution related coverage of property damage resulting from discharges, dispersals, releases and escapes of pollutants that insureds did not anticipate or intend. Post-claim underwriting cannot alter the environmental problems we face. The challenge of businesses, insurance companies, courts, public agencies, and society is to develop responsible, realistic, forward-thinking environmental responses to ensure a safe future without bankrupting valuable contributors to society.