

1993

LaSal Oil Company, Inc. v. Chicago Insurance Company (Interstate Insurance Group); Omaha Indemnity (Frank B. Hall): Zurich Insurance Company; and Utah Property and Casualty Insurance Guaranty Association : Amicus Brief

Utah Court of Appeals

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In The Utah Court of Appeals

LaSAL OIL COMPANY, INC.,
Plaintiff/Appellant

v.

CHICAGO INSURANCE COMPANY
(INTERSTATE INSURANCE GROUP);
OMAHA INDEMNITY (FRANK B.
HALL); ZURICH INSURANCE
COMPANY; and UTAH PROPERTY AND
CASUALTY INSURANCE GUARANTY
ASSOCIATION;

Defendants/Appellees

Case No. 930536-CA

Priority No. 15

Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah

The Honorable John A. Rokich, District Judge
Civil No. 88-0907028

BRIEF AND EXHIBITS OF *AMICUS CURIAE* INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION

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Utah Court of Appeals

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Mary T. Noonan
Clerk of the Court

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The parties to the action below were:

Plaintiff: LaSal Oil Company, Inc.

Defendants: Allianz Insurance Company
Carriers Insurance Company
Chicago Insurance Company
(Interstate Insurance Group)
Midland Insurance Company
Omaha Indemnity Company
(Frank B. Hall)
Pacific Employers Insurance Company
(CIGNA)
Travelers Insurance Company
Zurich Insurance Company
Utah Property & Casualty Insurance
Guaranty Association

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(k) (1993 Supp.).

INTEREST OF AMICUS CURIAE

The Insurance Environmental Litigation Association ("IELA") is a trade association of major property and casualty insurers. IELA was formed, in part, to appear as amicus curiae in environmental insurance coverage cases and to assist courts in the determination of important insurance coverage questions presented in such litigation. IELA members have entered into insurance contracts in Utah and throughout the nation containing provisions similar to the pollution exclusion at issue in the instant case. IELA is therefore vitally interested in the judicial interpretation of these coverage provisions.¹

¹ IELA files this brief as amicus curiae on behalf of IELA member companies Allstate Insurance Company, American International Group, Chubb Group of Insurance Companies, Continental Insurance Company, Crum & Forster Corporation, Hanover Insurance Company, Hartford Insurance Group, Home Insurance Company, Liberty Mutual Insurance Company, Royal Insurance, Prudential Reinsurance Company, St. Paul Companies, Selective Insurance Group of America, State Farm Fire & Casualty Company, and United States Fidelity & Guaranty Company. IELA members CIGNA Property and Casualty Companies, Fireman's Fund Insurance Companies, Maryland Insurance Group and The Travelers Insurance Companies, or their affiliates, are parties in this matter; accordingly, IELA's brief is not filed on their behalf. Additionally, IELA's brief is not filed on behalf of member Aetna Casualty and Surety Company.

ISSUES PRESENTED FOR REVIEW

- I. Did the trial court correctly hold that the word "sudden" in the "sudden and accidental" exception to the pollution exclusion at issue unambiguously contains a temporal element?
- II. Did the trial court correctly hold that the gradual, ongoing discharge of gasoline from a corroded underground line cannot be considered "sudden"?

A. Standard of Review

The interpretation of an integrated, unambiguous insurance contract is a matter of law, with the trial court's conclusions of law to be reviewed for correctness. See, e.g., Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 653 (Utah 1988); Valley Bank & Trust Co. v. U.S. Life Title Ins. Co., 776 P.2d 933, 935 (Utah Ct. App. 1989).

STATEMENT OF THE CASE

IELA hereby adopts and incorporates by reference the Statement of the Case set forth in Appellant's Brief.

STATEMENT OF THE FACTS

LaSal Oil Company, Inc. ("LaSal") filed this declaratory judgment action against nine insurance companies which issued general and excess liability policies to LaSal. In this action, LaSal seeks a declaration that the various insurers

have a duty to defend and indemnify LaSal against claims arising from the leakage of gasoline from a corroded underground pipe over a period of approximately eighteen to twenty-four months at a service station owned by LaSal.

The trial court ruling currently under review stems from LaSal's Motion for Partial Summary Judgment against Omaha Indemnity ("Omaha") and two other defendants filed September 10, 1990 (R. 491-495), and from Omaha's Motion for Summary Judgment. Among the issues raised in those pleadings was the interpretation of the language of the pollution exclusion contained in the Omaha policies. Under that exclusion, coverage does not apply

to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalies, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or other water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental

(R. 2416, 2067).

The court, after reviewing the parties' briefs and hearing oral argument, held an evidentiary hearing to determine whether the leakage from the underground gasoline line at the LaSal station was "sudden" under the terms of the policy. Both Omaha and LaSal presented expert testimony at that hearing. The two experts agreed that the leakage from LaSal's gasoline line was caused by corrosion of the pipeline. (R. 3234-3235, 3238-3239, 3271-3272, 3277). They

disagreed, however, as to whether the discharge of gasoline from a corroded pipe was "sudden" under the policy language. (R. 3254, 3271-3272).

In a January 21, 1993 memorandum decision, the trial court, following this Court's decision in Gridley Associates, Ltd. v. Transamerica Insurance Co., 828 P.2d 524 (Utah Ct. App. 1992), held that the term "sudden," as used in the "sudden and accidental" exception to the pollution exclusion in the Omaha policy, unambiguously contained a temporal element, and that a leak caused by corrosion could not be considered "sudden." The court therefore ordered that judgment in conformance with the evidence presented be entered in favor of Omaha. (R. 1886-1893). The trial court filed Findings of Fact and Conclusions of Law on February 11, 1993. (R. 1894-1906). This appeal followed.

SUMMARY OF ARGUMENT

The insurance policies at issue expressly exclude coverage for pollution unless "the discharge, dispersal, release or escape" of contaminants is both "sudden" and "accidental." These critical words are clear and unambiguous, especially when read together and in context. "Accidental" means "unexpected and unintended." "Sudden" means "quick" or "abrupt." If the discharge is not both "sudden" and "accidental" -- i.e., unexpected and unintended and abrupt -- then the exception to the pollution exclusion

cannot come into play. As this Court recognized in Gridley Associates, Ltd. v. Transamerica Ins. Co., 828 P.2d 524 (Utah App. 1992), the "sudden and accidental" exception cannot restore coverage for the gradual, long term leakage of gasoline from LaSal's corroded underground line.

Well-settled rules of contract interpretation prohibit a court from considering extrinsic evidence to "construe" unambiguous contract terms. But even if such evidence were relevant and admissible, an even-handed review of the so-called drafting and regulatory history of the pollution exclusion would support the application of the plain meaning of the word "sudden."

Further, sound public policy dictates that the plain terms of the insurance contract should be enforced. The risk-allocation system that is the basis of liability insurance will function effectively only if unambiguous contract terms are enforced as written.

ARGUMENT

I. THE WORD "SUDDEN" IN THE "SUDDEN AND ACCIDENTAL" EXCEPTION TO THE POLLUTION EXCLUSION CONTAINS A TEMPORAL ELEMENT UNAMBIGUOUSLY BARRING COVERAGE FOR THE GRADUAL "DISCHARGE, DISPERSAL, RELEASE OR ESCAPE" OF POLLUTANTS.

The liability insurance policy in question contains a "pollution exclusion" which precludes coverage for any liability "arising out of the discharge, dispersal, release or escape of . . . fumes, . . . toxic chemicals, liquids or

gases, . . . or other irritants, contaminants or pollutants into or upon land, the atmosphere or other water course or body of water." The only exception to this exclusion of pollution-related coverage is for a "discharge, dispersal, release or escape" that is both "sudden and accidental."

This Court, in Gridley Associates, Ltd. v. Transamerica Insurance Co., 828 P.2d 524 (Utah Ct. App. 1992), held that the "sudden and accidental" exception to the pollution exclusion is unambiguous. Id. at 527. In a case of first impression in Utah, the Gridley Court stated that "'sudden' within the 'sudden and accidental' clause cannot be defined without reference to a temporal element, specifically immediacy, abruptness and quickness." Id. This Court found that a "clean break" in an underground gasoline line fell within the exception, contrasting it with a break "caused by corrosion or deterioration which would have resulted in a gradual drip or trickle of gasoline from the line." Id.

Well-established principles of contract interpretation under Utah law require that the term "sudden" be construed temporally. An insurance policy "is merely a contract between the insured and the insurer. Its language should be construed pursuant to the same rules as are applied to other ordinary contracts" ² Thus, a contract of insurance, like any other contract, must be enforced according to its

² Bergera v. Ideal Nat'l Life Ins. Co., 524 P.2d 599, 600 (Utah 1974).

terms.³ The terms of the policy must be construed as a whole, and each of its terms should be given effect where possible.⁴ In determining whether a contract is ambiguous, the first source is the language of the contract itself.⁵ "A [contractual] term is not necessarily ambiguous merely because one party seeks to endow it with a meaning different from that relied upon by the drafter."⁶ Nor will this Court find a provision to be ambiguous "because a party may get a different meaning by placing a force[d] or strained construction on it in accordance with his interest."⁷

³ See, e.g., St. Paul Fire & Marine Ins. v. Commercial Union Assurance, 606 P.2d 1206, 1208 (Utah 1980) ("Unless there is some ambiguity or uncertainty in the language of an insurance policy, the policy should be enforced according to its terms."); Hartford Acc. & Indem. Co. v. United States Fidelity & Guar. Co., 962 F.2d 1484, 1486 (10th Cir.) ("an unambiguous insurance contract, like any other contract, should be enforced as written") (applying Utah law), cert. denied, 113 S. Ct. 411 (1992)

⁴ Marriot v. Pacific Nat'l Life Assurance Co., 24 Utah 2d 182, 467 P.2d 981, 983 (1970) (court is "obliged to assume that language included therein was put there for a purpose, and to give it effect when its meaning is clear and unambiguous"); Big Cottonwood Tanner Ditch Co. v. Salt Lake City, 740 P.2d 1357, 1359 (Utah Ct. App.) (all parts of contract "should be given effect insofar as that is possible"), cert. denied, 765 P.2d 1277 (Utah 1987).

⁵ Williams v. First Colony Life Ins. Co., 593 P.2d 534, 536 (Utah 1979).

⁶ See, e.g., Camp v. Deseret Mut. Benefit Ass'n, 589 P.2d 780, 782 (Utah 1979); Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 729 (Utah Ct. App. 1990).

⁷ Auto Leasing Co. v. Central Mut. Ins. Co., 7 Utah 2d 336, 325 P.2d 264, 266 (1958).

Ultimately, any rule requiring insurance policies to be strictly construed against the insurer is to be applied only after application of the other rules of construction.⁸ Most fundamentally, "[a] court will not . . . make a better contract for the parties than they have made for themselves."⁹

Consistent with these principles, the word "sudden," as coupled with the term "accidental" in the exception to the pollution exclusion, must be accorded a temporal meaning, denoting an event that occurs quickly, hastily, immediately and abruptly. To interpret the term "sudden," as LaSal asks, to mean "unexpected or unintended" would render it coextensive with "accidental," ignoring basic tenets of construction and rewriting the bargain between insurer and insured. The contract provision says "sudden and accidental," not "accidental and accidental."

LaSal asks this Court to find that the "sudden and accidental" exception to the pollution exclusion is

⁸ E.g., Fawcett v. Security Benefit Ass'n, 99 Utah 193, 104 P.2d 214, 218 (1940) ("Even though a particular provision of a contract of insurance be susceptible of more than one meaning, the construction of such provision more favorable to the assured will not be adopted if other provisions of the entire contract clearly resolve the ambiguity in favor of the contrary construction."); Williams, 593 P.2d at 536 ("in determining the intent of a contract the language of the instrument itself should first be looked to, and unless there is some ambiguity or uncertainty, there is no justification for attempting to vary it by extrinsic or parol evidence").

⁹ Rio Algom Corp. v. Jimco, Ltd., 618 P.2d 497, 505 (Utah 1980).

ambiguous, and therefore should be interpreted to provide coverage. In attempting to convince this Court to overturn its prior precedent in Gridley, LaSal seeks to point the Court to dictionaries, extrinsic "evidence" purporting to reflect the "drafting history" of the policy language, and the existence of a minority of results-oriented judicial opinions adopting LaSal's position. In its attempt to create ambiguity where none exists, LaSal looks everywhere except to the plain language of the insurance contract it entered into with Omaha. As this Court and scores of others have found, fundamental principles of contract interpretation require that the term "sudden," read in context, contain a temporal element.

To support its argument, LaSal strives to create ambiguity within the policy by citing in the abstract multiple definitions of the word "sudden." However, such an analysis snatches the word "sudden" from its context and views it in isolation, gleaning ambiguity solely from the pages of dictionaries, where multiple meanings appear for the vast majority of words which, as used in context, are clearly understood.¹⁰ What a word means in a particular usage

¹⁰ See, e.g., Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Co., No. 78,293, 1993 WL 241520 at *4 (Fla. July 1, 1993) ("dictionaries are 'imperfect yardsticks of ambiguity'"); Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 702 F. Supp. 1317, 1324 (E.D. Mich. 1988) ("[I]f merely applying a definition in the dictionary suffices to create ambiguity, no term would be unambiguous. The interpretation of contractual language is not mechanical.").

depends in large part on context. As Judge Learned Hand observed,

[w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used[.]

NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941).

For example, in the sentence "the bride's train was made of lace," no one would argue that the bride was carrying a railroad car down the aisle on the basis of the fact that the first entry in the dictionary under "train" may be "railroad car." Like "train" in the example above, the word "sudden" must be read in its contractual context, where it is coupled with "accidental." In that context, to read "sudden" to mean only "unexpected or unintended" would deprive the term of any independent meaning. As the California Court of Appeal recently noted, read in context "the word [sudden] must, if it is to be anything more than a hiccup in front of the word accidental, convey a 'temporal' meaning of immediacy, quickness or abruptness." ACL Technologies, Inc. v. Northbrook Property & Casualty Co., 17 Cal. App. 4th 1773, 22 Cal. Rptr. 2d 206, 214 (1993), review denied (Cal. Nov. 17, 1993).

Applying Utah law, the United States Court of Appeals for the Tenth Circuit, in rejecting an argument identical to LaSal's, cogently stated the point:

[R]eading "sudden" without a temporal component renders "accidental" redundant. While both

conditions might include "unexpected" or "unintended," "sudden" cannot mean "gradual," "routine" or "continuous." Since Utah law dictates each contract provision be given effect, . . . the conjunctive association of "sudden" with "accidental" is exactly the point on which our interpretation turns. Dictionaries may indicate each word has several overlapping meanings. We cannot use only the redundant definitions, however. Giving effect to every provision obliges us to construe "sudden" and "accidental" as separate, conditional requirements for coverage. This interpretive rule thus removes any ambiguity created by common usage.

Hartford Accident & Indem. Co. v. United States Fidelity & Guar. Co., 962 F.2d 1484, 1489 (10th Cir.), cert. denied, 113 S. Ct. 411 (1992).

LaSal also encourages this Court to find the term "sudden" ambiguous merely because of the existence of conflicting judicial precedent. However, a contract is not rendered ambiguous simply because some courts have interpreted its language contrary to its plain meaning. As one appellate court observed, "we would be abdicating our judicial role were we to decide such cases by the purely mechanical process of searching the nation's courts to ascertain if there are conflicting decisions." Lower Paxton Township v. United States Fidelity & Guar. Co., 383 Pa. Super. 558, 557 A.2d 393, 400 n.4, allocatur denied, 93 M.D. Allocatur Dkt. 1989 (Pa. 1989). As the Michigan Supreme Court has noted, relying on differences in judicial opinions as proof of ambiguity "merely begs the question." Upjohn Co. v. New Hampshire Ins. Co., 438 Mich. 197, 476 N.W.2d 392, 398 n.8 (1991).

In fact, the majority of recent decisions, including decisions by six state supreme courts,¹¹ seven federal circuit courts of appeal,¹² and numerous lower appellate and

¹¹ See, e.g., Dimmitt, 1993 WL 241520 at *4 (Fla. July 1, 1993) ("to construe sudden also to mean unintended and unexpected would render the words sudden and accidental entirely redundant"); Polaroid Corp. v. Travelers Ins. Co., 414 Mass. 747, 610 N.E.2d 912, 915 (1993) (pollution exclusion bars coverage where "the discharge of pollutants into the environment happened gradually, over a lengthy period of time"); Hybud Equip. Corp. v. Sphere Drake Ins. Co., 64 Ohio St. 2d 657, 597 N.E.2d 1096, 1102 (1992), cert. denied, 113 S. Ct. 1585 (1993) ("[t]he inclusion of the word 'sudden' readily indicates that the exception was not intended to apply to a release that occurred over an extended period of time"); Upjohn Co. v. New Hampshire Ins. Co., 438 Mich. 197, 476 N.W.2d 392, 403 (1991) ("when considered in its plain and easily understood sense, 'sudden' is defined with a temporal element that joins together conceptually the immediate and the unexpected"); Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc., 407 Mass. 675, 555 N.E.2d 568, 572 (1990) ("[i]f the word 'sudden' is to have any meaning or value in the exception to the pollution exclusion clause, only an abrupt discharge or release of pollutants falls within the exception"), cert. denied, 112 S. Ct. 969 (1992); Powers Chemco, Inc. v. Federal Ins. Co., 74 N.Y.2d 910, 548 N.E.2d 1301, 1302, 549 N.Y.S.2d 650 (1989) (exception to pollution exclusion is not operative unless occurrence is both "sudden and "accidental"); Technicon Elecs. Corp. v. American Home Ins. Co., 74 N.Y.2d 66, 542 N.E.2d 1048, 1050, 544 N.Y.S.2d 531 (1989) (same); Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374, 382 ("[t]he exception . . . describes the event -- not only in terms of its being unexpected, but in terms of its happening instantaneously or precipitantly"), reh'g denied, 316 N.C. 386, 346 S.E.2d 134 (1986).

¹² Smith v. Hughes Aircraft Co., No. 91-16758, 1993 WL 485275 (9th Cir. Nov. 26, 1993); Bituminous Casualty Co. v. Tonka Corp., 9 F.3d 51 (8th Cir. 1993); Bureau of Engraving, Inc. v. Federal Ins. Co., 5 F.3d 1175 (8th Cir. 1993); United States Fidelity & Guar. Co. v. Morrison Grain Co., 999 F.2d 489 (10th Cir. 1993); Anaconda Minerals Co. v. Stoller Chem. Co., 990 F.2d 1175 (10th Cir. 1993) (Utah law); Aetna Casualty & Sur. Co. v. General Dynamics Corp., 968 F.2d 707 (8th Cir. 1992); Hartford Accident & Indem., 962 F.2d 1484 (Utah law); Ray Indus., Inc. v. Liberty Mut. Ins. Co., 974 F.2d 754 (6th Cir. 1992) (continued...)

trial courts,¹³ have held that, to be sudden, a "discharge, dispersal, release or escape" of pollutants must be instantaneous or nearly instantaneous; it cannot occur gradually or continue over an extended period of time.¹⁴ As the California Court of Appeal found in ACL Technologies, a case similarly involving pollution resulting from the long-term leakage of corroded underground storage tanks:

[W]hatever "sudden" means, it does not mean gradual. The ordinary person would never think that something which happens gradually also happened suddenly. The words are antonyms. . . . [G]radual is the opposite of sudden. . . . Sudden never means both "unexpected and gradual."

¹²(...continued)
Cir. 1992); Terminix Int'l Co. v. Maryland Casualty Co., 956 F.2d 270 (6th Cir. 1992); Northern Ins. Co. v. Aardvark Assoc., Inc., 942 F.2d 189 (3d Cir. 1991); State of New York v. AMRO Realty Corp., 936 F.2d 1420 (2d Cir. 1991); A. Johnson & Co. v. Aetna Casualty & Sur. Co., 933 F.2d 66 (1st Cir. 1991); Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc., 938 F.2d 1423 (1st Cir. 1991), cert. denied, 112 S. Ct. 969 (1992); Ogden Corp. v. Travelers Indem. Co., 924 F.2d 39 (2d Cir. 1991); FL Aerospace v. Aetna Casualty & Sur. Co., 897 F.2d 214 (6th Cir.), cert. denied, 498 U.S. 911 (1990); Grant-Southern Iron & Metal Co. v. CNA Ins. Co., 905 F.2d 954, 955 (6th Cir. 1990); United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988); Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984).

¹³ A list of decisions recognizing that the term "sudden" in the pollution exclusion has a temporal meaning is attached as Addendum A.

¹⁴ In Morton International, Inc. v. General Accident Insurance Co., 134 N.J. 1, 629 A.2d 831 (1993), motions for recons. pending, the New Jersey Supreme Court also recognized that the pollution exclusion as written unambiguously bars coverage for temporally sudden discharges of pollutants, but refused to apply the plain language of the exclusion based upon an estoppel theory. Id. at 847; see infra at pp. 15-16.

ACL Technologies, 22 Cal. Rptr. at 215-16 (citations and footnotes omitted).

Finally, LaSal relies heavily on the analysis of a handful of courts that have found coverage for gradual pollution after inappropriate consideration of one-sided "drafting history" or "regulatory history" of the pollution exclusion.¹⁵ Those courts have relied primarily on articles written by counsel for policyholders, and their decisions are based on selected statements quoted from pro-policyholder articles or from other decisions erroneously considering such "evidence," which is untested by traditional rules of impeachment and cross-examination.

This Court should reject any reliance on materials relating to the exclusion's purported history. First, it is a fundamental precept of Utah law that extrinsic evidence of the parties' intent will not be considered where a contract is unambiguous.¹⁶ Moreover, even were this Court to find that ambiguity exists such that reference to extrinsic evidence is permitted, only evidence of the contracting

¹⁵ See Morton Int'l, 629 A.2d at 848-49; Just v. Land Reclamation, Ltd., 155 Wis. 2d 737, 456 N.W.2d 570, 574-75 (1990); Claussen v. Aetna Casualty & Sur. Co., 259 Ga. 333, 380 S.E.2d 686, 689 (1989).

¹⁶ Williams v. First Colony Life Ins. Co., 593 P.2d 534, 536 (Utah 1979); Anaconda Minerals Co., 990 F.2d at 1179.

parties' intent should be considered.¹⁷ LaSal does not, and cannot, contend that the materials relied upon in this handful of decisions demonstrate the mutual intent of LaSal and its insurers at the time they entered into the policies at issue. Indeed, LaSal does not suggest that it was even aware of these statements when the insurance contracts were executed. These statements provide no evidence probative of the mutual intent of the parties to the insurance contracts at issue and therefore should not be considered by the Court.

The more reasoned decisions have refused to engage in appellate "fact-finding" based upon self-serving assertions of the purported "history" of the pollution exclusion. For example, in Polaroid Corporation v. Travelers Indemnity Co., 414 Mass 749, 610 N.E.2d 912 (1993), the highest court of Massachusetts refused to consider extrinsic materials in construing the terms "sudden" and "accidental" and struck such materials from the record, stating that "'[b]ecause the word 'sudden' in the pollution exclusion clause is not ambiguous, we have no need to consider the drafting history of that clause or any statements made by insurance company representatives concerning the intention of its drafters.'"

¹⁷ See G.G.A., Inc. v. Leventis, 773 P.2d 841, 845 (Utah Ct. App. 1989) (in interpreting contract, court determines "what the parties intended by examining the entire contract and all of its parts in relation to each other, giving objective and reasonable construction to the contract as a whole") (emphasis added).

Id. at 916 n.7 (quoting Belleville Indus., 555 N.E.2d at 573).¹⁸

A recent example of misplaced reliance on partisan articles presenting the alleged "history" of the pollution exclusion appears in Morton International, Inc. v. General Accident Insurance Co., 134 N.J. 1, 629 A.2d 831 (1993), motions for recons. pending. Although Morton International recognized that the plain language of the exclusion as written eliminates all coverage for pollution except that caused by discharges that are both sudden and accidental, Id. at 847. Id. It relied on the "regulatory history" of the exclusion as presented in articles by policyholder attorneys, held that insurers were "estopped" from asserting what the court had found to be the clear terms of their contracts. Id. at 848.¹⁹

¹⁸ Other state supreme courts are in accord. Upjohn Co., 476 N.W.2d at 396 n.6 ("when the policy is found to be clear and unambiguous, 'there is no need to resort to extrinsic evidence to ascertain the meaning of the exclusion'"); Belleville Indus., 555 N.E.2d at 573 (same). Earlier this year, the Florida Supreme Court vacated an earlier opinion finding the word "sudden" to be ambiguous on the basis of such purported "drafting history." Dimmitt, No. 78,293, 1993 WL 251520 (Fla. July 1, 1993). Upon motion for rehearing, the Dimmitt court found the "sudden and accidental" exception to the pollution exclusion to be unambiguous; therefore, the court found it "inappropriate and unnecessary" to consider the extrinsic evidence of "drafting history" put forth by the policyholder. Id. at *5.

¹⁹ The New Jersey court's analysis fails in at least three crucial regards. First, the court asserts that state regulators were somehow misled about the terms of the exclusion, even though the regulators were presented with the admittedly unambiguous language of the exclusion itself.

(continued...)

Even if LaSal's contentions regarding the "drafting history" or "regulatory history" of the pollution exclusion were relevant, a full and fair evaluation of the complete range of available materials documenting the drafting and regulatory background of the pollution exclusion supports the proposition that the exclusion means what its plain language says: there is no coverage for pollution occurrences unless the discharge, dispersal, release or escape of contamination is both temporally abrupt and accidental.²⁰

¹⁹(...continued)

Second, at the time the exclusion was drafted, environmental regulatory regimes like CERCLA did not yet exist. No one -- not insurers, not policyholders, not state regulators -- could have anticipated the kinds of massive, latent liabilities that have arisen. Finally, the court made its decision based on an unbalanced, incomplete view of the pollution exclusion's drafting history. No trial was ever held on this issue such that the parties could address the various arguments adopted by the court. These flaws in the Morton opinion, along with others, form the basis for insurers' motion for reconsideration currently before the New Jersey Supreme Court.

²⁰ We note that the law review article on which LaSal relies was written by attorneys who regularly represent policyholders in insurance coverage litigation. See, e.g., Coakley v. Maine Bonding & Casualty Co., 136 N.H. 402, 618 A.2d 777 (1992) (policyholders represented by Ms. Ballard, principal author of article cited by LaSal). For the insurers' side of the drafting history debate, see articles of insurer representatives Bernard J. Daenzer & Edward Zampino, Environmental Liability and the Pollution Exclusion: Why Some Courts Find Coverage, 46 Chartered Property & Casualty Underwriters Journal No. 2, 84 (June 1993) (Ex. 1) and Victor C. Harwood, III, Brian J. Coyle & Edward Zampino, The "Frivolity" of Policyholder Gradual Pollution Discharge Claims, 5 Mealey's Litig. Reps.: Ins. No. 40 (Aug. 27, 1991) (Ex. 2); cf. Note, The Pollution Exclusion Clause Through the Looking Glass, 74 Geo. L.J. 1237, 1241-53 (1986). See also Brief of Amicus Curiae Aetna Casualty and Surety Company. IELA proffers these materials conditionally and
(continued...)

The pollution exclusion was drafted in 1970 by the Insurance Rating Board ("IRB"). IRB's General Liability Governing Committee decided to adopt "a policy exclusion of pollution that would run to bodily injury and property damage . . . for all general liability insurance, the exclusion to except pollution caused injuries when the pollution results from the classical accident."²¹ A contemporaneous memorandum confirmed what was common knowledge among insurers and major insureds: that the pollution exclusion was to "exclude all . . . pollution or contamination of water and air except for the 'boom' case, or 'classical accident.'"²²

²⁰(...continued)
invites the Court to consider them only if the Court elects to consider extrinsic materials relied upon by LaSal.

²¹ Minutes of IRB General Liability Governing Committee ("GLGC") meeting (March 17, 1970), quoted by Harwood, Coyle & Zampino, supra note 20, at 22 (emphasis in original).

²² Memorandum by Robert S. Hansen, Aetna Casualty's representative on the GLGC (March 20, 1970), quoted by Harwood, Coyle & Zampino, supra note 20, at 22. In order to accomplish this, the pollution exclusion was drafted to differ from the definition of "occurrence," which is part of the contract's insuring agreement, in at least two important ways. First, the pollution exclusion eliminates coverage for repeated or continuous exposure to conditions with regard to pollution-related liability. Second, unlike the "occurrence" definition, the pollution exclusion does not focus upon the nature of the damage or upon whether such damage was expected or intended, but rather upon the nature of the discharge, dispersal, release or escape. Accordingly, liability for the repeated or intentional release of pollutants was plainly intended to be excluded from coverage.

This classical accident (or "boom" event) has always been understood to be sudden or abrupt.²³ An explanatory memorandum submitted by the IRB to state insurance commissioners in 1970 incorporated this accepted understanding of the word "accident":

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 the 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
²⁴

This directly contradicts any claim that the pollution exclusion would not change coverage for pollution claims under the occurrence-based policies. The occurrence definition focuses on intent; for there to be an occurrence, the damage must be unexpected and unintended. In contrast, the IRB submission plainly states that the pollution exclusion "avoid[s] any question of intent." As the submission states, the pollution exclusion does this by eliminating coverage for all pollution-related liability unless it was caused by the classical "accident." Courts

²³ See Harwood, Coyle & Zampino, supra note 20, at 22-24 & n.6.

²⁴ See Harwood, Coyle & Zampino, supra note 20, at 38 & n.51 (emphasis in original).

have found that this is the proper interpretation of the IRB submission.²⁵

Policyholders and their representatives also recognized and understood this purpose when the exclusion was drafted. One broker wrote in the leading publication for corporate insurance buyers that the exclusion's "purpose" is to provide for some very short term phenomenon."²⁶ An insurance consultant wrote at the time:

the exception to the [pollution] exclusion states that the dispersal, release or escape must be "sudden and accidental." In other words, it must be both sudden and accidental rather than either sudden or accidental.²⁷

Mr. Melvin L. Summerhays was the General Liability Rates and Forms Analyst for the Utah Department of Insurance in 1970. He has stated that, at the time of the filing of the pollution exclusion with the Department, his understanding was that "'[s]udden' was something 'abrupt' or 'quick.'" An

²⁵ See American Motorists Ins. Co. v. General Host Corp., 120 F.R.D. 129, 133-34 (D. Kan. 1988) (finding that the submission "support[s] the court's previous interpretation that the pollution exclusion has an independent, objective meaning and is not simply a restatement of the subjective definition of occurrence"); see also Truck Ins. Exchange v. Pozzuoli, 17 Cal. App. 4th 856, 21 Cal. Rptr. 2d 650, 651 n.2 (1993) (finding that intent behind the exclusion was to "wholly eliminate coverage for pollution except in the case of a 'classical accident,' . . . defined as a 'sudden, boom-type accident' such as an explosion"), rev. denied, (Cal. Nov. 17, 1993).

²⁶ G. R. E. Bromwich, Pollution and Insurance, 1971 Risk Mgmt. 15, 19 (Ex. 3).

²⁷ Warren G. Brockmeier, Pollution -- The Risk and Insurance Problem, 12 For The Defense 77, 79 (1971) (Ex. 4).

'accident' was a sudden event that happened by chance."
Affidavit of Melvin L. Summerhays ¶ 4 (September 2, 1993)
(Ex. 5).²⁸ Thus, "[c]learly, coverage for gradual pollution
discharges would be excluded." Affidavit ¶ 5.

Numerous state regulatory documents also demonstrate
that insurance commissioners understood the pollution
exclusion to restrict coverage. After considering the
exclusion, the Kansas Insurance Commissioner wrote, "[i]n
view of the obvious reduction in coverage, to what extent
will the premiums be reduced when this endorsement is
attached?"²⁹ Moreover, Iowa, Louisiana, Michigan, South
Dakota, Hawaii, Virginia, West Virginia, and the District of
Columbia -- because of the reduction in coverage -- all
required the consent of the insured before permitting the
endorsement to be deemed part of outstanding policies.³⁰
Kansas, Kentucky, Mississippi, New York, Texas, and Georgia
permitted carriers to attach the pollution exclusion only to
new or renewal policies.³¹

²⁸ Because the cases relied upon by LaSal fail to
describe fully the drafting and regulatory history of the
pollution exclusion, IELA conditionally proffers this
affidavit in response. If the Court accepts LaSal's improper
invitation to go beyond the plain policy language to
interpret the exclusion, IELA offers this affidavit to help
the Court gain a complete view of that history.

²⁹ Daenzer & Zampino, supra note 20, at 89.

³⁰ Harwood, Coyle & Zampino, supra note 20, at 41.

³¹ Id. at 40.

Significantly, two states initially disapproved the exclusion because it eliminated coverage. The New Hampshire Insurance Commissioner, in a 1970 press statement, announced disapproval of the exclusion because it excluded coverage that otherwise might be available on an occurrence basis; and the Vermont Insurance Commissioner initially disapproved the exclusion as well.³² Obviously, if the exclusion were merely a "clarification" that did not restrict or limit coverage, these regulatory actions would have been unnecessary. It was only because the exclusion eliminated coverage that state insurance commissioners took these steps.

Ultimately, however, the entire historical debate is irrelevant to the decision before this Court. Interpretation of the plain language of the insurance contract according to the principles established by Utah courts can lead to but one conclusion: that the contract of insurance purchased by LaSal did not contemplate insurance coverage for property contamination caused by gasoline gradually dispersed through the policyholder's corroded piping.

II. THE GRADUAL "DISCHARGE, DISPERSAL, RELEASE OR ESCAPE" OF GASOLINE FROM A CORRODED UNDERGROUND PIPE CANNOT BE CONSIDERED "SUDDEN."

LaSal argues in the alternative that, even if "sudden" is properly interpreted to contain a temporal element, the gradual leakage stemming from the corrosion of LaSal's

³² Id. at 43.

underground line was somehow temporally "sudden." LaSal attempts to achieve this sleight-of-hand by contending that neither the length of time during which the leakage occurs, nor the volume of pollutants released, nor the process by which the release occurs is pertinent to whether the event resulting in contamination was "sudden." According to LaSal, the only relevant inquiry is whether, at the instant when the final molecules of the pipe wall gave way, the so-called "fracture moment," the initial contact between gasoline and soil was temporally "sudden."³³

What LaSal's analysis ignores, however, is that this Court will not impose "a force[d] or strained construction" on a contractual term in order to create ambiguity. Auto Leasing Co. v. Central Mut. Ins. Co., 7 Utah 2d 336, 325 P.2d 264, 266 (1958). Nor will this Court permit "a hypertechnical distortion of language not in accordance with the meaning intended by the insurance contract." Marriot v. Pacific Nat'l Life Assurance Co., 24 Utah 2d 182, 467 P.2d 981, 983 (1970). LaSal's arguments torture the policy language and would wholly eradicate any independent meaning of the word "sudden."

LaSal first argues that the length of time during which a discharge occurs is irrelevant to the discharge's temporal suddenness. Such a construction, however, ignores the language of the exclusion. The exception restores coverage

³³ LaSal Brief at 43.

for pollution events only where "the discharge, dispersal, release or escape" -- not the "fracture moment" -- is both "sudden and accidental." LaSal's contention that the operative "discharge, dispersal, release or escape" is merely the initial instant of contact between contaminant and environment does violence to the plain language of the insurance contract.

Every event has a beginning. The formation of the Grand Canyon began in one moment during which the accumulated effect of water, wind, sun and the elements caused the first particle of rock to separate from the earth. To consider such an event "sudden" because the precise point at which that first, inevitable separation occurred was "of abrupt or unexpected onset"³⁴ makes a mockery of the concept. Likewise, LaSal's argument would neutralize the plain meaning of the contract. See Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc., 938 F.2d 1423, 1428 (1st Cir. 1991) ("From a microanalytical viewpoint, almost any event can be labelled unexpected, since history probably never repeats itself precisely. But such an approach would eviscerate the exclusion for pollution.")³⁵

³⁴ LaSal Brief at 32.

³⁵ LaSal quotes only selectively from other cases to support this contention. For example, in Belleville Indus., 555 N.E.2d at 573 n.6, Massachusetts' highest court "decline[d] to speculate on the proper construction of the exception, if a release or discharge, initially both accidental and sudden, continues for an extended period. As
(continued...)"

Further, LaSal's argument that the duration of the "discharge, dispersal, release or escape" is irrelevant ignores the weight of the many decisions which have held that, because "sudden" has a temporal element, routine discharges of pollutants or contaminants over an extended period are barred from coverage by the pollution exclusion.³⁶

³⁵(...continued)
the discharge or release continues, at some point, presumably, it would likely cease to be . . . sudden (even in the sense of unexpected)." Similarly, the California Court of Appeal in Shell Oil v. Winterthur Swiss Ins. Co., 12 Cal. App. 4th 715, 15 Cal Rptr. 2d 815 (1993), qualified the dictum relied upon by LaSal: "If a sudden and accidental [event] continues for a long time, at some point it ceases to be sudden or accidental." 15 Cal. Rptr. 2d at 842.

Additionally, the New York intermediate appellate cases relied upon by LaSal are clearly in conflict with the pronouncements of that state's highest court. In both Powers Chemco, 542 N.E.2d at 1302, and Technicon, 542 N.E.2d at 1050, the New York Court of Appeals recognized that the "sudden" and "accidental" prongs of the exception to the exclusion are independent requirements which must both be satisfied in order for coverage to be restored. The cases relied upon by LaSal clearly ignore that requirement.

³⁶ See, e.g., Belleville Indus., 938 F.2d at 1429-30 ("sudden and accidental" exception bars coverage attributable to gradual pollution; no coverage for pollution occurring over a period of years); AMRO Realty Corp., 936 F.2d at 1428-29 (release or discharge over a period of years not "sudden" despite insured's attempt to represent discharge as sudden or accidental ruptures of individual containers); Farm Bureau Mut. Ins. Co. v. Laudick, 859 P.2d 410, 412-13 (Kan. Ct. App. 1993) (long term leak from underground storage tank is not "sudden"), review denied (Kan. November 9, 1993); Upjohn Co., 476 N.W.2d at 394-95 (no coverage where manufacturing by-product was pumped into a leaking underground storage tank in nine batches over a month-long period); Technicon Elecs., 542 N.E.2d at 129 (industrial waste discharged for six years not "sudden"); Waste Management, 340 S.E.2d at 382-83 (no coverage where contaminants were disposed of at a landfill over a number of years); ACL Technologies, 22 Cal. Rptr. 2d at 215-16 (where pollution resulted from corroded underground
(continued...))

The Gridley court implicitly recognized that the term "sudden" cannot be fairly interpreted within the context of the exception to the exclusion without some reference to the duration and volume of the "discharge, dispersal, release or escape." In Gridley, the underground line leak at issue was a "clean break" caused by shifting of the area where the pipe was located. 828 P.2d at 525. This Court distinguished the situation before it from the situation where "the break was caused by corrosion or deterioration which would have resulted in a gradual drip or trickle from the line." Id. at

³⁶(...continued)
storage tank, "sudden does not mean gradual"); Pozzuoli, 21 Cal. Rptr. 2d 650 (long-term gasoline leak from underground storage tank is not "sudden"); Borg-Warner Corp. v. Insurance Co. of N. Am., 174 A.D.2d 24, 577 N.Y.S.2d 953 (disposal of waste over periods ranging from two years to four decades not "sudden"), review denied, 80 N.Y.2d 751, 600 N.E.2d 632, 587 N.Y.S.2d 950 (1992); Harleysville Mut. Ins. Co. v. R.W. Harp & Sons, Inc., 305 S.C. 492, 409 S.E.2d 418, 420 (App. 1991)(gasoline leak from negligently installed underground pipe union lasting between fourteen and thirty days is not "sudden"), cert. dismissed, 419 S.E.2d 222 (S.C. 1992); Mays v. Transamerica Ins. Co., 103 Or. App. 578, 799 P.2d 653, 655, 657 (1990) (exclusion bars coverage for release of wastes over ten year period as a regular part of business operations), rev. denied, 311 Or. 150, 806 P.2d 128 (1991); Transamerica Ins. Co. v. Sunnes, 77 Or. App. 136, 711 P.2d 212, 214 (1985) (pollution exclusion bars coverage for discharges released "regularly over a period of many years"), rev. denied, 301 Or. 76, 717 P.2d 631 (1986); Barnet of Indiana, Inc. v. Security Ins. Group, 425 N.E.2d 201, 202 (Ind. Ct. App. 1981) (no coverage where frequency of gas emissions ranged from occasional to once or twice a week); Lower Paxton Township v. United States Fidelity & Guar. Co., 557 A.2d at 403 (no "sudden" discharge where methane gas emanated from landfill "for some time"); Techalloy Co. v. Reliance Ins. Co., 338 Pa. Super. 1, 487 A.2d 820, 827 (1984) (no coverage for "regular or sporadic [discharge] . . . over a period of 25 years"), rev. denied, 338 E.D. Allocatur Dkt. 1985 (Pa. Oct. 31, 1985).

527 (emphasis added). That is precisely the situation currently before this Court.

Other courts have agreed with the trial court and with this Court's dictum in Gridley that leakage stemming from corrosion of underground storage tanks cannot be temporally "sudden." See, e.g., ACL Technologies, 22 Cal. Rptr. 2d at 219 ("Corrosion is, by definition, a gradual process.").³⁷

³⁷ LaSal's suggestion that the interpretation of the words "sudden and accidental" in old boiler and machinery policies to include gradual deterioration of equipment may be imported wholesale into the interpretation of the pollution exclusion clause is wholly without merit. The term "sudden," as employed in those policies, has a purpose wholly different from that of the term "sudden" in the pollution exclusion. Boiler and machinery policies protect insureds against liability arising out of damage to equipment. See 10A G. Couch, Couch on Insurance 2d § 42.385 at 496-98 (rev. ed. 1982). Thus, "sudden" modifies the actual damage to the machine -- its breakage or explosion. See, e.g., Julius Hyman & Co. v. American Motorists Ins. Co., 136 F. Supp. 830 (D. Colo. 1955) (policy provided coverage for sudden and accidental tearing, cracking, burning or bulging of insured's machinery). In the context of the pollution exclusion, however, "sudden" defines the temporal nature of the "discharge, dispersal, release or escape" of pollutants, not the resulting damage. The rationale provided for this interpretation of "sudden" in boiler and machinery policies, which specifically obligate the insurer to cover the sudden and accidental breaking of covered machinery, cannot be transferred to the pollution exclusion in general liability policies.

In Anderson & Middleton Lumber Co. v. Lumbermen's Mutual Ins. Co., 53 Wash. 2d 404, 333 P.2d 938, 940 (1959), the court opined that "[i]t seems to us that the risk to the insurer would be the same, whether a break was instantaneous or began with a crack which developed over a period of time until the final cleavage occurred, as long as its progress was undetectable." This often-criticized, results-oriented analysis, see, e.g., Victor C. Harwood III, A Case of Misplaced Reliance: Anderson & Middletown Lumber Company Revisited, 7 Mealey's Litig.Reps.: Ins. No. 33 at 12 (July 1, 1993)(Ex. 6), cannot rationally be incorporated into the pollution exclusion, where the parties plainly contracted to

(continued...)

LaSal can contend that the ongoing and extended leakage of gasoline due to gradual corrosion in an underground line is "sudden" is to create a scenario where every "discharge, dispersal, release or escape" of a pollutant is "sudden" based on its initial contact with the environment. Such a misinterpretation of the unambiguous contractual language defies common sense and violates fundamental rules of contract interpretation. "Sudden" cannot be made to mean "gradual." The judgment of the trial court should be affirmed.

III. IGNORING THE PLAIN MEANING OF INSURANCE CONTRACTS
DISSERVES THE PUBLIC INTEREST BY DESTABILIZING THE
INSURANCE SYSTEM AND HARMING ENVIRONMENTAL GOALS.

Any failure to enforce the clear provisions of insurance contracts necessarily affects the integrity of the insurance

³⁷(...continued)
exclude coverage for all pollution claims, except those where the "discharge, dispersal, release or escape" was "sudden and accidental." Whether or not the insured could detect, or even knew of the polluting event is irrelevant to application of the pollution exclusion. See, e.g., Aardvark Assocs., 942 F.2d at 194 (pollution exclusion applies to "passive polluters," i.e., those who do not actually release pollutants); Powers Chemco, 548 N.E.2d at 1302 (exclusion precludes coverage even where former property owner discharged pollutants without policyholder's knowledge or consent); Waste Management, 340 S.E.2d at 379 (pollution exclusion applicable despite fact that insured was waste transporter, not operator of waste disposal site); Dimmitt, No. 78,293, 1993 WL 241520 at *5 (pollution exclusion bars coverage despite fact that policyholder was generator of waste oil who sold it to polluting recycler); ACL Technologies, 22 Cal. Rptr. at 219 (pollution exclusion bars coverage to policyholder who unknowingly purchased property with leaking underground storage tanks).

underwriting process in general. Insurance involves an agreement by the insurer to protect the insured against a specified risk for a fee. Insurance can cover risks, even very large ones, that can be actuarially predicted over a large number of insureds. This vital risk-spreading function is undercut, however, by excessive uncertainty as to the nature of the risk assumed. No insurer can (or would) agree to cover a carefully defined risk if courts felt free to impose liability as they saw fit, notwithstanding the plain language of the policy.³⁸

In short, settled assumptions concerning judicial enforcement of contracts underlie insurers' actuarial projections of their expected loss experience and the resulting calculation of premiums, particularly for large commercial risks. Distorting policy language as LaSal urges would transform the insurance contract from a pool of actuarially predictable risks into a gambling transaction with the odds stacked so that the insurer always pays. In the context of environmental claims, such a profound

³⁸ As the United States General Accounting Office recently noted in testimony before a subcommittee of the United States House of Representatives, the projected cost of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) alone is as much as five times the total surplus of the U.S. property/casualty insurance industry. See Insurance Liability for Cleanup Costs at Hazardous Waste Sites: Hearing Before the Subcomm. on Policy Research and Insurance of the House Comm. on Banking, Finance and Urban Affairs, 101st Cong., 2d Sess. 50 (1990) ("Potential Liability of Property/Casualty Insurers for Costs of Cleaning Up Hazardous Waste Sites").

alteration of the insurance risk would expose insurers to liabilities many times greater than the capacity of the industry as a whole.

Moreover, if a court were to disregard the express and unambiguous provisions defining the risks that the insurer agreed to cover, the underwriter must pass on the cost of this uncertainty to all consumers of insurance. The failure to enforce the insurance contract as written therefore would affect the price and availability of insurance coverage for those who do not have the resources to self-insure, e.g., individuals and small businesses.³⁹ As the California Supreme Court observed in Garvey v. State Farm Fire & Casualty Co., 48 Cal.3d 395, 770 P.2d 704, 711, 257 Cal. Rptr. 292 (Cal. 1989), judicially created insurance coverage leaves "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities."

³⁹ The Environmental Protection Agency itself has explained that the limited availability of insurance for Superfund contractors is based in part on the fact that "[c]ourts in key jurisdictions have imposed retroactive liabilities on insurers for pollution damages and cleanup costs that were never intended to be covered The reinsurance market for gradual pollution insurance has virtually disappeared because of adverse loss experience and concerns over legal trends in the U.S." EPA, "Superfund Response Action Contractor Indemnification," 54 Fed. Reg. 46012, 46013 (October 31, 1989). See also J. Kehne, Note, Encouraging Safety Through Insurance-Based Incentives: Financial Responsibility for Hazardous Wastes, 96 Yale L.J. 403, 423 (1986) (contraction of pollution coverage market attributed in part to insurers' "fears that further changes in legal rules will undermine the basis upon which policies are currently written").

In the long run, public policy is best served by adhering to time-tested principles of insurance contract interpretation. These fundamental public policy considerations reinforce what Utah law requires: an insurance policy, like any other contract, must be construed according to its clear language and not distorted to provide free insurance where none was intended.

CONCLUSION

For the reasons stated above, amicus curiae IELA urges this Court to affirm the judgment below in favor of the appellees.

Dated Dec 29, 1993.
Respectfully submitted,

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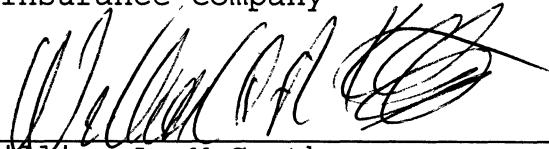
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Tab A

ADDENDUM A

Cases Holding That The Term "Sudden" In The Pollution Exclusion Has A Temporal Meaning¹

State Supreme Court Cases

1. Hybud Equipment Corp. v. Sphere Drake Insurance Co., 597 N.E.2d 1096 (Ohio 1992) ("the word 'sudden' in the exception is not synonymous with the word 'unexpected' in the typical definition of 'occurrence'; instead, the word also has a temporal aspect") (emphasis in original), reh'g denied, 600 N.E.2d 686 (Ohio 1992), cert. denied, 113 S. Ct. 1585 (1993).
2. Liberty Mutual Insurance Co. v. SCA Services, Inc., 412 Mass. 330, 588 N.E.2d 1346 (1992) (pollution at landfill occurring gradually over several months of repeated activity was not the result of a "sudden and accidental" discharge).
3. Upjohn Co. v. New Hampshire Insurance Co., 438 Mich. 197, 476 N.W.2d 392 (1991) ("'sudden' includes a temporal element as well as a sense of the unexpected"), reh'g denied, 439 Mich. 1202 (1991).
4. Protective National Insurance Co. v. City of Woodhaven, 438 Mich. 154, 476 N.W.2d 374 (1991) ("'sudden' is defined with a 'temporal element that joins together conceptually the immediate and the unexpected").
5. Hazen Paper Co. v. United States Fidelity & Guaranty Co., 407 Mass. 689, 555 N.E.2d 576, 579 (1990) (pollution exclusion provides coverage "only if the discharge or release was not only accidental but also 'sudden,' in the sense of an unexpected, abrupt discharge or release").
6. Lumbermens Mutual Casualty Co. v. Belleville Industries, Inc., 407 Mass. 675, 555 N.E.2d 568, 572 (1990) ("For the word 'sudden' to have any significant purpose, and not to be surplusage when used generally in conjunction with the word 'accidental,' it must have a temporal aspect to its meaning, and not just the sense of something unexpected").
7. Waste Management of Carolinas, Inc. v. Peerless Insurance Co., 315 N.C. 688, 340 S.E.2d 374, 382-83 (1986) (pollution exclusion bars coverage for "'contribution' over a number of years of contaminating materials to a landfill").

¹ In order not to burden the Court, we have not enclosed copies of the unreported opinions in this addendum. However, we can provide immediate copies of any or all of the unreported opinions upon request.

8. Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp., No. 78-293 (Fla. July 1, 1993) ("The ordinary and common usage of the term 'sudden' includes a temporal aspect with a sense of immediacy or abruptness"; no coverage where pollution "took place over a period of years and most of it occurred gradually").
9. Polaroid Corp. v. Travelers Insurance Co., 610 N.E.2d 912 (Mass. April 7, 1993) (pollution exclusion bars coverage where evidence showed that "the discharge of pollutants into the environment happened gradually, over a lengthy period of time").

State Intermediate Appellate Court Cases

1. Dakhue Landfill, Inc. v. Employers Insurance of Wausau, No. CO-93-905 (Minn. Ct. App. Nov. 23, 1993) ("Releases of pollutants that extend over two decades cannot be considered 'sudden' under any reasonable interpretation of the word").
2. County of Fulton v. United States Fidelity & Guaranty Co., No. 67681, 1993 WL 271807 (N.Y. App. Div., 3d Dep't July 22, 1993) ("The [underlying] complaints do not allege an abrupt or quick discharge, but rather the inference is that the discharge occurred over long periods of time. Such discharge does not qualify as being sudden").
3. Greenville County v. Insurance Reserve Fund, 427 S.E.2d 913 (S.C. Ct. App. 1993) ("sudden" as used in pollution exclusion "is unambiguous and must be defined in its temporal sense" to describe "a release which was abrupt or precipitant"; no coverage for alleged "regular dumping" of hazardous wastes).
4. Plasticolors, Inc. v. Cincinnati Insurance Co., 1992 WL 532785 (Ohio Ct. App. Dec. 14, 1992) (pollution exclusion bars coverage except where release was abrupt; no coverage where policyholder failed to show sudden and accidental release).
5. Sanborn Plastics Corp. v. St. Paul Fire & Marine Insurance Co., 616 N.E.2d 988 (Ohio Ct. App. Jan. 4, 1993) (pollution exclusion barred coverage for continuous discharge of waste over four-year period).
6. Sylvester Brothers Development Co. v. Great Central Insurance Co., 503 N.W. 2d 793, (Minn. Ct. App. July 12, 1993) (because "'sudden' in the pollution exclusion exception carries the temporal connotation of 'abruptness'" long-term and ongoing release of contaminants for over two decades "cannot reasonably be considered 'sudden'"), review denied (Minn. Sept. 30, 1993)

7. Board of Regents v. Royal Insurance Co., 503 N.W. 2d 486 (Minn. Ct. App. 1993) (alleged gradual and continuous deterioration of asbestos-containing building materials over the course of more than twenty years "cannot reasonably be construed to be 'sudden'"), appeal pending, Nos. C1-93-24, C8-93-36, C5-93-186 (Minn.).
8. Shell Oil Co. v. Winterthur Swiss Insurance Co., 12 Cal. App.4th 715, 15 Cal. Rptr.2d 815 (Cal. Ct. App., 1st Dist. 1993) (a temporal connotation is inherent in ordinary meaning of "sudden"; for pollution exclusion to permit coverage, discharge must be abrupt as well as unexpected), appeal denied (Cal. May 13, 1993).
9. Sylvester Brothers Development Co. v. Great Central Insurance Co., 480 N.W.2d 368 (Minn. Ct. App. 1992) ("'sudden' in the context of the policies carries the temporal connotation of 'abruptness' . . . 'sudden' means the incident at issue occurs relatively quickly rather than gradually over a long period of time"), review denied, 480 N.W.2d 368 (Minn. Ct. App. 1992).
10. Borg-Warner Corp. v. Insurance Co. of North America, 577 N.Y.S. 2d 953 (App. Div. 1992) ("liability arising out of the long-term, intentional disposal of plaintiff's industrial waste was not covered under the 'sudden and accidental' exception to the pollution exclusion": "for a release or discharge to be 'sudden' within the meaning of the pollution exclusion, it must occur abruptly or quickly or over a short period of time"), appeal denied, 80 N.Y.2d 753, 587 N.Y.S.2d 905, 600 N.E.2d 632 (1992).
11. Harleysville Mutual Insurance Co. v. R.W. Harp & Sons, Inc., 409 S.E. 2d 418 (S.C. Ct. App. 1991) (gasoline leak of up to sixty days' duration was not sudden), cert. dismissed, 419 S.E.2d 222 (S.C. 1992).
12. Mays v. Transamerica Insurance Co., 103 Or. App. 578, 799 P.2d 653 (1990) (pollution exclusion bars coverage for releases of wastes over a ten-year period).
13. Weber v. IMT Insurance Co., No. 9-437, slip op. at 7 (Iowa Ct. App. Apr. 24, 1990) ("'sudden' in its common usage, means 'happening without previous notice or with very brief notice'"; no coverage where pollutants were discharged on ongoing basis over ten-year period), aff'd on other grounds, 462 N.W.2d 283 (Iowa 1990).
14. Chemetco, Inc. v. Citizens Insurance Co. of America, No. 109913, slip op. at 3 (Mich. Ct. App. Feb. 13, 1990) (pollution occurring over "a long period of time" was not sudden).

15. Lower Paxton Township v. United States Fidelity & Guaranty Co., 383 Pa. Super. 558, 557 A.2d 393, 398 (1989) ("sudden" means "abrupt and lasting only a short time"), review denied, 93 M.D. Allocatur Dkt. 1989 (Pa. Sept. 22, 1989).
16. Technicon Electronics Corp. v. American Home Assurance Co., 141 A.D.2d 124, 533 N.Y.S.2d 91, 99 (1988) ("[a] 'sudden and accidental' event is one which is unexpected, unintended and occurs over a short period of time"), aff'd on other grounds, 74 N.Y.2d 66, 544 N.Y.S.2d 531, 542 N.E.2d 1048 (1989).
17. Barnet of Indiana, Inc. v. Security Insurance Group, 425 N.E.2d 201, 203 (Ind. Ct. App. 1981) (discharge of emissions due to regular and frequent malfunctioning of pollution control equipment is not sudden and accidental).
18. Techalloy Co. v. Reliance Insurance Co., 338 Pa. Super. 1, 487 A.2d 820, 827 (1984) (no coverage for "a regular or sporadic discharge over a period of 25 years"), review denied, 338 E.D. Allocatur Dkt. 1985 (Pa. Oct. 31, 1985).
19. Transamerica Insurance Co. v. Sunnes, 77 Or. App. 136, 711 P.2d 212, 214 (1985) (pollution exclusion bars coverage for discharges "regularly over a period of many years"), review denied, 301 Or. 76, 717 P.2d 631 (1986).
20. O'Brien Energy Systems, Inc. v. American Employers' Insurance Co., No. 2660 PHL 92 (Pa. Super. Ct. Aug. 3, 1993) (pollution exclusion unambiguously bars coverage for "gradual migration" of polluting gases).
21. Truck Insurance Exchange v. Pozzuoli, 17 Cal. App. 4th 856, 21 Cal. Rptr. 2d 650 (Cal. Ct. App., 4th Dist. Aug. 3, 1993) (pollution exclusion barred coverage for leak from underground storage tank of at least 60 days' duration).
22. ACL Technologies, Inc. v. Northbrook Property & Casualty Co., 17 Cal. App. 4th 1773 (Cal. Ct. App., 4th Dist. 1993) ("gradual is the opposite of sudden"; no coverage for longterm leakage from corroded storage tanks on property purchased by insured).
23. Farm Bureau Mutual Insurance Co. v. Laudick, No. 68990 (Kan. Ct. App. Sept. 17, 1993) (pollution exclusion bars coverage for longterm leakage from underground tank, since "sudden" has a temporal meaning, "combining both the elements of without notice or warning and quick or brief in time").
24. Krawczewski v. Western Casualty and Surety Co., No. C3-93-672 (Minn. Ct. App. Oct. 5, 1993) (pollution occurring over a period of one to thirteen years "cannot reasonably be considered 'sudden'").

State Trial Court Cases

1. City of Portsmouth v. New Hampshire Insurance Guaranty Association, No. 88-E-759 (N.H. Super. Ct., Rockingham County Sept. 22, 1993) (pollution exclusion unambiguously bars coverage for gradual contamination of a landfill over a thirteen-year period: "[w]hen read in conjunction with the term 'accidental,' a reasonable [insured] could only understand 'sudden' to mean abrupt")
2. Atlas Tack Corp. v. Commercial Union Insurance Co., Nos. 91-566, 91-5667, 91-5669 (Mass. Super. Ct. Suffolk County Sept. 15, 1993) (no coverage where "the contamination resulted from regular business activity over an extended period of time").
3. Service Control Corp. v. Liberty Mutual Insurance Co., No. 644496 (Cal. Super. Ct., San Diego County Apr. 12, 1993) (pollution exclusion bars coverage for leakage from corroded underground tanks: "corrosion, by its very definition, [is] not abrupt, but gradual").
4. Hecla Mining Co. v. Continental Insurance Co., No. CV-91-87608 (Idaho Dist. Ct., Kootenai County Mar. 19, 1993) ("sudden" in phrase "sudden and accidental" in pollution exclusion is unambiguous and has a temporal connotation).
5. Cooley, Inc. v. Aetna Casualty & Surety Co., No. 90-00060 (Mass. Super. Ct., Bristol County Feb. 17, 1993) (pollution exclusion barred coverage where insured failed to show release was abrupt as well as inadvertent).
6. MSM Industries, Inc. v. United States Fire Insurance Co., No. 90-6968 (Mass. Super. Ct., Middlesex County Jan. 19, 1993) (coverage barred by pollution exclusion where insured failed to show that alleged polluting discharge was abrupt as well as unexpected).
7. Martin Marietta Corp. v. Aetna Casualty & Surety Co., No. C-610358 (Cal. Super. Ct., Los Angeles County May 17, 1993) (to avoid effect of pollution exclusion, insured must show that polluting event was a "'sudden' event," as opposed to "a gradual event").
8. Republic Insurance Co. v. Sunshine Mining Co., Nos. 95229 and 95239 (Idaho Dist. Ct., Ada County Apr. 27, 1993) (pollution exclusion bars coverage for contamination arising from insured's longstanding waste disposal practices).
9. ACC Chemical Co. v. Alexander & Alexander, Inc., No. CL-14219 (Iowa Dist. Ct., Clinton County Mar. 16, 1993) ("sudden" includes a temporal element and means "happening, coming, made or done quickly, or abruptly without warning").

10. Arthur Bleakney v. California Union Insurance Co., No. 90-00-4-18 (Mass. Super. Ct., Norfolk County April 15, 1993) (pollution exclusion barred coverage for pollution resulting from policyholder's routine business operations and waste disposal practices).
11. General Chemical Corp. v. First State Insurance Co., No. 90-3833 (Mass. Super. Ct., Suffolk County Sept. 18, 1992) (a continuous course of disposal of pollutants over a 26-year period due to practices in the regular course of operating the facility "is not sudden and accidental").
12. Landauer, Inc. v. Liberty Mutual Insurance Co., No. 91-5802 (Mass. Super. Ct., Suffolk County Apr. 24, 1992) (routine dumping of hazardous substances at landfill over several years is not "sudden"), appeal pending, No. 92-P-1175 (Mass. Ct. App.).
13. United States Fidelity & Guaranty Co. v. City of Menominee, No. 87-4939CE (Mich. Cir. Ct., Menominee County Feb. 13, 1992) (no coverage for routine dumping of hazardous materials at landfill over many years).
14. Rochester Smelting & Refining Co., Inc. v. Merchants Mutual Insurance Co., No. 91/02683 (N.Y. Sup. Ct., Monroe County Sept. 9, 1991) (where wastes were deliberately dumped in a landfill over a seven-year period, "it would be difficult to conclude that such discharges were either sudden or accidental"), aff'd, No. 1495 (N.Y. App. Div. Dec. 30, 1992).
15. Aerojet-General Corp. v. Transport Indemnity Insurance Co., No. 262425 (Cal. Super. Ct. San Mateo County Aug. 20, 1991) ("the plain, ordinary and popular meaning of sudden is abrupt, quick, swift, not gradual"), appeal pending, Nos. A057580, A057812, A059976 (Cal. Ct. App., 1st Dist.).
16. St. Paul Fire & Marine Insurance Co. v. McCormick & Baxter Creosoting Co., No. A6711-07096 (Or. Cir. Ct., Multnomah County Dec. 21, 1990) ("while the term 'sudden' in certain contexts may mean 'unforeseen,' when used in conjunction with 'accidental,' it necessarily assumes its temporal definition of short in time"; no coverage for 25 to 30 spills of chemicals over 40-year period), appeal pending, No. A71072 (Or. Ct. App.).

17. New Hampshire Insurance Co. v. H. Brown Co., No. 87-56315-CK (Mich. Cir. Ct., Kent County Sept. 27, 1989) ("only fair reading" of the pollution exclusion is that the policy does not cover damage which arises from normal, continuous business operations), aff'd, No. 121961 (Mich. Ct. App. July 29, 1991), cert. denied, 483 N.W.2d 901 (Mich. 1992).
18. City of Maple Lake v. American States Insurance, Co., No. C4921804 (Minn. Dist. Ct., Wright County Jan. 29, 1993) (polluting discharge of effluent from policyholder's wastewater treatment plant "was neither sudden nor accidental").
19. United Technologies Corp. v. Liberty Mutual Insurance Co., No. 87-7172 (Mass. Super. Ct., Suffolk County Aug. 3, 1993) ("The term 'sudden' has a temporal aspect; only an abrupt discharge or release of pollutants falls within the exception"; exclusion bars coverage for pollution resulting from releases occurring in the course of continuing manufacturing and disposal operations).
20. Union Oil Co. v. International Insurance Co., No. 361219 (Cal. Super. Ct., San Mateo County Aug. 16, 1993) (no coverage for discharge from underground storage tank; judge instructed jury that "(a) process that occurs slowly and incrementally over a relatively long time is not sudden").

Federal Appellate Court Cases

1. Smith v. Highes Aircraft Co., No. 91-16758 (9th Cir. Nov, 1993) (no coverage for claims arising from practice of discharging pollutant into unlined ponds: "the 'sudden and accidental' exception to the pollution exclusion necessarily incorporate a notion of temporal brevity")
2. Bituminous Casualty Corp. v. Tonka Corp., No. 92-3187 (8th Cir. Nov. 12, 1993) (to qualify for "sudden and accidental" exception, insured must show that release of contaminant was abrupt; "ongoing and routine" onsite disposal of wastes was not "sudden" as a matter of law).
3. Bureau of Engraving, Inc. v. Federal Insurance Co., No. 92-2910 (8th Cir. Oct. 1, 1993) (no coverage for pollution where barrels of contaminants had been leaking at the site for almost ten years).
4. United States Fidelity & Guaranty Co. v. Morrison Grain Co., Inc., No. 90-3123 (10th Cir. July 19, 1993) ("The discharge here was not 'sudden and accidental,' but a gradual dispersal or release of toxic chemicals which ought to have been anticipated or avoided").

5. Anaconda Minerals Co. v. Stoller Chemical Co., 990 F.2d 1175 (10th Cir. 1993) ("sudden" in the pollution exclusion must be given its conventional temporal definition, which is "abrupt or instantaneous"; no coverage for pollution that took place gradually as result of routine release of flue dust).
6. Ray Industries, Inc. v. Liberty Mutual Insurance Co., 974 F.2d 754 (6th Cir. Sept. 10, 1992) (routine dumping and crushing of drums containing insured's wastes at landfill was not "sudden and accidental" within exception to pollution exclusion).
7. Aetna Casualty & Surety Co. v. General Dynamics Corp., 968 F.2d 707 (8th Cir. 1992) ("'sudden' must mean abrupt," barring coverage for discharges "occurring over an extended period of time").
8. Hartford Accident & Indemnity Co. v. United States Fidelity & Guaranty Co., 962 F.2d 1484 (10th Cir. 1992) ("continuous or routine discharges of pollutants are not covered").
9. Terminix International Co. v. Maryland Casualty Co., 956 F.2d 270 (6th Cir. 1992) (affirming and adopting trial court's holding that pollution exclusion bars coverage where contaminants were released over a long period of time).
10. Grant-Southern Iron & Metal Co. v. CNA Insurance Co., 905 F.2d 954, 955 (6th Cir. 1990) ("the phrase 'sudden and accidental' has a temporal component and does not describe continuous or ongoing polluting events").
11. FL Aerospace v. Aetna Casualty & Surety Co., 897 F.2d 214, 219 (6th Cir. 1990) ("word 'sudden' has a plain, everyday temporal component . . . a sudden and accidental event is one that happens quickly, without warning, and fortuitously or unintentionally"), cert. denied, 111 S. Ct. 284 (1990).
12. Ogden Corp. v. Travelers Indemnity Co., 924 F.2d 39, 42 (2d Cir. 1991) ("For a release or discharge to be sudden, it must 'occur[] over a short period of time'").
13. United States Fidelity & Guaranty Co. v. Star Fire Coals, Inc., 856 F.2d 31, 34 (6th Cir. 1988) ("[w]e do not believe that it is possible to define 'sudden' without reference to a temporal element that joins together conceptually the immediate and the unexpected").
14. Great Lakes Container Corp. v. National Union Fire Insurance Co., 727 F.2d 30, 33 (1st Cir. 1984) (no coverage for contamination as a result of "regular business activity").

15. A. Johnson & Co. v. Aetna Casualty & Surety Co., 933 F.2d 66, 72 (1st Cir. 1991) (predicting that Maine will "join the jurisdictions which accord 'sudden' its unambiguous, plain and commonly accepted meaning of temporally abrupt").
16. State of New York v. AMRO Realty Corp., 936 F.2d 1420 (2d Cir. 1991) ("The underlying complaint here, alleging that an industrial operation disposed of its manufacturing waste by certain improper methods for close to thirty years, cannot be understood to allege a 'sudden' release").
17. Lumbermens Mutual Casualty Co. v. Belleville Industries, Inc., 938 F.2d 1423 (1st Cir. 1991) (pollution exclusion bars coverage for discharge of pollutants as ordinary part of longterm business operations, notwithstanding that scattered instances of release may have been unforeseen or occurred suddenly), cert. denied, 112 S. Ct. 969 (1992).
18. Northern Insurance Co. v. Aardvark Associates, Inc., 942 F.2d 189 (3d Cir. 1991) ("exception for 'sudden and accidental' discharges applies only to discharges that are abrupt and last a short time": no coverage for pollution "occurring over a period of years").

Federal District Court Cases

1. Aetna Casualty and Surety Co. v. General Dynamics Corp., no. 88-2220C(8) (E.D. Mo. Oct. 1, 1993) (contamination that "reflects the culmination of years of illegal or at least improper waste disposal, [resulting in] a slow and persistent dissemination of chemical pollutants into the soil, "cannot reasonably be termed a "sudden" discharge).
2. Cincinnati Insurance Co. v. Flanders Electric Motor Service, Inc., No. EV 91-186-C (S.D. Ind. Aug. 20, 1993) (pollution exclusion barred coverage for "long-term effects of leakage from improper handling and storage practices"; "the word 'sudden' would not have any meaning in the exception if it is not interpreted to mean quick, abrupt, or happening without previous notice or very little notice")
3. Hussey Plastics Co. v. Continental Casualty Co., No. 90-13104-WD (D. Mass. June 18, 1993) (pollution exclusion bars coverage where insured "over the course of years . . . deliberately caused its plastic waste materials to be deposited at the landfill").
4. Freedom Gravel Products, Inc. v. Michigan Mutual Insurance Co., No. CIV-91-237C (W.D.N.Y. Apr. 22, 1993) (pollution exclusion barred coverage for contamination alleged to occur over a three-month period, a "non-sudden" event).

5. Cessna Aircraft Co. v. Hartford Accident & Indemnity Co., No. 91-2346 (D. Kan. Feb. 17, 1993) ("sudden" is not ambiguous and includes meaning of "quick or brief in time"; no coverage for groundwater contamination that occurs gradually or over an extended period of time).
6. Gould, Inc. v. CNA, No. 3-CV91-0569 (M.D. Pa. 1992) (pollution exclusion unambiguously bars coverage for bodily injury claim arising from gradual pollution; "sudden" includes a "temporal element, that being 'abrupt' and lasting a short time").
7. Upjohn Co. v. Aetna Casualty & Surety Co., No. K88-124CA4 (W.D. Mich. Feb. 26, 1993) ("sudden" includes a temporal element as well as the unexpected; no coverage where pollution resulted from poor business practices at plant or from intentional dumping of wastes at landfill).
8. Meridian Oil Production, Inc. v. Hartford Accident and Indemnity Co., No. G-91-167 (S.D. Tex. Mar. 4, 1993) (discharge of pollutants "in the normal course of [insured's] drilling operations over a period of thirteen months . . . does not fulfill the temporal requirements for 'sudden'"), appeal pending, No. 93-7463 (5th Cir.)
9. Nationwide Mutual Insurance Co. v. R.P. Hoffman Mobil Inc., No. 90-1187 (M.D. Pa. Sept. 17, 1992) ("a release of gasoline over the period of several months to almost two years cannot be said to be abrupt or sudden"; no coverage for pollution resulting from leakage from underground storage tank), appeal pending, No. 92-7549 (3d Cir.).
10. Oklahoma Publishing Co. v. Kansas City Fire and Marine Insurance Co., 805 F. Supp 905, 909 (W.D. Okla. 1992) ("As the discharges at issue occurred over a number of years in accordance with [the policyholder's] intended disposal plan, they cannot as a matter of law be deemed to be 'sudden and accidental.' . . . Routine discharges over a period of years cannot be viewed as 'sudden.' Likewise, in no event can such purposeful conduct be 'accidental'"), appeal pending, No. 92-6391 (10th Cir.).
11. City of Johnstown v. Bankers Standard Insurance Co., No. 88-CV-574 (N.D.N.Y. Sept. 22, 1992) (pollution exclusion bars coverage for "a lengthy and continuous course of conduct. . . , whereby wastes were intentionally deposited at the site").

12. West American Insurance Co. v. City of Southgate, No. 91-17 (E.D. Ky. Jan. 22, 1992) (pollution exclusion bars coverage where insured had its wastes disposed of at landfill over ten-year period).
13. In re Texas Eastern Transmission Corp. PCB Contamination Insurance Coverage Litigation, MDL No. 764 (E.D. Pa. July 9, 1992) ("sudden' clearly has a temporal meaning," barring coverage where discharges into environment took place over a period of years), aff'd, No. 92-1638 (3d Cir. May 28, 1993).
14. Christopher v. Hartford Insurance Group, No. 89-CV-72492-DT (E.D. Mich. July 1, 1992) (ongoing pollution at drum-reconditioning site, including leaks, spills, and discharges from accidental machinery malfunctions, was not "sudden and accidental").
15. State of New York v. Raeco Products, Inc., Nos. 89-1263L, 91-6015L (W.D.N.Y. Jan. 7, 1992) ("long-term, continuous release of pollutants over the course of sixty years cannot be interpreted as an allegation of a 'sudden' discharge").
16. G. Heileman Brewing Co. v. Royal Group, Inc., 779 F. Supp. 736 (S.D.N.Y. 1991) (discharge not "sudden" because waste was deposited repeatedly over an extended period of time), aff'd, (2d Cir. May 14, 1992).
17. Oklahoma Publishing Co. v. Continental Insurance Co., No. 90-1251-A, slip op. at 2 n.1, 1991 WL 323804 (W.D. Okla. Nov. 5, 1991) (insured's "arguments that the word 'sudden' has no temporal component would require the Court to ignore that the clause in question refers to 'sudden and accidental' discharges") (emphasis in original).
18. Aeroquip Corp. v. Aetna Casualty and Surety Co., No. CV 90-4260 RG(Gx) (C.D. Cal. Oct. 16, 1991) ("the release must be brief, abrupt and of short duration to fall within [the 'sudden and accidental'] exception to the pollution exclusion"), appeal pending, No. 91-56356 (9th Cir.).
19. Ludlow's Sand & Gravel Co. v. General Accident Insurance Co., No. 87-CV-1239 (N.D.N.Y. May 13, 1991) (discharges taking place over twenty-year period cannot be considered "sudden").
20. Detrex Chemical Indus., Inc. v. Employers Insurance of Wausau, 681 F. Supp. 438, 457 (N.D. Ohio 1987) ("sudden and accidental" does not include events over a period of time).
21. Peerless Insurance Co. v. Strother, No. 87-91-CIV-3-B0, slip op. at 10 (E.D.N.C. June 21, 1990) ("a pattern of repetitive activity" is not "sudden and accidental")
22. Inland Waters Pollution Control, Inc. v. National Union Fire Insurance Co., No. 89-CV-70584-DT (E.D. Mich. May 17, 1990) (pollution exclusion unambiguous).

23. Becker Electronics Manufacturing Corp. v. Granite State Insurance Co., No. 86-CV-1294, slip op. at 6 (N.D.N.Y. June 9, 1989) (1989 WL 63671) ("[n]or can this court conclude that allegations of continuous disposal of waste solvents for a period of approximately twenty years . . . constitutes a 'sudden and accidental' exception to the pollution exclusion").
24. C.L. Hauthaway & Sons Corp. v. American Motorists Insurance Co., 712 F. Supp. 265, 268 (D. Mass. 1989) ("sudden" connotes "a temporal aspect of immediacy, abruptness, swiftness, quickness, instantaneousness, and brevity").
25. Federal Insurance Co. v. Susquehanna Broadcasting Co., 727 F. Supp. 169, 177 (M.D. Pa. 1989) ("pollution exclusion broadly, but nevertheless plainly, excludes coverage for gradual pollution"), aff'd, 928 F.2d 1131 (3d Cir. 1991).
26. United States Fidelity & Guaranty Co. v. Murray Ohio Manufacturing Co., 693 F. Supp. 617 (M.D. Tenn. 1988), aff'd without opinion, 875 F.2d 868 (6th Cir. 1989) (release of pollutant over seven year period "cannot, under any reasonable interpretation, be deemed a 'sudden' discharge or release").
27. United States Fidelity & Guaranty Co. v. Korman Corp., 693 F. Supp. 253, 260 (E.D. Pa. 1988) (pollution exclusion applies where alleged leaching of contaminants was not sudden but rather "occurred continually over a long period of time").
28. Fireman's Fund Insurance Cos. v. Ex-Cell-O Corp., 702 F. Supp. 1317, 1325-26 (E.D. Mich. 1988) ("'sudden' in the pollution exclusion includes the temporal component of briefness, and means 'brief, momentary, or lasting only a short time'").
29. EAD Metallurgical, Inc. v. Aetna Casualty & Surety Co., 701 F. Supp. 399 (W.D.N.Y. 1988) (no coverage for releases occurring from 1977 to 1983), aff'd on other grounds, 905 F.2d 8 (2d Cir. 1990).
30. Centennial Insurance Co. v. Lumbermens Mutual Casualty Co., 677 F. Supp. 342, 347, 348 (E.D. Pa. 1987) ("pollution exclusion clause . . . [is] unambiguous and . . . the language should be given its plain and ordinary meaning"; waste released on numerous occasions over thirteen-month period cannot be characterized as "sudden").
31. American Mutual Liability Insurance Co. v. Neville Chemical Co., 650 F. Supp. 929, 933 (W.D. Pa. 1987) ("annual careless spillage onto the ground surface cannot be sudden").

32. Borden, Inc. v. Affiliated FM Insurance Co., 682 F. Supp. 927, 930 (S.D. Ohio 1987) (regular depositing of radioactive wastes "is precisely the type of activity which the pollution exclusion was drafted to preclude"), aff'd mem., 865 F.2d 1267 (6th Cir.), cert. denied, 110 S. Ct. 68 (1989)
33. American Motorists Insurance Co. v. General Host Corp., 667 F. Supp. 1423, 1428 (D. Kan. 1987) ("[n]o use of the word 'sudden' or 'suddenly' could be consistent with an event which happened gradually or over an extended time"), aff'd on other grounds, 1991 U.S. App. LEXIS 4428, vacated in part on reh'g, 946 F.2d 1489 (10th Cir. 1991).
34. Fischer & Porter Co. v. Liberty Mutual Insurance Co., 656 F. Supp. 132, 140 (E.D. Pa. 1986) (continuous dumping of toxic chemicals is not "sudden").
35. Grant-Southern Iron & Metal Co. v. CNA Insurance Co., 669 F. Supp. 798, 801 (E.D. Mich. 1986) (pollution exclusion bars coverage for pollution discharged "at least sporadically and may be continuously"), appeal dismissed mem., 838 F.2d 470 (6th Cir. 1988).
36. American States Insurance Co. v. Maryland Casualty Co., 587 F. Supp. 1549, 1553 (E.D. Mich. 1984) (no coverage for continuous dumping).
37. National Standard Insurance Co. v. Continental Insurance Co., No. CA-3-81-1015-D, slip op. at 17 (N.D. Tex. Oct. 4, 1983) (chemical discharges "over a period of years" are not sudden).
38. Olin Corp. v. Insurance Co. of North America, 762 F. Supp. 548 (S.D.N.Y. Apr. 23, 1991) (pollution exclusion bars coverage for claims resulting from discharge of DDT-bearing effluent where discharge was neither "sudden," since it occurred over a sixteen-year period, nor "accidental," since insured was aware of DDT in effluent).
39. United States v. Amro Realty Corp., No. 87-CV-1418 (N.D. N.Y. Nov. 10, 1992) (no coverage where allegations that contamination occurred over period of several decades precluded finding that contamination was "sudden"), aff'd, No. 93-6046 (2d Cir. June 18, 1993).
40. Downtown Airpark, Inc. v. Continental Insurance Co., No. CIV-91-673-L (W.D. Okla. Mar. 22, 1993) (pollution exclusion unambiguously bars coverage for pollution occurring over a number of years as a result of routine waste disposal practices).
41. Upjohn Co. v. Aetna Casualty & Surety Co., No. K88-124CA4 (W.D. Mich. June 3, 1993) (pollution exclusion bars coverage where insured's wastes were deliberately dumped at landfill over period of years).

42. Macklanburg-Duncan v. Aetna Casualty & Surety Co., No. CIV-92-1650-A (W.D. Okla. March 29, 1993) (no coverage for claims arising from repeated and deliberate disposal of wastes at a landfill).
43. United States v. Hardage, No. CIV-86-1401-W (W.D. Okla. April 20, 1993) ("sudden and accidental" exception to pollution exclusion applies only to discharges that are "both abrupt and unexpected or unintended by the insured").
44. Transamerica Insurance Co. v. Duro Bag Manufacturing, Co., No. 89-161 (E.D. Ky. Aug. 5, 1993) ("sudden and accidental" exception to pollution exclusion does not apply to the hauling of waste to a dumpsite regularly over a period of years).
45. St. Paul and Marine Insurance Co. v. Warwick Dyeing Corp., No. 91-0518P (D.R.I. Dec. 8, 1992) (discharge of insured's wastes into landfill was neither "sudden" nor "accidental"; "(t)he majority of the recent judicial interpretations of the sudden and accidental exception to the pollution exclusion clause held that the word 'sudden' unambiguously has a temporal component and means abrupt"), adopted June 3, 1993, appeal pending, No. 93-1721 (1st Cir.).
46. Harrow Products, Inc. v. Liberty Mutual Insurance Co., No. 1:89-CV-967 (W.D. Mich. Aug. 30, 1993) (no coverage where spills "appear to have occurred in the regular course of business and cannot reasonably be characterized as abrupt or sudden events").
47. IMCERA Group, Inc. v. American Home Assurance Co., No. BC 011005, slip op. at 13 (Cal. Super. Ct., Los Angeles County Sept. 8, 1993) (pollution exclusion barred coverage: "This was an instance of long chemical use, and of gradual variegated chemical and metallic pollution of the soil and consequent pollution of the water flowing through the soil and into the groundwater. This was pollution which occurred over a extended period of time").

Tab 1

Environmental Liability and the Pollution Exclusion: Why Some Courts Find Coverage

by Bernard J. Daenzer, CPCU, and
Edward Zampino, J.D.

ABSTRACT: Since 1970 pollution exclusions have been endorsed to or included in American comprehensive general liability (CGL) policies. Insureds frequently seek coverage for gradual pollution discharge claims as coming within the "sudden and accidental" exception to certain exclusions. They allege not only that exclusion language is ambiguous on its face but that the "history" of that policy language shows that insurers' conduct has threatened the integrity of the judicial process. In this article, the authors discuss the litigation strategies addressing these allegations and evidence that they believe refutes such contentions.

Editor's Note: This article was submitted in response to the article by Charles Becker published in the December 1992 CPCU Journal. While this article does not address the accuracy of the survey of case law made in the earlier article, it does provide a different perspective on the issue. It contains insight into both the issues and the process that surrounds the resolution of these issues.

The onslaught of environmental insurance coverage litigation that began in the 1980s shows no sign of letting up in the 1990s. Insureds and insurers continue to litigate quite ferociously over who will ultimately pay the price of a nationwide cleanup of contamination resulting primarily from decades of insureds' normal operational polluting acts. The intensity of this battle is understandable. There are, literally, billions of dollars at stake.

What is not understandable to many people in the insurance field are some of the tactics used in this litigation.

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These tactics are founded upon accusations that in 1970 the entire community of insurance companies perpetrated a fraud upon the public and all state insurance commissioners when the standard bureau pollution exclusion was drafted, filed for regulatory approval, and marketed. The purpose of this article is to demonstrate why some courts are finding coverage for environmental liabilities under the comprehensive general liability (CGL) policy's pollution exclusion based upon such groundless accusations.

The Evolution of Pollution Exclusion Litigation

The pollution exclusion was drafted as an endorsement in 1970 and later incorporated into the standard 1973 CGL policy. It reads as follows:

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

In environmental coverage cases, policyholders assert that "sudden" must be interpreted as "unexpected." It is also urged that there is coverage under the exclusion for any unexpected pollution damage, even though the "sudden and accidental" language in the exclusion's exception modifies the "discharge" of pollutants. On the other hand, insurance carriers contend that "sudden" cannot be stripped of its temporally abrupt element, and that the exclusion's plain "discharge" focus cannot be ignored.

Some early court decisions interpreting the "sudden and accidental" exception to the pollution exclusion found coverage for long-term and gradual pollution



discharges. As time passed, the rationale of those pro-policy holder decisions was rejected-in some of the jurisdictions where those cases had been decided. As more courts were dismissing insureds' claims based upon the plain language of the exclusion, many policyholders and their lawyers began creating and expanding upon arguments based upon the exclusion's purported "history."

Specifically, it was argued that an analysis of the exclusion's drafting history demonstrated drafting intent to create an exclusion that excluded nothing. Some suggested that the exclusion was deliberately drafted to be ambiguous.² It was also argued that the regulatory history of the exclusion's filing for approval with state insurance commissioners showed that insurance

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bureaus such as the Insurance Rating Board (IRB) and the Mutual Insurance Rating Bureau (MIRB) made dishonest representations to insurance regulatory bodies.³ It was argued at every turn that a public history of speeches, articles, and comments made by individuals in the insurance business demonstrated that the exclusion was not meant or understood to restrict existing coverage in 1970, and that the carriers' present litigation posture is seriously disingenuous.

The Integrity Argument

In light of their purported evidence of insurance dishonesty, many policyholders, primarily through the assistance of policyholder *amici curiae* associations



represented by the same lawyers that represent individual insureds, have insisted that courts must find coverage for insureds. They have alleged that denial of coverage for insureds' gradual pollution discharge claims would destroy the "integrity of the judicial system."⁴ Insurance carriers are cast as chameleons who told the world one thing about the meaning of the exclusion at its "point of sale" in 1970 and who now tell quite a different and unscrupulous story at the "point of claim."⁵

Not all of the verbiage used is so inflammatory.

However, the inflammatory message transmitted to courts nationwide has been uniformly consistent—the insurers scammed both the public and insurance regulatory bodies in 1970. They told everyone that the exclusion merely restated then-existing occurrence coverage for unexpected harms, and they now must be made to provide coverage for gradual pollution discharge claims. While insurers contend that all of these accusations are patently false, a number of courts have taken them at face value.

The Insurer Dilemma

Even in the face of these accusations, for many years insurance carriers did little to challenge or rebut the policyholders' extrinsic "history" contentions. Rather, they properly held firm to the proposition that courts should not have to resort to extrinsic evidence when interpreting policy language. They argued that this was especially true of extrinsic evidence of a far-flung "history" that played no part whatsoever in the insurance dealings between a particular policyholder and a particular insurer.

On top of these objections, carriers correctly argued to courts that the extrinsic history materials policyholders were relying on were not even part of the record in a given case. Generally, there was no discovery taken or provided by policyholders concerning such materials or the individuals who generated them. Most frequently, policyholder *amici curiae* groups appeared in cases on a na-



tionwide basis when they reached a jurisdiction's intermediate appellate or highest court. Thus, for the first time during the appellate process, these *amici* raised arguments based upon extrinsic materials whose existence was unknown to insurance carriers or their attorneys in a given case.

Some carriers made, with mixed success, affirmative motions to strike such evidence. When insurers opposed the insureds' extrinsic evidence tactics, insureds and their *amici* argued to courts that such resistance proved that carriers were trying to "keep hidden" revealing evidence that supported the policyholders' contentions and accusations.⁶

However, as time went on, carriers found they could not count upon the courts to enforce traditional legal rules that clearly delineated precise restrictions on the use of parol evidence to demonstrate the intent of the particular parties entering into a contract of insurance. These courts often looked at the insured presentation of such evidence and did not uniformly grant carrier motions to strike it. More distressing, some courts relied upon this extrinsic evidence in awarding coverage to policyholders.⁷ Indeed, in light of the policyholders' accusations and one-sided presentation of extrinsic history evidence, some courts have labeled insurers "dishonest" and described the carrier coverage position as "irrational."⁸

An Invisible Body of Evidence

Courts that purport to make observations on the "history" of the exclusion have not seen the complete evidence of that history. In some instances, a handful of documents were attached to the briefs of insureds and their *amici curiae*. Most often, these briefs simply made reference to published "commentaries" about the import of the exclusion written by lawyers who represent policyholders in environmental coverage disputes. These arguably biased articles, which appeared in such diverse places as insurance

trade journals, law reviews, and insurance litigation trade publications, presented certain excerpts of extrinsic evidence documents. As demonstrated below, this "evidence" was presented out of context.

The court briefs that referenced these articles of policyholder counsel (and the snippets of evidence contained therein) also routinely relied upon self-serving "conclusions" set forth in such articles. Courts were typically told that "commentators agree" that the exclusion excluded nothing. However, courts were rarely advised of the partisanship of these commentators.⁹

Thus, without reviewing any, or the smallest selection of, actual evidence, some courts made erroneous assumptions about the import of extrinsic "history" evidence based upon policyholder counsel commentaries.¹⁰ As soon as one court accepted these accusations and arguments, policyholders cited its opinion as precedent to other courts. Without making an independent review of the insureds' extrinsic evidence, the observations previously made by one court were simply accepted by others.¹¹ Thus, a small cycle was created wherein unfounded conclusions about the history of the exclusion set forth in policyholder lawyers' articles were adopted by some courts, and were in turn rehearsed by still other courts.

Belated Insurer Response

The above scenario occurred often enough that a few carriers began to obtain and take a very hard look at the universe of documents comprising the history of the pollution exclusion. Hundreds of thousands of documents were reviewed. They included the drafting history records of the National Bureau of Casualty Underwriters (NBCU), IRB, MIRB, and the Insurance Services Office (ISO). They included the records of state insurance departments across the country. Additionally, because many insureds were also asserting in courts that they had a reasonable expectation of coverage for the consequences of

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gradual pollution discharges under the exclusion, a virtual storeroom of documents was compiled. It included evidence from (1) leading international insurance brokers who acted as agents for policyholders (2) insurance broker trade associations, (3) prominent policyholder industry and insurance trade associations, (4) the federal government, and (5) a host of major insurance trade publications.

This enormous collection of historical materials proved quite enlightening. It demonstrated that every segment of the insurance world understood exactly how, in accord with its plain language, the pollution exclusion restricted coverage. How, then, have

courts been persuaded to think otherwise? The answer is more than a little disturbing.

Anatomy of a Stratagem: Selective Excerpting

It is commonplace that briefs citing documents or testimony in support of positions do not recite the entirety of that evidence. Rather, pertinent excerpts are cited. This is especially so when that evidence is part of the record in a case. However, use of excerpts to cast a document or a set of documents in a misrepresentative light is quite another matter.

The complete history of the pollution exclusion demonstrates that in 1970 it was drafted and understood as comprising both a clarification and a restriction of coverage. It clarified that "in most cases" there was no coverage for harm resulting from normal operational polluting events under the occurrence definition. It further restricted coverage only to temporally abrupt (sudden) and fortuitous (accidental) pollution discharges. By focusing on the discharge of pollution, the exclusion also avoided debate as to what damage insureds expected or intended to result from their polluting conduct.¹²

Unfortunately, over the years, many policyholders and their amici curiae have selectively excerpted and exagger-

and references in extrinsic materials addressing the clarification aspect of the exclusion. References to the exclusion's restrictive aspect in these very extrinsic materials were completely ignored. It was then inaccurately argued to courts that the extrinsic evidence showed that the exclusion only clarified existing coverage.

Of course, courts were especially susceptible to being misled by such arguments when they did not review the actual evidence, and they misplaced trust in and reliance on the inaccurate "inclusions" set forth in policyholder commentaries that selectively excerpted these materials to begin with.

Some specific examples follow.

"Drafting History." One of the purposes of the pollution exclusion was to stop coverage for normal business pollution practices. In 1970 it was commonly perceived that routine operational pollution conduct caused "expected" pollution damage. Coverage for such claims was already precluded by the "neither expected nor intended" limitation of the 1966 CGL policy's occurrence definition.¹³ This limitation was subsumed within the exclusion's further restriction of coverage for pollution damage to that caused by a sudden and accidental pollution discharge. Thus, in one respect the pollution exclusion did clarify the coverage situation.

The exclusion provided an extra fail-safe mechanism, different and separate from that of the occurrence definition, to produce a similar result: the preclusion of coverage for most industrial pollution. However, while the results of the different occurrence definition and pollution exclusion mechanisms were similar, they were not identical. Those claims for unexpected damage slipping through the "occurrence" net would be caught by the exclusion—unless the damage was caused by a discharge that was both sudden and accidental.

The March 17, 1970, minutes of IRB's General Liability Governing Committee (GLGC) show that it decided to re-

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from mentioning
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expressly described
drafting efforts to narrow
pollution coverage to the
temporally oriented
“classical accident”
and provide for a
buyback of coverage...
”

turn pollution coverage from a broader occurrence basis back to the more narrow classical accident basis. It commissioned the creation of:

a policy exclusion of pollution that would run to bodily injury and property damage should be adopted for all general liability insurance, the exclusion to except pollution caused injuries when the pollution results from the classical accident. It was agreed that coverage should be made available on an individual buyback basis. (emphasis added)¹⁴

As stated in these minutes, it was recognized that insureds could repurchase the coverage taken away by the exclusion via a buyback.

For years, many insureds and their amici routinely cited only to another excerpt of these minutes (a few paragraphs above the excerpt cited here), which stated that the exclusion also clarified the coverage situation. They repeatedly refrained from mentioning in their court briefs and articles how these very March 17, 1970, minutes (and many other contemporaneous drafting documents) expressly described drafting efforts to narrow pollution coverage to the temporally oriented “classical accident” and provide for a buyback of coverage taken away by the exclusion.¹⁵ Through such selective excerpting some courts have been persuaded to accept inaccurate drafting history arguments.

Drafting History “Presumption” Argument. Large numbers of policyholders and their amici have also asserted that there should be a “presumption” that in 1970 the drafters of the exclusion had in mind a nontemporal meaning for “sudden” purportedly adopted by one or two courts that had already interpreted “sudden and accidental” in the context of the boiler and machinery insurance policy.¹⁶ However, those drafters have testified that, not only did they intend a temporal restriction by using

"sudden" in the pollution exclusion, they were also unaware of any decision that purportedly interpreted "sudden and accidental" without its temporal element in the context of a boiler and machinery policy.

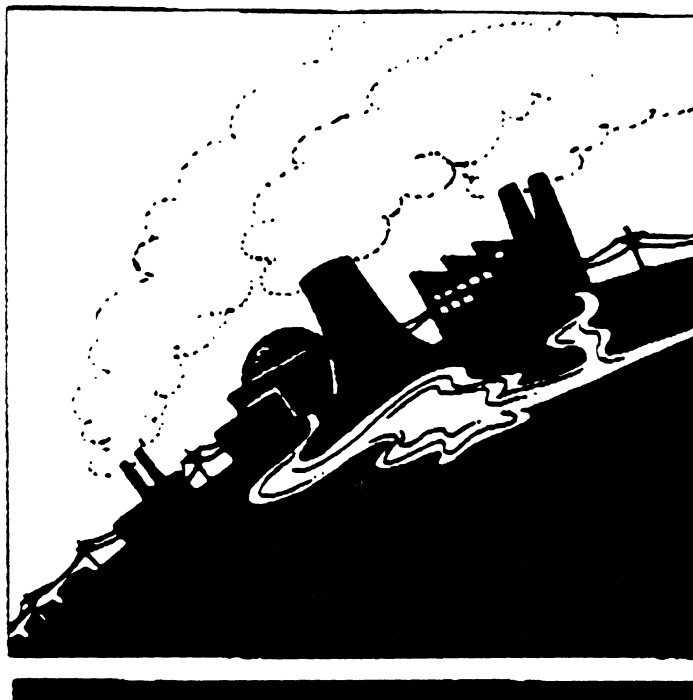
Long ago, the community of policyholder litigators had also obtained all of the actual *contemporaneous* drafting history documents (such as the March 17, 1970, minutes, referred to earlier) that corroborated the drafters' sworn testimony and thoroughly rebutted any "presumption" of contrary drafting. Why, then, do policyholders and their amici continue to make a clearly unfounded drafting history "presumption" argument? The answer is quite simple: some courts are occasionally taking the bait on this argument and awarding millions of dollars in coverage when insurers do not precisely rebut it.

Nationwide Regulatory History Documents. For years, many insureds have urged that the community of state insurance commissioners presiding over the regulatory filing of the exclusion in 1970 understood it as *only* clarifying coverage. For instance, through selective excerpting, it has been argued that the Kansas insurance commissioner only understood that the exclusion precluded coverage for intentional conduct. Based on this excerpt, it has in turn been argued that then-Commissioner Sullivan understood the exclusion as a "mere" clarification of existing coverage.

On the contrary, the complete Kansas filing documents demonstrate that Insurance Commissioner Sullivan understood that the exclusion also restricted coverage. He wrote the IRB recognizing the "obvious" coverage reduction inherent in the exclusion's language:

*In view of the obvious reduction in coverage, to what extent will the premiums be reduced when this endorsement is attached? Will a buyback be available, and how will it be rated? (emphasis added)*¹⁷

The IRB's response confirmed that the coverage taken



away by the exclusion would be subject to a buyback on an individual risk basis. The IRB also revised the proposed effective date so that the restrictive endorsement would apply only to "new and renewal" policies. This responded to Sullivan's terming the endorsement "discriminatory" and to his questioning its attachment to outstanding policies.¹⁸

As in Kansas, insurance departments in West Virginia, Kentucky, Mississippi, New York, Texas, and Georgia would not approve the restrictive endorsement's unilateral attachment to outstanding policies.

Through selective excerpting tactics, some courts have been persuaded to accept the argument

that the exclusion was understood by the insurance commissioner of Georgia as merely restating then-existing "occurrence" coverage.¹⁹ In reality, the complete Georgia regulatory filing documents reflect that its insurance commissioner prohibited attachment of the restrictive exclusion to existing policies as he felt "...the effect of the addition of this exclusion could be so great."²⁰ (Former Insurance Commissioner Samuel Weese, CPCU, of West Virginia has confirmed that this conditioned approval of the exclusion indicated that it was perceived as a restriction of coverage. The Weese affidavit is discussed later in this article.)

The Louisiana Insurance Commission also balked at approving an exclusion with this coverage "restriction." An Aetna employee

...discussed this matter further with H.P. Walker, Executive Secretary of the Louisiana Insurance Commission. He said that the disapproval of the IRB's filing for this restriction of coverage was a political situation. (emphasis added)²¹

While recognizing the restriction of coverage, Louisiana did, however, permit application to outstanding policies in which the insured signed a letter acknowledging the "restriction of coverage." Similarly, Michigan, South

Dakota, Hawaii, Virginia, Iowa, and the District of Columbia also approved the pollution exclusion filing upon the condition that the *written consent of the insured* be obtained before attaching the restrictive endorsement to an outstanding policy.

Regulatory records from Texas demonstrate that the "drafting history" intent of restricting coverage to the sudden "boom" or "classical" accident was highlighted for Texas insurance regulators. Texas regulatory records also reflect awareness that coverage taken away by the exclusion could be repurchased via a buyback.²²

Thus, all of this nationwide evidence (and similar, lengthy evidence from other states) demonstrates that the presentation of the "regulatory history" of the exclusion made by many insureds has been distorted. It is suggested that courts that rendered decisions awarding coverage based upon such arguments have been led astray.

West Virginia Regulatory History. Perhaps no source of evidence has been more distorted than the 1970 West Virginia pollution exclusion filing scenario. For years, large numbers of insureds and their *amici* have been attempting, sometimes successfully, to persuade courts to accept their version of what then-Commissioner Samuel Weese, CPCU, was told and understood about the import of the pollution exclusion.²³

It is true that Weese signed an administrative order in 1970 referring to the exclusion as a "mere clarification." This seemed odd since the evidence from the historical West Virginia regulatory files indicated that the insurance department was advised and understood how this exclusion *did* change existing coverage.²⁴

This situation is readily explained. Unbeknown to most insurers, a prominent policyholder insurance expert testified in 1987 about a conversation he had had with Weese. In that conversation, Weese advised that he had had little involvement in the 1970 proceedings, which were essentially handled by one of his assistants.²⁵ This testimony



cast doubt upon insured contentions about the significance of the verbiage in Weese's 1970 order.

In a July 7, 1992, affidavit, Weese corroborated what he told the insureds' expert five years earlier. He further explained that his 1970 administrative order referred to the exclusion as a "mere clarification" only because of an "assumption" he had made, and not because of anything that any insurance bureau or carrier representative had said or submitted during the regulatory process.

2. I did not actively participate at the hearing or in the pre-hearing or post-hearing filing process. Although present at the

hearing, as Insurance Commissioner, I appropriately delegated the filing process to others. I was not involved in the discussions of the legal complexities underlying the coverages provided by the policies as amended by the addition of the proposed pollution exclusion. I recall entering the hearing with the belief that coverage was generally excluded for normal operational polluting events and premiums charged did not reflect such coverage under the 1966 CGL policy. I also recall leaving the hearing with an assumption that, with the addition of the pollution exclusion, there continued to be no general coverage for normal operational polluting events. Therefore, *without additional analysis, I assumed that the exclusion did not alter coverage, as none was intended initially.* (emphasis added)

Indeed, if anyone had asked Weese in 1970, he would have told them that "sudden" described a temporal event identifiable in time and place. He also understood that, unlike the exclusion's discharge language, the occurrence definition focused upon resultant harm.

4. In 1970, I understood that a "sudden" event was one which was identifiable in time and place. I also knew that an "accident" was an insurance term which contained a "sudden" element. In addition, I understood that the language of the occurrence definition

focused upon unexpected or unintended damage.²⁰

The affidavit also notes that the conditioned approval of the exclusion in West Virginia (as in the numerous states discussed earlier), indicates that those actively involved in the approval process properly perceived the exclusion as a restriction of coverage. Weese further disapproved of certain policyholders' use of a 1988 declaration of his to "misrepresent" his recollection of and involvement in those 1970 events.

The representative of the West Virginia Insurance Department who actually handled the conditional approval of the exclusion on Weese's behalf, Deputy Commissioner Donald W. Brown, has also admitted that the insurers' position is correct. He testified that the exclusion was understood as both clarifying and restricting then-existing coverage. He has also admitted that "sudden" meant "quickly," and that it would not even be reasonable, as policyholders assert, to equate the scope coverage of the pollution exclusion with that of the occurrence definition.²¹

It is astounding that so many millions of dollars of coverage have been awarded by courts based on what Weese and the West Virginia Insurance Department purportedly did or understood in 1970. This is especially so when the 1987 testimony of a most prominent insured expert should have informed many policyholders that the arguments being made in courts about Weese were completely unfounded.

Premium Reduction Argument. Many policyholders and their amici have also routinely asserted in courts that, since there was no reduction in premium when the exclusion was introduced in 1970, this shows that there was no intent by the insurance industry to reduce existing gradual pollution coverage.²² While some courts may have been persuaded by that argument, it is flatly incorrect. The 1966 CGL policy, which expanded coverage to include certain gradual exposures, did not involve a premium increase

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for occurrence coverage in the first place. Therefore there was no reason to rebate any premium when the exclusion eliminated all gradual pollution coverage in 1970.²³ Unfortunately, insurers that were not aware that this evidence was buried among hundreds of thousands of insurance bureau and regulatory documents were unable to prevent courts from being persuaded by this argument.

Public History of Pollution Exclusion

Many insureds and their amici also argue that the exclusion was publicly spoken of and marketed in a fashion supportive of their "mere clarification" thesis. A good example of

that allegation's lack of merit is the uniform evidence of public statements made by the community of insurance brokers who negotiated and procured coverage on behalf of their policyholder clients.

Consider the documentation generated by the respected international broker, Johnson & Higgins (J&H). Materials used by J&H in pollution coverage presentations to policyholders highlighted that the exclusion both clarified and restricted existing coverage.

Insurance Industry Both Clarifies (And Reduces) Coverage—The Sudden and Accidental Exception.²⁴

Thus, brokers, like the exclusion's drafters and state insurance regulators, were keenly aware of both of the dual aspects of the exclusion.

A member of J&H's Pollution Committee criticized those courts that would go so far as to misinterpret the exclusion simply to find coverage. J&H recognized that some courts did this by ignoring the discharge focus contemplated by the drafters and expressed in the exclusion's plain language:

our forecast that the courts would argue in favor of coverage under the General Liability policy even to the extent of misinterpreting the exclusion has been borne out. [T]he courts in their desire to hold that

the insured is covered by the policy have not realized that it is the discharge of the pollutants which must be sudden and accidental and not the damage or injury caused by the discharge of the pollutants. (emphasis added)²¹

Many other brokers disseminated similar information about the lack of gradual pollution discharge coverage under the exclusion, including the largest brokers in the world—Marsh & McLennan, Alexander & Alexander, and Frank B. Hall. In fact, on behalf of all of its nationwide membership, the National Association of Insurance Brokers (NAIB) acknowl-

edged that gradual pollution was not covered under the ISO CGL policy. In a 1978 survey, NAIB members called for ISO's deletion of its restrictive sudden and accidental exclusion. They wanted the exclusion replaced with broader language that did not contain a "sudden" discharge limitation.²²

The broker evidence is so powerful that some insureds and policyholder commentators now also accuse the broker community of dishonesty. Brokers are specifically accused of creating a false impression that the pollution exclusion created a gap in coverage and of misleading insureds into spending vast amounts of money for environmental impairment liability (EIL) policies solely to generate commissions for themselves.²³ These accusations should disturb all insurance men and women, especially those brokers who took the CPCU charge to uphold a "standard of honor and integrity" and put the interests of their clients before their own.

Reasonable Coverage Expectations

Numerous insureds and their amici have routinely come into court asserting that a finding of coverage for gradual pollution discharges comports with their "reasonable expectations" of coverage. This is ironic because

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one of the leading policyholder amici curiae in the nation, the Chemical Manufacturers Association (CMA), made contrary admissions in formal submissions to the United States Environmental Protection Agency (EPA) over a decade ago on behalf of its wide membership. In a nonlitigious setting addressing financial responsibility requirements under federal statutes, CMA freely admitted that the CGL policy, while providing coverage for sudden polluting events, did not provide coverage for gradual polluting events.²⁴

Perhaps even more disconcerting, the head of CMA's specialized Insurance Committee, Thomas A. Caldwell, CPCU, published an article criticizing those policyholders who made

"frivolous" claims for gradual pollution coverage in the face of the exclusion. He criticized "creative" and "cold-blooded" policyholder lawyers for filing such frivolous claims because all policyholder risk managers and insurance personnel always understood the coverage restrictions inherent in the plain language of the exclusion.²⁵

At the time he wrote his scathing commentary, this CMA Insurance Committee chairman was also the director of corporate insurance of one of the largest chemical companies in the world. Unfortunately, that chemical company subsequently filed one of those "frivolous" gradual pollution claims in a New Jersey court seeking coverage under the pollution exclusion.²⁶

The policyholder risk manager association, the Risk and Insurance Management Society (RIMS), similarly acknowledged the lack of gradual pollution coverage in formal submission to the EPA in a nonlitigious setting over a decade ago. Furthermore, in an announcement of ISO's then-new pollution insurance policy, RIMS pointed out in its newsletter, *RIMSCOPE*, that this policy provided "both sudden and gradual" coverage. It admitted that "gradual incidents currently are not covered under standard general liability contracts." In fact, RIMS once drafted its own proposed pollution exclusion language. RIMS's exclusion

conspicuously omitted the restrictive "sudden" limitation exactly because its temporal restriction was understood.³⁷

Thus, like brokers, major industry and insurance trade associations representing the policyholder community independently recognized the coverage restrictions inherent in the plain language of the pollution exclusion. This recognition was documented years before segments of that community asserted contradictory coverage claims in courts.

A Matter of Priorities

There are a host of other examples where drafting, regulatory, and public history documents have been ignored or selectively excerpted and presented out of context to courts. The sampling provided in the instant presentation, however, should suffice to make the fair-minded reader take notice. In the final analysis, the core question is whether insureds and insurers alike should continue to tolerate patently false accusatory tactics which, while sometimes successful in court, truly undermine the integrity of the judicial process and the insurance business.

Notably, the availability of pollution coverage has dried up, primarily as a result of court misinterpretations of the 1970 exclusion. This is something the head of CMA's Insurance Committee, a CPCU, recognized and lamented in his public criticism of the "frivolous" gradual pollution claims being filed by many policyholders.

The attitude of management is, let's spend some money on lawyers and see if the courts will rule in our favor. At best some battles were won but I am afraid we lost the war.³⁸

It is also suggested here that the answer to the question of whether such claims, accusations, and tactics should be tolerated must take the form of a resounding no.

In late 1992, a handful of insurers began attempts to change the manner in which the extrinsic history issue is



perceived by litigants and, hopefully, our courts. They have done this by presenting courts with a twofold argument. The first argument reiterates the carriers' traditional stance—that there is no reason for courts to go beyond the policy (to its "history") to interpret its language. The language is unambiguous and the "history" evidence is objectionable, since it is neither part of the record nor illustrative of the specific dealings between an insured and its insurer. However, the second argument is that, if courts are going to consider extrinsic evidence presented by policyholders, they need to look at *all* such evidence in fair and full context. A number of party and *amicus curiae* briefs pre-

senting the insurer side of the extrinsic evidence issue have recently been filed with the courts. Time will tell what impact they have on pending coverage litigation.³⁹

However, it is clear that these insurer presentations are having an impact on certain policyholder *amicus curiae* and commentators. For instance, not long ago a policyholder *amicus curiae* filed a brief with the New Jersey Supreme Court which made extrinsic evidence arguments about the "drafting history" of the pollution exclusion. Thereafter, an insurer *amicus* filed its own brief that demonstrated that the drafting history of the exclusion supported only the insurers' coverage positions.

In a rather abrupt retreat, the policyholder *amicus* then urged the New Jersey Supreme Court to ignore the *amicus* carrier's drafting history evidence. The policyholder *amicus* stated that such "internal" evidence had no bearing on an insured's "reasonable expectations" of coverage or on how a court should interpret the exclusion's language:

..."drafting history" refers to internal insurance industry documents, such as those in *Amicus Curiae* Aetna Casualty & Surety Company's (hereinafter "*Amicus Aetna*") motion to expand the record. The vast majority of the drafting history documents were never shown to the New Jersey Department of Insurance or the policyholder public. Except for

those few documents which were actually seen by the New Jersey Department of Insurance or the policyholder public, the drafting history documents neither formed the basis of the Insurance Commissioner's approval of the "polluter's exclusion" or the policyholders' objectively reasonable expectations. Thus, the drafting history documents relied on by Defendants-Respondents and Amicus Aetna are irrelevant in determining the meaning of the "polluter's exclusion." (emphasis added)⁴⁰

It is almost beyond irony that the authors of the above court submission denouncing drafting history as "irrelevant" before the New Jersey Supreme Court are the same authors who, in numerous other policyholder amicus briefs, have insisted that courts must look at drafting history evidence. It is these same authors who have urged courts to find coverage so as to protect the "integrity" of the judicial system. It is also these same authors who publish commentaries (which are routinely cited to courts) lambasting insurance companies under titles decrying their "dishonesty." It appears that certain insured proponents of "history" evidence want courts to look at it only if it can be presented unilaterally and inaccurately.⁴¹

The final irony is that the *amicus curiae* entity frequently utilized by these authors and others when making such allegations and accusations is represented to courts as



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 ”

being “nonpartisan.” On the contrary, this policyholder amicus filer, which also congratulates itself in court papers for its “vigilance” in protecting the integrity of the judicial system, is lavishly funded by the policyholder community, including policyholders litigating these very coverage issues.⁴²

A number of other policyholders are now vehemently objecting to carriers' recent presentations of the very categories of extrinsic evidence they and their amici have incessantly pressed upon the courts for so long. They understand that an undistorted “history” of the exclusion actually corroborates the restrictions set forth in its plain language—and seek to block courts' consideration of that evidence in fair and full context.⁴³

It is respectfully submitted here that, if the “integrity” of the judicial process is at risk, as those representing insureds have repeatedly alleged, it has certainly not been put there by insurers.

Conclusion

In an ideal world, a discussion of this nature would not be necessary. Litigants would be content to let courts interpret the

language set forth in black and white in a policy. If a court wished to resolve a perceived ambiguity, it would consider only direct evidence bearing on the intent and reasonable expectations of the particular parties to a contract of insurance. Notably, it was those representing policyholders who first put forth “history” arguments in attempts to create an aura of ambiguity before courts

even determined whether policy language was so unclear as to prevent insureds from understanding the bounds of their coverage. Seemingly made overconfident by their success in persuading some courts to accept their version of the history of the exclusion, some also saw fit to heighten unfounded *ad hominem* accusations.

Regrettably, a good deal of damage has already been done. A body of case law founded upon acceptance of

these accusations has been handed down. A body of publications elaborating upon these charges has formulated negative public perception. In the long run, policyholders, insurers, the judicial system, and the insurance industry would all be better served by the straightforward advocacy and good faith dealings that have historically underpinned insurance coverage disputes in the business world. ■

Endnotes

1. Early pro-policyholder rulings in New York were negated by pro-insurer rulings by its highest court. See *Powers Chemco v. Federal Ins. Co.*, 74 N.Y.2d 910, 549 N.Y.S.2d 650 (1989) and *Technicon Electronics Corp. v. American Home Assurance Co.*, 74 N.Y.2d 66, 544 N.Y.S.2d 531 (1989).
2. See Saylor, *The Emperor's Newest Clothes*, 5 Mealey's Ins. Lit. Rep. No. 46 (October 8, 1991), at 43-47, and Chester and Rodberg, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 Rutgers L.J. 9 (1986), at 37, respectively.
3. See, e.g., Anderson and Passannante, "Dishonesty" And The "Sudden And Accidental" Con Game: It's A Beautiful Thing, The Destruction Of Words, 5 Mealey's Ins. Lit. Rep. No. 17 (March 5, 1991). See also the State of Florida's amicus curiae brief (October 1991) submitted in *Daimler Chevrolet v. Southeastern Fidelity Ins. Corp.*, No. 78,293 (Fla. S. Ct.), at 16.
4. See, e.g., Polaroid Corporation and amicus curiae Mid-America Legal Foundation's Joint Opposition to Insurance Company of North America's Motion To Strike (December 11, 1992), at 2, submitted in *Polaroid v. Travelers Indemnity Co., et al.*, No. SJ-C-06151 (Mass. S. Ct.):
Mid-America has properly sought to lend added perspective to these proceedings for the Court's benefit by presenting both published materials for convenient reference, and critical information concerning previous representations made to courts and to state insurance regulatory agencies by the insurance industry and particular insurance carriers. This material includes statements that are contrary to the present contentions of the defendant-appellee insurance carriers and their amici before this Court. The integrity of the judicial system depends on vigilance by litigants and by amici curiae to prevent parties from making contradictory representations in different form or at different times depending upon their economic interests. (emphasis added).
See also, e.g., amicus curiae brief of Mid-America Legal Foundation in Support of Tonka Corporation (November 17, 1992), submitted in *Batuminus Cas. Corp. v. Tonka Corp.*, No. 92-3187 (U.S. Ct. App. 8th Cir.), at 15-16 and n. 34. The "integrity" argument is also used by some to attack purportedly inconsistent positions taken by some insurers in court briefs addressing interpretation of the pollution exclusion.
5. See, Saylor, *The Dutch Boys At The Dike: The Apologists For The Polluter's Exclusion Run Out Of Fingers*, 6 Mealey's Ins. Lit. Rep. 32 (June 23, 1992), at 28.
6. See, e.g., Response of Amic. Curiae Ohio Attorney General, et al. to Motion To Strike (January 6, 1992), submitted in *Hydrex Equip. Corp. v. Sohne Drake Ins. Co.*, No. 91-541 (Ohio S.Ct.), at 20. Joint Opposition of Polaroid/Mid-America submitted in *Polaroid*, supra n.4, in some instances, courts were rendering opinions without even ruling upon properly filed carrier motions to strike. This was the case with Appellee Liberty Mutual's Motion To Strike Portions of The Brief And Certain Documents Filed By Appellant Joy Technologies (November 1991), filed in *Joy Technologies, Inc. v. Liberty Mutual Ins. Co.*, No. 20'53 (W.Va. S. Ct.).
7. See, e.g., *Just v. Land Reclamation Ltd.*, 155 Wn. 2d 737, 458 N.W.2d 570 (1990) (and relying upon three "commentaries" of policyholder counsel as to the purported import of extrinsic history evidence); *Claussen v. Aetna Cas. & Sur. Co.*, 259 Ga. 333, 380 S.E. 2d 686 (1980); *New Castle County v. Hartford Acc. & Indem. Co.*, 933 F.2d 1162 (3d Cir. 1991); *Joy Technologies, Inc. v. Liberty Mutual Ins. Co.*, 421 S.E. 2d 493 (W.Va. 1992); *Queen City Farms v. Central Nat'l Ins.*, 64 Wn. App. 838, 827 P.2d 1024 (Wash. App. 1992) and relying upon and citing verbatim two entire pages of a policyholder lawyer's extrinsic evidence commentary. See *Bradbury, Original Intent, Revisionism, and the Meaning of the CGL Policies*, 1 Env. Claims J. No. 3 (Spring 1989).
8. See *Claussen v. Aetna Cas. & Sur. Co.*, 878 F. Supp. 1571, 1573 n. 4 and *Teledyne, Inc. v. Continental Casualty Company*, No. 908363, Calif. Sup. Ct., San Fran. Cty. (January 8, 1992), reporter's transcript reprinted in 6 Mealey's Ins. Lit. Reps. No. 12 (January 28, 1992), TR at 107 respectively.
9. See, e.g., amicus curiae brief of a frequent policyholder amicus curiae filer, the Chemical Manufacturers Association (CMA) et al. (June 1990), submitted in *USF&G v. Morrison Grain Company, Inc.*, No. 90-3123 (U.S. Ct. App. 8th Cir.), which cited nine policyholder commentaries in support of self-serving contentions without revealing their partisanship.
10. See n.7, supra.
11. For instance, the court in *CPC International v. Northbrook Excess & Surplus Ins.*, 982 F.2d 77, 91 (1st Cir. 1992), described and adopted the Third Circuit's examination of extrinsic evidence in *New Castle County* as "encyclopedic." See n.7, supra. However, the New Castle County court had expressly qualified its limited observations on that evidence. It admitted it had to "assume" what the evidence it was shown by the policyholder "implied." 933 F.2d at 1197-1198.
12. Drafting, regulatory, and public "history" documents clearly pointed out that the exclusion "clarified" existing coverage since, "in most cases," pollution harm resulting from insureds' operations would naturally have been expected or intended, and thus already precluded from coverage under the occurrence definition. See, e.g., March 17, 1970, drafting agenda and minutes of the General Liability Governing Committee, infra n.14. Exclusion drafter Bruton expressly rejected a suggestion to include occurrence language ("neither expected nor intended from the

- standpoint of the insured") in the exclusion. He emphasized that the exclusion's aim was to avoid a "state of mind" debate by focusing upon the "physical event." See Bruton letter to IFB counsel Edward Eane (June 5, 1970). See also Insurance Rating Board "Explanatory Memorandum" submitted to all state insurance commissioners when the pollution exclusion endorsement was filed for regulatory approval in 1970 (reiterating the "in most cases" perception).
13. See Pfenningstorf, *Environment, Damages, and Compensation*, 1979 Am. B. Found. Res. J. 349, 439 ("The authors of [the occurrence] clause did not intend to cover pollution damages that result as a natural and obvious consequence from the regular operation of a business"). (emphasis added) See also n.12 *supra*.
 14. See Agenda and Minutes—Meeting of the General Liability Governing Committee (March 17, 1970).
 15. See, e.g., Bradbury, *supra* n.7, at 283; amicus curiae brief of Chemical Manufacturers Association, submitted in *U.S.F.&G. v. Morrison Grain*, *supra* n.9, at 7; amicus curiae brief of City of Akron, et al. (November 14, 1991), at 20; and amicus curiae brief of Ohio Manufacturing Association, et al. (November 14, 1991), at 28-29, submitted in *Hybud*, *supra* n.6; amicus brief of CMA, submitted in *Dimmitt Chevrolet*, *supra* n.3, at 39.
 16. See, e.g., Anderson and Passanante, *Insurance Industry Doubletalk: The Real And Revisionist Meanings Of "Sudden and Accidental,"* 12-Mealey's Ins. Lit. Rep. No. 186 (May 1990); Saylor, *supra* n.2, at 43-44; amicus curiae brief of CMA submitted in *Morrison Grain*, *supra* n.9, at 11; amicus briefs of the City of Akron (at 24), and the Ohio Manufacturing Association (at 30-31), submitted in *Hybud*, *supra* n.6; amicus brief of Mid-America Legal Foundation submitted in *Beumgardner v. Tonka*, *supra* n.4, at 40.
 17. See letter from Frank Sullivan, Kansas Commissioner of Insurance to Lawrence E. Brown, Jr., I.R.B. (June 11, 1970).
 18. See letter from Lawrence E. Brown, Jr., I.R.B. to Frank Sullivan, Kansas Commissioner of Insurance (June 18, 1970), and Brown letter (June 18, 1970), *supra* n.17, respectively.
 19. See, e.g., Claussen, *supra*, 380 S.E.2d, at 689. See also Saylor, *supra* n.5, at 39.
 20. See letter from Emory Loscomb, Rating Deputy, Georgia Comptroller General to R. Stanley Smith, Manager, I.R.B. (May 29, 1970).
 21. See Aetna internal memorandum to James C. Stamos, Superintendent, UD-SCAD, from David L. Marshall, Asst. Sec., Und. R&D Division (June 19, 1970).
 22. See letter from R.G. Foster, IFB, to Texas State Board of Insurance (April 20, 1970). See also Texas State Board of Insurance, General Casualty Bulletin No. 390 (June 10, 1970). ("It is contemplated that any buy-back program will be on an individual (at) rate basis.")
 23. See, e.g., Steuber, *The Doctrines of Judicial and Collateral Estoppel: The 1970 Pollution Exclusion Clause Proceedings Before The West Virginia Insurance Commissioner*, Vol. 2 Env. Claims J. No. 3 (Spring 1990). See also Saylor, *supra* nn.2 and 5; Anderson and Passanante, *supra* n.3; amicus brief of Ohio Manufacturing Association, submitted in *Hybud*, *supra* n.6, at 34-35; amicus brief of CMA, submitted in *Dimmitt Chevrolet*, *supra* n.3, at 43.
 24. See *Smith v. Hughes Aircraft Co. Corp.*, 783 F. Supp. 1222, 1231 n. 11 (D. Ariz. 1991); *Northern Pacific Ins. Co. v. United Chrome Products, Inc.*, No. CV 89-0777 Mem. Op. Ore. Sup. Ct., Benton City Cir. Ct. (September 30, 1991), reprinted in Mealey's Ins. Lit. Reports No. 47 (October 15, 1991) Mem. Op. at 5. Though presented with the policyholder's selected excerpting of extrinsic evidence, both of these courts pointed out how even some of those materials would have alerted the West Virginia commissioner of a change in coverage.
 25. See September 29, 1987 deposition transcript of Richard E. Stewart in *Shell Oil Co. v. Accident and Cas. Ins. Co. of Winterrun* No. 273953 slip op. (Cal. Super. Ct., San Mateo County, July 13, 1988) access pending, 1st Dist. 1 Civil No. A 045344 at T. 679-1 to 16.
 26. See Affidavit of Samuel Weese, CPCU (July 7, 1992) reprinted in 6 Mealey's Ins. Lit. Rep. No. 35 (July 21, 1992).
 27. See Brown's testimony taken in *Aerper-General Corp. v. Transport Indem. Ins. Co.*, No. 262425, Cal. Super. Ct., San Mateo County, September 11 and October 1, 1990, at TR 127-1 to 128-11, TR 238-9 to 25; and TR 325-16 to 326-14, respectively.
 28. See, e.g., Saylor, *supra* n.5, at 20, 22 and 29; CMA amicus curiae brief submitted in *Morrison Grain*, *supra* n.9, at 8; Brief of Insured, Texas Eastern (December 3, 1992), submitted in *Re Texas Eastern Transmission Corp. PBC Contamination Insurance Coverage Litigation*, No. 92-1638 (3d Cir.), at 41; Reply Brief *Morrison International* submitted in *Morrison International*, *infra* n.40, at 9, 13.
 29. The General Liability Rating Committee (GLRC) of the National Bureau of Casualty Underwriters voted that no rate increase would accompany the inclusion of occurrence coverage in the 1966 CGL policy. See Minutes of the GLRC (November 17-18, 1964). These minutes also confirm that a premium previously charged for the occurrence endorsement (used in connection with the "caused by accident" policy form) was simply given up, or "lost" when standard occurrence coverage was introduced in the 1966 CGL policy.
 30. See Johnson & Higgins, New York Insurance Seminar (November 4-5, 1982).
 31. See internal J&H memorandum of Eton Denimann to Gilbert Buckley (September 23, 1983). The memorandum went on to warn policyholders against relying on such misinterpretations since other courts would give effect to the exclusion's plain restrictions.
 32. See NAIB Survey of Members (March 24, 1978).
 33. See, e.g., Saylor, *supra* n.2, at 49-50.
 34. See, e.g., CMA Comments on EPA's Notice of Intent and Request for Comments (July 12, 1983). The CMA membership includes over 90 percent of the chemical companies in the United States.
 35. See Thomas A. Caldwell, CPCU, *A Multinational's Environmental Liability Problems*, *International Insurance Report* (September 1986), at 11-12.
 36. See Complaint filed in *American Cyanamid v. Aetna Cas. and Sur. Co.*, et al., No. L-8275-91, N.J. Sup. Ct. Passaic Cty. (July 22, 1991).
 37. See letter from Edith F. Lichota, V.P. General Affairs, RIMS, to Docquet Clerk, Office of Solid Waste, U.S.E.P.A. (July 15, 1980); *RIMSCOPE* (September 14, 1981); and "RIMS Position Paper on ISO Cams Made CGL" (January 26, 1986), respectively.
 38. See Caldwell, *supra* n.35, at 11.
 39. Unfortunately, some of these submissions were filed only after some high courts had rendered pro-policyholder opinions based on the "history" of the exclusion. In *Joy Technologies*, *supra* nn.6 and 7, the insurer side of this issue was raised for the first time in connection with the carrier's motion for reconsideration. Numerous procedural and timeliness objections were raised by the policyholder, and the court refused to rehear the matter and made no comment whatsoever as to the merits of the evidence the carrier wished to present. In *Dimmitt Chevrolet v. Southeastern Fidelity Ins. Corp.*, No. 78293, 1992 WL 212008 (Fla. S. Ct., September 3, 1992), a similar scenario occurred. However, in that case, the Florida Supreme Court has not yet ruled on the carrier's motion for a rehearing. See also n.3, *supra* and n.43, *infra*.

40 See letter memorandum of *amicus curiae*: New Jersey State League of Municipalities (November 23, 1992), submitted in *Morton International v. General*, Accident No. 34-341 (N.J.S. Ct.), at 2 n.1.

41 See n.4 *supra*, and n.3 *supra*, respectively. See also Saylor *supra* n.3 at 19 and 26 (arguing that there is no basis for courts to consider the carriers' presentations of extrinsic history evidence since it has no bearing on what the parties to insurance contracts "mutually agreed").

42 See, e.g., the motion of the Mid-America Legal Foundation filed in *Polaroid*, *supra* n.4 at 2. However, between 1980 and 1990, the Mid-America Legal Foundation received hundreds of thousands of dollars in grants from Shell Oil, Amoco, Upjohn, Dow Chemical, Exxon, General Motors, and a host of other policyholder entities. See public "990" tax filings made with the Illinois Attorney General's Charitable Trust Division, and issues of the Foundation Grants Index published by the Foundation Center (which include contribution information taken from public IRS "990" filings).

43 See, e.g., policyholder Motion To Strike Motions for Rehearing, made in *Dimmitt*, *supra* nn. 3 and 39 at 2 (Dimmitt complaining of carrier history evidence as "inconsequential extra-record materials," even though Dimmitt's own brief contained a twenty-page discussion of "history" evidence); Objections of Outboard Marine To Motion Of Transamerica Insurance Company For Leave To Appear As *Amicus Curiae* (August 25, 1992), filed in *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, Nos. 71753 and 71761, at 6 (OMC complaining of carrier extrinsic evidence as "totally outside the record," even though its own briefs insisted that extrinsic history evidence discussed in cases it cited to was highly relevant, and though numerous policyholder *amici* filed briefs in support of OMC making extensive extrinsic evidence arguments). See also *Polaroid's Opposition To Transamerica Insurance Company's Motion For*

Leave To Appear Nunc Pro Tunc As Amicus Curiae (January, 5, 1992), submitted in *Polaroid*, *supra* n.4 at 3 (seeking to block the court's consideration of carrier presentation of an accurate "history" of exclusion via procedural objections and an attempt to distinguish carrier's "regulatory history" evidence from the "regulatory history" evidence previously submitted by policyholder *amici*).

Tab 2

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THE "FRIVOLITY" OF POLICYHOLDER GRADUAL POLLUTION DISCHARGE CLAIMS

(Everything carriers should want to know about pollution exclusion generic discovery, and shouldn't be afraid to ask)

By
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COMMENTARY

Picture for a moment a major figure in the insurance community stepping up to a spotlight podium. He admonishes CGL policyholders regarding their pursuit of coverage for gradual environmental con-

tamination claims made against CGL policies containing a pollution exclusion with an exception affording coverage only for "sudden and accidental" pollution discharges. This speaker also strongly admonishes the courts in no uncertain terms for resolving some of those claims in favor of the policyholder.

For instance, imagine this speaker accusing the policyholders of submitting:

"frivolous claims to their insurers and the courts in the hope of finding coverage".

Listen to the speaker further assert that:

"it was clearly not the intent of either party to the insurance contract to cover many of these events which were not truly sudden and accidental in nature".

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The speaker relentlessly insists that policyholder risk managers clearly understood that gradual pollution discharges were not covered by virtue of the pollution exclusion, but that nothing deterred their "cold blooded" and "creative" lawyers who try to:

"exploit a lack of specificity in policy wording and convince a judge that any doubt regarding intent should be ruled in favor of the policyholder".

The speaker indignantly concludes:

"This does not make the final outcome right".

Who is this vehement denouncer of perceived injustice? Is he the disgruntled president of a major insurance carrier? Perhaps a frustrated attorney for a carrier? You might be surprised to learn that our speaker is actually the Director of Corporate Insurance for one of the largest chemical company policyholders in the world.¹

Don't be surprised anymore. This policyholder risk manager is only one of innumerable members of the insurance universe including policyholder risk managers, insurance brokers, policyholder and broker trade associations, trade publication authors, state insurance commissioners, and policy drafters who have known from the very inception of the pollution exclusion in and around 1970 that gradual pollution discharges were not, and were never meant to be, covered under a CGL policy with a pollution exclusion. They were also well aware that only an Environmental Impairment Liability ("EIL") policy could plug the gradual pollution discharge "gap" created by the pollution exclusion.

Unfortunately policyholders have been able to convince some courts to the contrary by proffering misleading arguments based upon a handful of extrinsic documents propped up by semantical confusion, many of which have appeared in the pages of this publication. Policyholders and brokers are no doubt thrilled to find these "gifts" of coverage from certain members of the judiciary, but they are not always surprised by the generosity of the courts. For instance, after one of the earlier favorable "policyholder" decisions in the country was rendered by a New Jersey trial court judge², a member of the pollution committee of broker, Johnson & Higgins, observed they had already predicted that courts would do anything to find coverage, even if it meant misinterpreting the plain language of the policy exclusion.

... our forecast that the courts would argue in favor of coverage under the General Liability policy even to the extent of misinterpreting the exclusion has been borne out.³

Johnson & Higgins also immediately recognized a major flaw in the comprehension and reasoning exhibited in such decisions, which improperly focused on pollution damage rather than the pollution discharge.

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... the courts in their desire to hold that the insured is covered by the policy have not realized that it is the discharge of the pollutants that must be sudden and accidental and not the damage or injury caused by the discharge of the pollutants. (emphasis added)⁴

Policyholders have flooded the insurance literature forum with fantastical ramblings on "The World According To The West Virginia Commissioner Filings". They make untenable contentions that the drafting history of the pollution exclusion somehow supports their case. They utter pleas of ignorance regarding their lack of understanding of the restrictive nature of the pollution exclusion. Unfortunately, some carriers have shied away from generic discovery efforts, burying their heads in the sand while simultaneously being sandbagged into believing the policyholder myth that generic discovery is against them.

A great deal of credit is due to aggressive carriers who have permitted their counsel to meet the generic discovery challenge generated by policyholders' contentions as to the content of generic discovery materials. Thus, we have been able to pursue generic discovery projects involving several hundreds of thousands of pages of documents, memoranda, minutes, letters, speeches, articles, books, and other writings generated by the broker community, Insurance Service Organization (ISO), trade publications, policyholder industry and insurance associations, state insurance commissions, the Environmental Protection Agency (EPA), and the like. While consistently confident that the plain language of the pollution exclusion is not remotely ambiguous, these carriers have recognized that the courts have been mistakenly and unduly influenced by the policyholders' presentation of the import of certain extrinsic evidence.

To paraphrase a famous quote which requires no footnote, "we hold this truth to be self-evident": the pollution exclusion language is clear and unambiguous in excluding coverage for gradual pollution discharges. However, if your state considers extrinsic evidence and finds gradual pollution coverage in favor of the policyholders, it is because the courts have not been properly informed. Unless you can guarantee that extrinsic evidence will not be admitted in court, you had better be ready to confront it. We hope that the evidence presented in this article will encourage others not only to negate extrinsic evidence arguments raised by policyholders but to aggressively go after decisive wins, if necessary, on the very extrinsic evidence battlefield where policyholders, until now, have always felt very much at home.

1. DRAFTING HISTORY: THE POLICYHOLDERS' UNRELIABLE ALLY

Policyholders have routinely pressed courts to consider their unfounded arguments regarding the drafting history of the pollution exclusion. While some courts have accepted these histrionics where nothing in defense has been offered, the fact of the matter is that the drafting history is one of the policyholders' worst enemies.

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A logical and chronological starting point as to the intended meaning and purpose of the pollution exclusion is the documentation generated by the men who drafted the exclusion. It is generally acknowledged that one of the drafters of the wording of the pollution exclusion was Francis X. Bruton, a member of Aetna's casualty department, who was Aetna's representative on the drafting committee of the IRB (Insurance Rating Board). The IRB was a precursor of ISO, an organization charged with developing and filing standard policy forms for state approval on behalf of member insurance carriers. The deposition of Mr. Bruton was taken simultaneously in a large number of environmental declaratory judgment actions.⁵ Marked as an exhibit at that deposition was a sworn affidavit of Mr. Bruton attaching key supporting documents regarding his recounting of drafting intent to restrict pollution discharge coverage to the sudden/quick "classical accident".

These important documents establish that the IRB's General Liability Governing Committee ("GLGC") met on March 17, 1970 to discuss a proposed endorsement to exclude pollution coverage for general liability policies with an exception for pollution resulting from a "classical accident". As the minutes of the meeting reflect, the Committee decided:

that a policy exclusion of pollution that would run to bodily injury and property damage should be adopted for all general liability insurance, the exclusion to except pollution caused injuries when the pollution results from the classical accident . . . (emphasis added)

That the GLGC decided to go ahead with a pollution exclusion with a temporal "classical accident" exception is reflected in a March 20, 1970 memorandum prepared by Robert S. Hansen, an Assistant Vice-President of Aetna Casualty, who was Aetna's representative on the GLGC. Mr. Hansen reiterated that the exclusion decided upon by the GLGC would:

exclude all other pollution or contamination of water and air except for the "boom case", or "classic accident".

Subsequently, drafts of proposed pollution exclusion wordings were exchanged. The final draft made it clear that it was the "discharge" of pollutants that had to be "sudden and accidental" rather than the injury or damage caused by the pollution discharge. In fact, a suggestion to include in the pollution exclusion language similar to that found in the "occurrence" definition ("neither expected nor intended from the standpoint of the insured") was expressly dismissed by Mr. Bruton in a letter of June 5, 1970 to a member of the IRB staff for the reason that such "occurrence" wording would have the potential to drag back into the pollution exclusion a debate as to the insured's state of mind. This was unacceptable, as the intent of the pollution exclusion was to avoid any question of an insured's intent and direct focus only upon the physical nature of the pollution discharge.

The words "neither expected nor intended from the standpoint of the insured" when appearing in the "occurrence" definition of the policy actually appears in a completely different context

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and carries a different meaning than it would if added as a tag to the (pollution) exclusion. The words "sudden and accidental" are used to modify the words "discharge, dispersal, release, or escape" and as such refer to a physical event which itself is sudden and accidental. In the context of the "occurrence" definition the phrase in question modifies the words "bodily injury or property damage" and describe a state of mind of the insured as respects that occurrence of such bodily injury or property damage. The exclusion, as pointed out above, does not itself attempt to address to the state of mind of the insured but rather is pitched to a particular physical event. (emphasis added)

Thus, the drafters of the pollution exclusion, when wording the exception to it, expressly chose language ("sudden and accidental") requiring a true sudden/temporal "classical accident". The drafters made clear that the focus of this "sudden and accidental" exception was on the physical event of a pollution discharge. It was also made clear that application of the pollution exclusion would not involve any consideration of the insured's state of mind as to whether an insured "expected or intended" property damage or bodily injury resulting from a pollution event.

There is no point in belaboring this discussion with illustrations from the myriad documents which encompass the background of consistent understandings shared by the insurance universe of policy drafters, brokers, trade journalists, professors of insurance, etc. on this temporal issue. It was a long established insurance concept that "classical accident" or "boom" accident, or just plain "accident", were all described by the plain, ordinary, common word "sudden", and all incorporated quickness.⁶

Policyholders will ask:

1)Q: If the drafters intended a temporal meaning why did they use "sudden and accidental" when courts were already interpreting such language in boiler and machinery policies as merely fortuitous?

A: That myth has already been exposed. With only one possible exception boiler and machinery cases pre-1970 attributed a temporal meaning to sudden.⁷

2)Q: Why did the drafters use an ambiguous word like sudden to express the temporal when dictionaries define sudden as "unexpected"?

A: Respected dictionaries, such as Merriam-Websters, do not define the current ordinary meaning of "sudden" as "unexpected." The first listed sense cited by policyholders is the historical one, as explained in the "front matter" or usage instructions of the dictionary. All Merriam-Webster's dictionaries have always ordered the senses of a word historically. As explained, for example, in Webster's Seventh New Collegiate Dictionary (1972):

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ORDER OF DEFINITIONS

In general the order of definitions follows the practice of the **THIRD NEW INTERNATIONAL**, where the earliest ascertainable meaning is placed first and later meanings are arranged in the order shown to be most probable by dated citations and semantic developments. This arrangement applies alike to all meanings whether standard, technical, or scientific. The historical order is of especial value to those interested in the development of meanings and offers no difficulty to the user who is merely looking for a particular meaning (Preface, Page 5a).

Therefore, when the purpose of using a Merriam-Webster's dictionary is to find the plain, ordinary, and common (current) meaning of "sudden", one should look at subsequently listed senses, such as:

5. Hastily prepared, . . . very quickly made . . . Webster's New International Dictionary, Second Edition Unabridged (1935) and (1952).

2a: characterized by or manifesting hastiness . . . Webster's Third New International Dictionary, Unabridged (1961).

2: marked by or manifesting hastiness . . .

3: made or brought about in a short time . . . Webster's Seventh New Collegiate Dictionary (1972).

Only policyholders' incorrect use of dictionaries support their claims. When used as intended by their publishers all major dictionaries advise that "sudden" means "quick".⁸

3.Q: If "classical accident", or "accident", describes the temporal, why didn't the drafters just use those words in the language of the pollution exclusion?

A: Considering the way the courts were misconstruing "caused by accident" as covering many fortuitous events [reference Schmalz article, Endnote 6(b)], it would have been foolhardy to think courts would not treat that same language in the same way they did pre-1966. The selection of "sudden" was a safe choice of policy language (or so they thought) of a plain ordinary word to express the simple thought of quickness, especially since "sudden" was understood that way by insurance men and ordinary people alike. By emphasizing the temporal with "sudden", they permitted "accidental" to express fortuity, thereby completing the classical accident concept.

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Let us emphasize the dramatic impact of a full and accurate presentation of drafting history. When confronted with overwhelming generic evidence on this point, one of the leading policyholder insurance experts in the country, Richard E. Stewart (ex-Insurance Commissioner from the State of New York in 1970), made a headspinning turnaround. Stewart completely backed off his opinion that the drafting history documents reflect "that the 'sudden and accidental' language of that exclusion does not have a temporal component".⁹ In the very case where Mr. Stewart proffered this opinion, he later testified at his deposition that:

... the drafting documents ... speak of sudden in its temporal sense, and as accomplishing a serious cutback in coverage. Granted. I am not questioning the accuracy of anything in Mr. Bruton's Affidavit as to what was going on.¹⁰

That one of the policyholders' most impressive and articulate insurance experts had to pull up stakes and ditch policyholder "drafting history" arguments should leave little to the imagination regarding the positive and powerful use carriers can make of this category of extrinsic evidence.

2. THE (BASHFUL) BROKERS

Any carrier counsel who has experienced a deposition session with an account executive or other representative of a commercial broker has probably emerged from that session with the phrases "I do not recall", "that is not what I meant when I wrote that", or "what is a pollution exclusion" ringing in his or her ears. Apparently, many brokers do not wish to have it said that their testimony worked quite negatively against a client or former client. Fortunately, a wide and wonderful universe of generic broker documents exists for carriers to utilize. Without exception, these documents demonstrate that every commercial insurance broker in the country understood that the pollution exclusion restricted existing pollution coverage and created a gradual "gap" in coverage. Of course, the recognition of the gradual pollution "gap" by the entire insurance industry and policyholder brokers in particular, precludes any suggestion that the pollution exclusion merely restated the language of the "occurrence" definition and did not restrict existing coverage. Here are some samples from the universe broker documents:

(a) Alexander and Alexander

Alexander & Alexander ("A&A") was well aware since the introduction of the pollution exclusion in 1970 that coverage for "gradual" pollution discharges was expressly excluded from the CGL policy and that the pollution exclusion created a "serious coverage gap." Consider the following discussion contained in A&A's National Environmental Action Team pamphlet.

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Does Your Insurance Protect You? For accidental and sudden pollution, industry has long been covered under Comprehensive General Liability policies. But in the early 1970's gradual pollution was excluded from the CGL. This exclusion represents a serious coverage gap for most companies . . . (emphasis added)

A&A also had a complete understanding that the gradual pollution gap, not covered under a CGL with a pollution exclusion, could only be insured by way of purchase of an EIL policy. This long known principle is reflected in an excerpt from A&A's 1979 Annual Report.

A&A is developing programs which, using through engineering surveys and loss prevention techniques, provide coverage for gradual inadvertent environmental impairment. These programs fill the gap currently created by widespread restrictions that limit coverage to sudden and accidental events.

In fact, Alexander & Alexander acquired an EIL producer, Shand Morahan, as a subsidiary. There can certainly be no doubt that Alexander & Alexander understood the pollution exclusion and the gradual pollution gap it created in a manner perfectly in tune with the express intent of its drafters.

(b) Frank B. Hall

Frank B. Hall is another well known broker whose understanding of the nature and purpose of the pollution exclusion should be examined. In one of its highly informative publications entitled "Newsletter", Frank B. Hall routinely discussed the nature of the EIL policy and how it afforded the gradual pollution coverage taken away by the CGL's pollution exclusion.¹¹ The basic message succinctly carried by Frank B. Hall to its policyholder clients was the need to fill the temporal coverage gap for "long term" or gradual pollution:

Most companies are not insured against long term and gradual pollution, but several underwriters now offer EIL insurance, which provides coverage for claims arising out of gradual pollution occurrences. (emphasis added)¹²

But Frank B. Hall had an even stronger message to disseminate to policyholder clients which was published in an insurance trade publication. In that article, a senior staff scientist of Hall's subsidiary Risk Science International ("RSI"), highlighted the "brief temporal" element of "sudden" and blasted as "rash" court decisions rendered in favor of policyholders. It also stated:

It is clear that despite some readings to the contrary by some courts and commentators the pollution exclusion in the CGL

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policy was meant to and does deny coverage for claims arising out of pollution events that are not of a brief temporal duration. (emphasis added)¹³

The Frank B. Hall/RSI message ends with a plea for the courts to refrain from simply looking for a "deep pocket".

It has become a standard part of insurance law that ambiguity in an insurance contract should be resolved in favor of the policyholder. It is incumbent upon the courts, however, to provide reasonable interpretations of language based on contract and not to exploit the inherent ambiguity of the English language. Otherwise, the definitions section of an insurance contract will become unwieldy. Because an insurance company may have the deepest pocket in some pollution cases does not mean it should be unreasonably forced to empty it. (emphasis added)

This is not an insurer speaking! These are the words of a broker whose clients are policyholders! There can be no doubt that Frank B. Hall understood the true meaning of the pollution exclusion as expressed by the plain wording chosen by the drafters, and spread this understanding as gospel to its policyholder clients and the insurance community at large.

(c) Marsh & McLennan

All evidence similarly demonstrates that Marsh & McLennan ("M&M") was as well aware as its brethren that gradual pollution discharges were not afforded coverage under the CGL by virtue of the pollution exclusion. For instance, M&M's Technical Service Unit, also known as Clayton Environmental Consultants, Inc., expressly advised in its environmental "newsletter" that a CGL provided coverage only for "sudden" pollution events, and that only an EIL policy would afford coverage for "gradual" pollution.¹⁴ In its informational literature, M&M's Waste Management Services unit demonstrated a similar understanding when advising the public that only an EIL policy afforded the "gradual" pollution coverage that CGL underwriters never previously provided.¹⁵

The head of M&M's Hazardous Waste Management Program likewise broadcast to the policyholder public in insurance trade publications that only "sudden and accidental" coverage was provided in the CGL and that an EIL policy was required to afford "gradual" pollution insurance, correctly noting that the EIL "gradual" market needed time to develop.¹⁶ Even at the apparent height of environmental insurance litigation in 1990, and despite some court misinterpretations to the contrary, M&M was still acknowledging that the CGL provided only "sudden" pollution coverage, and that it took time, with Marsh & McLennan's help, to develop a "gradual" pollution market after the pollution exclusion was introduced in 1970.¹⁷

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(d) Johnson & Higgins

On May 11, 1970, shortly after the Insurance Company of North America (INA), a non-IRB member company, announced the introduction of its pollution exclusion ("sudden happening . . . neither expected nor intended"), Johnson & Higgins ("J&H") held a meeting of its Casualty Department where the exclusion was discussed. It was noted in the minutes that the IRB was preparing a similar endorsement. J&H prepared a form letter for distribution to its clients expressly advising them that INA's exclusion may have the effect of reducing the scope of coverage.

In a February 5, 1976 letter, J&H's in-house counsel to its Casualty Department expressed concern over the impact of a pollution exclusion with a "sudden and accidental" exception on the coverage of a J&H client. He pointed out that underwriters were motivated to exclude pollution coverage because of litigation directed at "concerns whose everyday plant operations created harmful exposures". He also complained that this exclusionary restriction was unfair and recommended negotiations with underwriters for a "more equitable" pollution exclusion. What wording did J&H suggest in lieu of the "sudden and accidental" language? Not surprisingly, J&H recommended negotiating for a pollution exclusion that barred only "unintentional" pollution discharges. It is obvious that very early on J&H recognized that the "sudden and accidental" concept was more restrictive than an exclusion that merely restated the fortuity requirement set forth in the CGL's "occurrence" concept.

The reader is requested to revisit a previously mentioned J&H memorandum commenting on courts' lack of comprehension of the obvious wording of the pollution exclusion.¹⁸ In this same memorandum J&H also warned against reliance upon such misguided decisions, fearing such misplaced reliance would prove detrimental in the event a court interpreted the exclusion in accord with its underwriting intent and plain wording.¹⁹ The memorandum concluded by recommending that J&H clients be advised to purchase EIL coverage when warranted.

In addition to the positions of J&H set forth in the above-cited memorandum, J&H personnel had no hesitation in voicing public acknowledgement of what courts were improperly doing when handing down decisions in favor of policyholders. For instance, in a leading trade publication, a J&H Assistant Vice-President was quoted as saying that such court opinions favoring policyholders had the effect of "completely emasculating" the CGL's pollution exclusion.²⁰ This J&H executive was making absolutely clear that these courts were (painfully) abusing the wording and purpose of the pollution exclusion, rendering it impotent.

These statements of broker employees were not the wild personal opinions of a few individuals. Rather, the understanding that gradual pollution claims were simply not covered by a CGL policy with a pollution exclusion constituted the formal position of the brokers in their insurance manuals and pollution seminars. In such materials one routinely finds historical discussion of the pollution exclusion. The J&H pollution insurance manual, for instance, echoes the drafting history story previously discussed, advising that the pollution exclusion

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came "full cycle" and returned coverage for pollution from a broader 1966 "occurrence" basis to the more narrow "interpretation of accident".²¹ Brokers' materials also show an excellent understanding of the coverage gap created by the pollution exclusion which could only be filled by a "gradual" pollution policy such as the EIL policy offered by the London market in the mid-1970's. Typical broker seminars similarly educated and informed policyholder clients and potential clients that the CGL only covered sudden pollution discharges and that EIL coverage was required to fill the gradual pollution "gap" created by the pollution exclusion.²²

(e) The National Association of Insurance Brokers (NAIB)

As will be discussed in regard to EPA topics, *infra*, the NAIB, on behalf of all of its broker members acknowledged that gradual pollution was not covered under the CGL and that an EIL was the appropriate coverage option.

3. POLICYHOLDER AMNESIA

As just demonstrated, there can be no question that insurance brokers perfectly understood and broadcast to their policyholder clients and the policyholder public that gradual pollution discharges were not afforded coverage under the "sudden and accidental" exception to the pollution exclusion. As will be further demonstrated, the community of policyholders itself broadcast the identical understanding. American Cyanamid's Director of Corporate Insurance was not the only risk manager to acknowledge that a CGL policy with a pollution exclusion did not cover gradual pollution discharges.²³ That only truly sudden/temporal discharges were afforded coverage under the pollution exclusion was a normal operating premise upon which business was done throughout the insurance community. Thus, when policyholder risk managers were routinely "quoted" in trade publications, as will be discussed, *infra*, their quoted discussions begin with a starting premise that a CGL with a pollution exclusion barred coverage for gradual pollution discharges.

For instance, one article describes how risk managers for Republic Steel Corporation and Hanna Mining Company, never presuming that any such "gradual" coverage was ever afforded in their CGL policies, got together and drafted their own version of an EIL gradual pollution policy.²⁴ In another trade publication article entitled "Most Firms Plan To Insure Gradual Pollution Risks", the quotes given by numerous policyholder risk managers reflected the normal operating premise that federal EPA insurance requirements for coverage of "gradual" pollution incidents could not be met by mere proof of CGL insurance.²⁵ Rather, the risk managers simply debated whether they would purchase quite expensive EIL policies or comply with EPA gradual pollution financial responsibility requirements by way of self-insurance. The quoted risk managers represented policyholders such as United Technologies Corporation, Hexcel Corporation, Koppers Company (and its subsidiary), as well as numerous unidentified petroleum, chemical, and manufacturing companies.

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Some comments chosen from the article sum up the strategy expressed by these risk managers for choosing either EIL policy coverage ("its expensive as hell") or going the self-insurance route ("its much less expensive"). The bottom line was, "It's all a matter of economics."²⁶ Of course, it was never once suggested that the cost (EIL) or risk (self-insurance) dilemma posed by the federal requirement to purchase "gradual" pollution coverage could be easily avoided because it was understood that CGL policies existing in these risk managers' portfolios already afforded such protection. If that were the case no risk manager, obviously perturbed by the high cost of EIL protection, would keep quiet about such a proposition. On the contrary, such an astute risk manager would have probably deserved a promotion. The reality of the situation was, however, that no risk manager ever suggested a CGL solution for the EPA's gradual pollution insurance requirements because it was simply impossible, illogical, and contrary to any policyholder understanding or objectively reasonable expectation of coverage.

Similarly, risk managers for some of the largest and most well known chemical companies in the country began their discussion of pollution insurance with the familiar premise that the CGL did not cover gradual pollution incidents. Once again, the only debate was whether to purchase EIL policy protection or go the self-insurance route.²⁷

From the risk manager of DuPont — "We want to self-insure as much as possible".

From the risk manager of DOW Chemical — "We haven't bought the (EIL) coverage yet, and were looking at self-insurance".

And, from the risk manager of American Cyanamid — "We hope the final regulations will permit some semblance of self-insurance".

It should not surprise anyone by this time that it was never suggested by these major chemical industry risk managers that their CGL policies already provided the gradual pollution insurance they were required to obtain by the government. Everyone knew the CGL did not ever provide such coverage.

4. POLICYHOLDERS' INDUSTRY ASSOCIATIONS: GROUP AMNESIA

The proclamations of the trade associations and industry groups to which policyholders and their risk managers belonged are also instructive on the understandings of its membership. Consider, for example, the Risk and Insurance Management Society, Inc., also known as "RIMS". According to a RIMS paper submitted to the EPA in 1980, RIMS represented 3,500 policyholder corporations and 6,500 policyholder risk managers.²⁸ RIMS' understanding of the gradual pollution gap created by the pollution exclusion mirrored those of the drafters of the pollution exclusion. For example, on April 21, 1982, RIMS and the broker, Alexander and Alexander, jointly participated in a pollution presentation in Washington, D.C. entitled "RIMS Seminar - Update of Environmental Impairment Insurance". The

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materials utilized at the RIMS pollution seminar make crystal clear that RIMS understood that the pollution exclusion accomplished exactly what its drafters wanted it to do.

A topic heading found in the seminar materials, "UNDERWRITERS' INTENT FOR EXCLUDING NON-SUDDEN AND GRADUAL COVERAGE FROM CGL", tells us:

Pollution incidents of this type are normally of long duration which causes difficulty in determining, in an occurrence policy, exactly when the occurrence took place. (emphasis added)²⁹

This and numerous other statements in the seminar materials remove any conceivable doubt that the RIMS risk managers perfectly understood that gradual "pollution incidents" (i.e. discharges) "are normally of long duration" (i.e. temporal). Thus, when the RIMS seminar material further stressed that "sudden and accidental" claims "have traditionally been covered by Comprehensive General Liability Policies (CGL)" there cannot be an iota of doubt that everyone understood that "sudden", like "gradual", was an expression of temporality. The RIMS pollution seminar material accordingly instructed its risk manager audience of the correct conclusion that:

Non-Sudden and Gradual Pollution Claims — Not Covered by CGL policies.

Of course, RIMS was also correct when it instructed risk managers that the industry response to the pollution exclusion's taking away of gradual coverage resulted in the creation of the EIL policy, that product being intended to fill the gradual pollution "gap" created by the pollution exclusion in the CGL policy.

INDUSTRY RESPONSE

Creation of a new product (policy) called Environmental Impairment Liability Insurance (EILI), EILI provides insurance for non-sudden and gradual pollution. It fills in the gaps not provided by your coverage CGL contract. (emphasis added)

Is it not curious that a risk manager association, run by and on behalf of risk managers, never even hinted, thought or suggested that a great deal of money could be saved by advising RIMS members or the EPA that CGL policies already issued to the policyholder community provided the EPA mandated "gradual" pollution coverage? Is it not curious that it was never hinted, thought, or suggested that it was simply not necessary to purchase expensive EIL coverage or assume catastrophic risks by way of self-insurance because the CGL already provided "gradual" coverage? No such suggestion was ever made by RIMS to its risk management audience or to the EPA since it was common knowledge and had been a normal operating premise for over a dozen years that, since its inception in 1970, the pollution exclusion covered only truly sudden/temporal pollution incidents.

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In addition to being members of RIMS and participating in the operating premises that were common knowledge in the community of risk managers, brokers and underwriters, policyholders routinely belonged to industry associations. Consider the industry trade association, CMA (Chemical Manufacturers Association). According to documents submitted by the CMA to the EPA in 1980, the CMA was made up of 190 member companies in the United States "representing more than 90 percent of the domestic production capacity for basic industrial chemicals".³⁰ What did 90 percent of the chemical industry understand about the pollution exclusion? In public documents comprising the submission of formal comments by the CMA on behalf of its membership, CMA addressed the use of liability insurance as a mechanism for complying with federal financial responsibility requirements. CMA expressed therein an explicit recognition that a CGL policy with a pollution exclusion could not be proffered as a mechanism for complying with federal requirements for "gradual" pollution coverage. It is further reflected that the CMA understood that only an EIL policy provided "gradual" pollution coverage and, EPA regulations aside, all types of gradual environmental exposures needed to be protected against with an EIL policy.³¹ As will be examined in a separate discussion of EPA topics, infra, other policyholder industry associations had similar understandings.

5. WHAT EVERY READER OF INSURANCE TRADE PUBLICATIONS KNEW

Insurance trade publications were read and contributed to by policyholders and brokers alike and present an accurate picture of the premise under which the insurance industry had been operating for many years — that a CGL with a pollution exclusion did not cover gradual pollution discharges. For example, contemporaneously with the filing of the IRB pollution exclusion with state insurance commissioners in 1970, the insurance trade publication, the John Liner Letter, addressed the impact of the new exclusion, immediately recognizing that the "sudden and accidental" exception of the exclusion pertained to the pollution discharge. The John Liner Letter also immediately recognized that the exclusion as described in the IRB announcement "obviously" constituted a reduction in coverage from that coverage previously afforded under the CGL.³²

In April 1971, Risk Management magazine carried an article pointing out the "limited extent of coverage" carriers were now affording for pollution liability claims. It also observed:

What seems to be the intent is to provide for some very short term phenomenon . . . (emphasis added)³³

In 1973, the Weekly Underwriter published a three part article regarding the then new CGL policy form, which incorporated into the policy the pollution exclusion which heretofore had to be added to a policy by separate endorsement. That article, authored by Bernard J. Daenzer, President of the national brokerage firm, Wohlrreich & Anderson Agencies, similarly highlighted that the exception to the pollution exclusion focused on the pollution "discharge". The author also expressly noted the temporal nature of "sudden", distinguishing this "sudden" requirement from the additional "accidental" requirement of the wording.

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. . . if the discharge is not sudden and accidental, there is no coverage in the basic policy. It must be both sudden and accidental, not either sudden or accidental.³⁴

In another Weekly Underwriter article, Daenzer, like so many others, recognized the gradual pollution "gap" created by the pollution exclusion's reduction in coverage.

"The non-marine market has been very sluggish in plugging the gap for gradual pollution — land, air, water — not now in the standard CGL or for the sudden and accidental exposure where it has been excluded."³⁵

In November, 1979, one author pointedly explained the long standing knowledge of the insurance industry that this gap was a gradual gap, giving the example of "slow leakage".³⁶ Thus, the author recommended the use of EIL to fill the "gradual pollution" gap.

Going beyond acknowledging the mere premise that the pollution exclusion barred gradual pollution coverage, trade publication authors were just as aware as risk managers and brokers³⁷ that courts rendering environmental insurance decisions in favor of policyholders were doing so without basis and in contradiction of the express and clear understanding of the entire insurance community. In discussing the weakening of the pollution insurance market available to help business meet EPA mandated requirements, one trade publication author succinctly noted that a cause of this problem was coverage awards made by courts without any basis in the insurance contract.

"The bottom dropped out of both types of coverage when courts began awarding coverage when none was written . . .". (emphasis added)³⁸

Regarding the pollution exclusion and its "sudden and accidental" exception, the obvious "instantaneous" temporal nature of "sudden" was highlighted by the author.

In this form, pollution or contamination is covered if it is sudden or instantaneous, not gradual. (emphasis added)³⁹

A director of environmental risk management services for the Corroon & Black brokerage also recognized in another trade publication the unfair treatment afforded to policy wording by certain courts.

Originally, comprehensive general liability (CGL) policies sought to exclude all claims arising from pollution that were not sudden and accidental. Recent court decisions, however, have awarded damages to insureds even though the pollution event was clearly not sudden or accidental. These cases significantly broadened the coverage provided under the CGL policy. (emphasis added)⁴⁰

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Along this identical line, in May 1984, another trade article noted that such court decisions ran afoul of the plain wording of the policy and the industry's common knowledge of the exclusion's "unequivocal" bar of gradual pollution coverage.

While that language appears to be unequivocal, the courts have now in a series of cases determined that gradual pollution is covered in many instances because (of) a variety of . . . interpretations. (emphasis added)⁴¹

While only a small sampling of the large number of trade publications expressing these propositions has been mentioned herein, it amply demonstrates that the articles being published by insurance trade publications were completely in accord with the intent of the drafters of the pollution exclusion to bar coverage of gradual pollution. Their message was also in accord with the common knowledge of all brokers and policyholders procuring and purchasing CGL policies containing the pollution exclusion — i.e. that only truly sudden (and not gradual) pollution discharges were afforded coverage.

6. THE EPA REGULATIONS: POLICYHOLDERS CHAMPION CARRIERS' POSITIONS

Certain documents generated by the insurance industry in response to the federal EPA financial responsibility requirements have been previously discussed. The instant discussion will focus on early formal analyses made by the EPA reflecting how the EPA understood a "sudden" pollution event and how that was distinct from a "non-sudden" or "gradual" pollution event. This discussion will then target a sampling of the formal comments submitted by the insurance community in response to the EPA request for public comments regarding pollution insurance issues. As will be seen, carriers could not have had better advocates than the policyholder voices themselves for the proposition that the pollution exclusion barred coverage for gradual pollution discharges.

In April of 1980, the EPA generated one of a number of "Background Documents" regarding the financial requirements mandated by the Resource Conservation and Recovery Act (RCRA) in 1976.⁴² The EPA recognized that the CGL provided coverage for "sudden events", but that "non-sudden" or "gradual" events were not afforded under the CGL.⁴³ What, then, did the EPA mean by a "sudden" event and how was "sudden" distinguished from "non-sudden" coverage? Firstly, and as will be seen continuously throughout EPA records, "non-sudden" was used interchangeably with "gradual". Secondly, the EPA's distinction between "sudden" and "gradual" was one of pure temporality - a "sudden" pollution event was one of short duration and a "gradual" pollution event was long term in nature. Appendix B of the EPA Background Document comprises an intensive case study of pollution events, separating them into these two categories - "sudden" and "gradual".

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ANALYSIS OF INCIDENTS ON HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL SITES

Incidents on sites where hazardous waste was knowingly received or managed were extremely varied. Incidents were both sudden and gradual; they occurred both on manufacturing sites and on independent commercial waste management sites; they occurred on abandoned and on operating sites. Based on a review of the damage reports, the incidents have been grouped into the following categories to facilitate their analysis:

Sudden:

1. Overflow of lagoons due to rain
2. Collapse of dikes supporting lagoons
3. Explosion/fire or toxic fumes
4. Spills or material discharge to the ground

Gradual:

1. Dumping on ground or burial of untreated wastes
2. Leaks from unlined ponds
3. Continual overflowing of lagoons
4. Leaking drums/tanks without back-up containment for wastes
5. Leaks during production or treatment of wastes⁴⁴

Tables and charts in the EPA's Background Document utilize these identical temporal categories.⁴⁵

Thus, the EPA quite logically included in the category of "sudden" events things that happened quickly — such as an explosion, a spill, or a collapse. This analysis in the 1980's is quite in accord, by the way, with the long standing insurance concept of the "boom" accident or the "classical accident" and the drafting intent to use "sudden" as expressing that concept within the pollution exclusion in 1970. The EPA also quite logically grouped under the "gradual" category events of long term duration such as leaking drums, continual overflows and burial/dumping of untreated wastes.

It is refreshing to sit back and see how ordinary people knew exactly what was meant by simple words like "sudden" and "gradual". It is also enlightening in this litigious era to see that the world always quietly understood that discharges from buried leaking drums and the like were not "sudden" pollution events. Of course, all of these plain and simple understandings existed without the benefit of the efforts of policyholders to "re-educate" the world that the concept of "sudden" was one beyond the normal comprehension of mankind. The

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EPA, like the rest of the world, simply operated on the common sense premise that "sudden" events were sudden and "gradual" events were gradual. There was absolutely no mystery involved.

As evidenced in its "Background Document", the EPA sought input from the insurance community regarding its proposed financial responsibility requirements. More specifically, in its "Request For Public Comments", the EPA asked some very pointed questions regarding the cost of gradual coverage, the timing of gradual coverage requirements, the capacity of the gradual pollution marketplace, etc. The responses submitted by the insurance community routinely tracked the order of the EPA questions. What, then, was the response of the insurance industry to the solicitation of the EPA regarding how to address availability and cost of insurance for gradual pollution events such as dumping of waste, burial of drummed waste, slow leakage of waste, etc.? The responses consistently reflected an understanding that the GCL's pollution exclusion coverage was limited to the EPA's "sudden" category of pollution incidents and that GCL coverage had to be supplemented with EIL coverage so as to protect against the exposures described in the EPA's "gradual" category of pollution incidents.

This article has already addressed the formal comment response of the chemical trade association, the CMA,⁴⁶ and that of RIMS, the risk manager association.⁴⁷ Moreover, the formal comment responses of individual major insurance brokers were totally in accord, as would be expected based upon the prior discussion in this article of broker understandings. However, consider the submissions to the EPA from the National Association of Insurance Brokers ("NAIB").⁴⁸ The NAIB informed the EPA that "NAIB member brokers negotiate the major share of the business-related insurance in this country." On behalf of all its member brokers (not just "major" brokers), the NAIB informed the EPA that gradual pollution was never covered by the CGL but that the NAIB had hopes for development of EIL coverage options.

Policyholders, through their industry organizations, also submitted formal comments to the EPA implicitly recognizing that the CGL did not cover "non-sudden" or gradual pollution discharges. A sampling of the list of policyholder industry associations who made such submissions includes the American Petroleum Institute, the American Iron & Steel Institute, and the National Solid Waste Management Association.⁴⁹ Thus, the innumerable policyholders comprising the petroleum industry, the iron and steel industry and the solid waste management industry also shared in the common knowledge of the entire insurance community that gradual pollution was not afforded coverage by the pollution exclusion's "sudden and accidental" exception. It should also be noted that many individual policyholders submitted similar comments to the EPA or expressly joined in the comments submitted by its industry association.

The EPA was not alone among federal agencies in having a clear grasp of the way the pollution exclusion operated to exclude gradual pollution. Indeed, in 1970, ISO specifically advised the Rural Electrification Administration (REA):

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First, although the intent of the endorsement is essentially clarification, there is no doubt that the endorsement tightens the coverage by requiring that the occurrence be "sudden" in addition to being neither expected nor intended. However, this is an underwriting exclusion which may be deleted for individual risks under the (a) rating procedure.⁵⁰

In any event, the bottom line concerning the EPA financial responsibility requirements issue is that no one ever thought, hinted or suggested that the EPA's gradual pollution coverage requirement could be satisfied by mere proof of CGL coverage. On the contrary, both the EPA which solicited public comment on gradual pollution coverage and the responding insurance community of policyholders/policyholder associations and brokers/broker associations clearly understood that the "sudden and accidental" exception to the pollution exclusion did not afford coverage for gradual pollution events such as dumping of waste, burial of drummed waste, slow leakage of waste and the like.

7. STATE COMMISSIONER FILINGS: THE "UNABRIDGED" STORY

Policyholders typically proffer the meritless argument that the IRB/insurance underwriters, when filing the pollution exclusion endorsement with state insurance commissioners in 1970, did not inform or represent to said commissioners that the pollution exclusion constituted a reduction in coverage. Rather, policyholders contend that the pollution exclusion was filed solely as a "clarification" and as a mere restatement of the "occurrence" definition's language ("bodily injury or property damage neither expected nor intended from the standpoint of the insured").

Indeed it was the opinion of underwriters that (under the 1966 policy prior to the exclusion) coverage for pollution was not provided in most cases because it could be said to be expected or intended from the standpoint of the insured. The IRB told that to the commissioners in the first sentence of the Explanation.⁵¹ It would stand to reason that pollution damages generated in the regular course of business by a regular manufacturing process would be something known to or reasonably to be expected by the insured in most cases.

However, the occurrence definition was not working well. Disputes arose as to whether the pollution damage was expected or intended, and the carriers were losing some of those disputes in court. An additional test was needed to simplify the matter that regular business pollution was not covered — and to get the insured's intent or expectation of damage issue out of the courts. In that respect the additional test was certainly a clarification of underwriting intent not to cover pollution damage. That is a far cry from saying, however, that the additional test would operate just like the old test, as merely restating the occurrence definition's coverage conditions.

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This additional test would also clarify that policyholder intention or expectation of damages was no longer relevant in this second line of defense to pollution claims. If policyholders passed the occurrence test they would next have to pass the "sudden and accidental" test. In that sense, the exclusion could be regarded as a restriction on coverage. However, most of the gradual pollution problem produced by regular business practices should be weeded out by the occurrence definition. But if any should slip through it would certainly be snared by the "sudden and accidental" test. Thus, the result under both tests would ordinarily be pretty much the same: the industrial pollution problem would not be covered, one way or the other.

Policyholders, however, routinely distort this issue and cite a few documents from the 1970 West Virginia insurance commissioner's file - to the exclusion of an entire universe of documents related to state insurance commissions across the country which reveal these policyholder assertions for what they are.

Preliminarily, in discussing the understanding of state insurance commissioners, it is anticipated that policyholders will argue that use of the word "accident" in the IRB "Explanation" which accompanied the pollution exclusion endorsement filings conveyed nothing to the state insurance commissioners about the restriction in coverage inherent in the plain exclusionary language. Accordingly, it is necessary to briefly discuss the historical usage of "accident" by insurance men and how it conveyed the classical "boom" concept contemplated by the drafters of the pollution exclusion. The IRB "Explanation" accompanying the pollution exclusion endorsement as filed with state commissioners read in part as follows:

Explanation

Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident . . . (emphasis added)³²

It is well known that prior to 1966 general liability insurance policies usually provided coverage on a "caused by accident" basis. As demonstrated in the discussion of drafting history above, the insurance community's use of "accident" had always been one of the "boom" accident or the "classical" accident which encompassed the temporal element of instantaneousness. "Accident" was commonly used in the insurance industry as a term of art pertaining to an event "identifiable in time and place". Astonishingly, policyholders have taken the meritless position that since various courts had broadly interpreted the word "accident" in the context of an insurance policy dispute, the insurance community completely threw away its long standing day to day common usage of the word "accident" to express a sudden "boom" event. Policyholders, mixing insurance apples and oranges, contend that anytime anyone in the insurance industry referred to "accident" in a conversation, piece of correspondence, or state filing memorandum, it had to be assumed that such reference necessarily incorporated the proposition that "accident" no longer conveyed the temporal meaning "accident" had since the dawn of (insurance) time.

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Quite frankly, this is preposterous. The insurance community never stopped using "accident" to describe a classical accident.⁵³ If that were the case, the then new 1966 CGL form could have simply retained the "caused by accident" terminology. Quite to the contrary, the insurance industry expressly sought to articulate the narrow meaning of "accident" by switching coverage in the revised 1966 CGL over to an "occurrence" basis. The new "occurrence" definition thus retained both the sudden "accident" concept and added the continuous "exposure to conditions" coverage as well.⁵⁴

There should be no disagreement that the advent of the revised 1966 CGL policy form was a major event in the history of insurance. A careful examination should be made, then, of what the insurance carriers (through their bureau) were telling state insurance commissioners in the 1966 "Explanatory Memorandum of Changes" when that policy was filed for approval. What the state insurance commissioners were being told in 1966 was this — that while the new "occurrence" coverage included broadened coverage for "exposure to conditions" occurring over time, such coverage was in addition to coverage for sudden events identifiable in time, i.e. "accident" coverage.

An "occurrence", as defined, includes not only a sudden event identifiable in time which is characterized as an "accident", but also exposures to conditions which may continue for days, weeks, months or even years.⁵⁵

The bureau also expressly advised state insurance commissioners in that filing that the new broader "occurrence" definition eliminated the connotation of suddenness inherent in the old "caused by accident" policy.⁵⁶ Therefore, when only a few years later in 1970 the state insurance commissioners were expressly told in the "Explanation" accompanying the pollution exclusion endorsement that pollution coverage would continue for a pollution "accident", those commissioners were well aware that an "accident" was a "sudden" event "identifiable in time". If that concept needed any reinforcement, it was provided in ISO's 1971 filing of an explanation relating to changes which eventually became the 1973 CGL policy.⁵⁷

It is, therefore, disingenuous of any policyholder to assert that insurance people (such as the IRB) speaking to other insurance people (such as the state insurance commissioners) in 1970 did not understand the usage of "accident" as referring to the sudden event identifiable in time. *This is precisely what the state insurance commissioners were told in the 1966 filing Explanation; exactly what they understood by the filing Explanation received with the pollution exclusion in 1970 and specifically what they were reminded of in the 1971 Explanation filing of the 1973 policy.* It should not be forgotten, however, that an "Explanation" was not necessary to tell any commissioner that the exclusion constituted a restriction of coverage to sudden pollution events. The clear wording of the endorsement did that.

Use of the word "accident" to capture the temporal/sudden/identifiable in time concept (in contra-distinction to use of the word "occurrence" to describe exposure-type/gradual events) is well documented in the pre-1970 literature and documents, as discussed in the

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drafting history section of this article.⁵⁸ Moreover, this distinction between "accident" and "occurrence", as a point of reference for insurance persons, persisted in the literature after 1970, and continued to constitute an acceptable framework for communication.⁵⁹

Furthermore, to put beyond any doubt the message given to and understood by state insurance commissioners in 1970 in the United States and Puerto Rico, an examination of material related to various state insurance commissions is instructive.⁶⁰ These materials overwhelmingly establish that, contrary to policyholders' contentions, there was a complete understanding by insurance commissioners that the pollution exclusion could take away a measure of existing pollution coverage.

Consider for example the Kansas' materials. On June 11, 1970, the Kansas Insurance Commissioner wrote to the IRB acknowledging that the filed pollution exclusion constituted an "obvious reduction in coverage".

In view of the obvious reduction in coverage, to what extent
will the premiums be reduced when this endorsement is attached?
Will a buy back be available, and how will it be rated?
(emphasis added)

As indicated above, the commissioner also inquired whether there would be a "buy back" of coverage available. A "buy back", obviously, would not be necessary or logical without an attendant understanding that the coverage to be repurchased had been taken away by the exclusion.

The Commissioner also inquired, since the endorsement was "discriminatory", why the endorsement should be attached to outstanding policies. The commissioner felt that such a restrictive endorsement should not be unilaterally superimposed upon an existing policy. In response to the Kansas Commissioner's letter, the IRB revised the proposed effective date so that the endorsement would apply only to "new and renewal" policies. The IRB also confirmed on June 18, 1970 that the restricted coverage would be subject to a "buy back" [on an individual risk basis with an (a) rate determined in accordance with the hazard of the risk].

Other states, like Kansas, conditioned approval of the filing upon carriers attaching the endorsement only to new and renewal policies. These states included Kentucky, Mississippi, New York, Texas, and Georgia. If there was no similar perceived effect on coverage, why limit the exclusion's application to new or renewed policies? A May 29, 1970 letter from the Georgia Insurance Commission to the IRB provides the answer, the insurance commission noting that "the effect of the addition would be so great".

Surely, there cannot be any doubt that the State of Kansas' Insurance Commission fully understood the "obvious reduction in coverage" expressed in the plain wording of the pollution exclusion. Moreover, Kansas' Commissioner suffered from no confusion whatsoever purportedly generated by the "Explanation" attached to the pollution exclusion endorsement advising him that pollution coverage would continue for a pollution "accident". Based

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upon the Kansas materials alone, Courts should dismiss out of hand the broad extrapolations policyholders seek to make from the West Virginia Insurance Commissioner files. However, as will be demonstrated, there is an abundance of additional evidence establishing awareness by other members of the insurance commissioner community that the pollution exclusion did not merely restate the "neither expected nor intended" language of the "occurrence" definition but resulted in an obvious coverage reduction.

The insurance commissioner materials for the State of Louisiana reflect that the IRB filing of the pollution exclusion was initially disapproved. Discussions held between Aetna Casualty and the Louisiana Insurance Commission in June of 1970 reflect that the disapproval was based upon political pressure generated by the "restriction" in coverage the exclusion obviously carried.

He said that the disapproval of the IRB's filing for this restriction of coverage was a political situation.⁶¹

The Louisiana Insurance Commission did, however, permit attachment of the pollution exclusion to individual risks as long as the insured acknowledged in writing it understood that the pollution exclusion constituted a "restriction of coverage".⁶²

Iowa, Michigan, South Dakota, Hawaii, Virginia, and the District of Columbia also approved the pollution exclusion filing upon the condition that the consent of the insured be obtained before attaching the endorsement to an outstanding policy. If there was no similar perceived effect on coverage, why would consent of the insured be required?

The filing documents from the State of Texas not only recognized the exclusion's reduction in coverage but emphasized the established insurance usage of "accident" to connote the sudden/boom "classical accident".⁶³ Obviously, the Texas Board of Insurance also did not suffer from the presently espoused policyholder delusion that the pollution exclusion merely restated the "neither expected nor intended" (damage) language of the "occurrence" definition. Rather, the documents reflect an understanding of the intent of the drafters to return pollution coverage to an (classical) "accident" basis.

In the Commonwealth of Puerto Rico, the pollution exclusion filing was initially disapproved. On November 30, 1970 in follow-up correspondence from the IRB to the Puerto Rico Commissioner of Insurance, the need for the exclusion was elaborated - the commissioner being informed that underwriters did not want to debate whether an insured "expected or intended" the pollution "act", especially a "continuous" pollution situation.

Relying solely upon the policy definition of occurrence which requires that the act causing damage must not be expected nor intended by the insured, might well cause dispute as to whether in fact the act was unexpected or unintended particularly in a fact situation involving a continuous course of action. This

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kind of situation is often very costly to both insureds and companies since many of them are brought into court to be resolved. (emphasis added)

This concept is totally consistent with the aim of the drafters to avoid debate over whether an insured "expected or intended" damage by shifting focus to the physical (sudden) discharge of pollution.⁶⁴ The filing was subsequently approved in Puerto Rico.

As noted, the State of New York approved the pollution exclusion filing but would not allow the endorsement to be placed on outstanding policies. If there was any doubt, however, that New York did recognize the exclusion's restriction against gradual pollution coverage, one need only read the law approved in 1971 that made it illegal to issue gradual pollution insurance coverage.⁶⁵ Immediately recognizing the gradual pollution gap which the law left unprotected, a utility company tried to persuade the governor not to sign the bill into law.⁶⁶ However, the law was passed.

Therefore when the EIL market for gradual pollution developed in the mid-1970's, those EIL policies could not be sold in the State of New York. It remained illegal to sell gradual pollution insurance in the State of New York, with certain legislative exceptions, until the repeal of this law in 1982. Thus, the New York Department of Insurance instructed ISO in 1981 that its claims-made pollution liability policy (i.e. EIL) could not be issued to an insured unless that insured fell within certain enumerated exceptions to the 1971 statute.⁶⁷ Of course, the New York Insurance Commission had no problems with existing CGL pollution coverage as it was evident that the "sudden and accidental" exception to pollution exclusion did not provide (illegal) gradual discharge coverage.⁶⁸

Regarding the North Carolina State Insurance Department, correspondence between the department and ISO reflects that policyholders in the exterminating industry opposed approval of the pollution exclusion because it "would take away coverage from them." It was noted, however, that one underwriter routinely modified the policy for a considerable number of exterminating risks by restoring the coverage taken away by the exclusion for a charge (via a buy-back).⁶⁹

The Illinois Department of Insurance file contains documents filed by the London Market evidencing a consistent understanding on the part of that State's Director of Insurance. London's Clause (Industries, Seepage, Pollution and Contamination Clause No. 3), like the IRB's pollution exclusion, contained a "sudden" happening limitation. Regarding the coverage taken away by the exclusion, the London Market pointed out to the Illinois Insurance Commission that coverage taken away by Clause No. 3 was subject to a "buy-back" (as was also the case with the IRB exclusion).⁷⁰ The Kentucky Department of Insurance was similarly advised by London representatives of the "buy-back" available for the gradual coverage taken away by London's Seepage Clause No. 3.⁷¹

Two states that did not approve the pollution exclusion filed by the IRB in 1970 were New Hampshire and Vermont. However, documents reflect awareness in those states of the restrictive nature of the exclusion. Moreover, subsequent insurance events which generated

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explanations from the insurance commissioners of New Hampshire and Vermont convincingly confirm the understanding of these commissions that the pollution exclusion constituted a reduction of existing coverage.

The commissioner in New Hampshire issued a press release on September 28, 1970 announcing disapproval because the exclusion excluded liability on an occurrence basis, providing only sudden and accidental coverage. Subsequently in September of 1981 ISO filed with the New Hampshire Insurance Department its then new claims made pollution liability policy (an EIL). New Hampshire's reason for denying its approval in 1981 is quite instructive. Essentially the Insurance Department told ISO that since it had disapproved the 1970 CGL pollution exclusion, gradual coverage was automatically afforded to CGL policyholders. Thus, there was no need in 1981 for a pollution liability policy covering gradual pollution.⁷²

The identical scenario is evidenced in Vermont which also disapproved the 1970 filing of the pollution exclusion. As was the case in New Hampshire, the IRB sent follow-up correspondence to the Vermont Commissioner of Insurance advising that the exclusion was subject to a buy-back, an obvious confirmation that the exclusion indeed reduced coverage. Vermont then disapproved ISO's pollution liability policy in 1982 on the basis that gradual pollution coverage was never taken away because the pollution exclusion was not approved in 1970.⁷³

The foregoing establishes beyond any doubt that the "big picture" of what the community of state insurance commissioners understood about the effect of the pollution exclusion is a vivid picture of clear recognition of the exclusion's restriction of existing coverage. Their collective understanding stands in stark and overwhelming contrast to the assertions of policyholders that the pollution exclusion was understood by the state insurance commissioners as merely restating the language of the "occurrence" definition.

Finally, regarding the insurance personnel of the State of West Virginia, the entirety of the evidence indicates that West Virginia truly understood that the pollution exclusion did not cover gradual pollution. Some of the documents in the 1970 West Virginia file demonstrate shared understanding by those who attended the July 16, 1970 hearing that the pollution exclusion was a restriction on coverage. These materials have already been reported on.⁷⁴ The record also discloses comments by another oil and gas industry spokesman who objected to the pollution exclusion. He understood that salt water produced with gas and oil was the largest cause of pollution in West Virginia. Recognizing that gradual salt water pollution would be excluded, he stated the "word sudden (is) inappropriate."⁷⁵

Moreover, consider the West Virginia Hazardous Regulations, Section 47-35-13 ("Financial Requirements").⁷⁶ and incorporating by reference the EPA financial responsibility requirements, the State of West Virginia acknowledged that it also participated in the long-standing and common knowledge of every segment of the insurance world that the pollution exclusion restricted coverage. This legislative acknowledgment is clearly contrary to policyholder assertions that West Virginia took the position that the pollution exclusion served no restrictive function whatsoever.

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Further confirming West Virginia's understanding that the pollution exclusion took away gradual pollution coverage provided in the CGL is the fact that West Virginia approved ISO's filing of its pollution liability policy. The reader will recall that states which had disapproved the 1970 pollution exclusion filing (such as New Hampshire and Vermont) also subsequently disapproved ISO's pollution liability policy filing, taking the logical position that a gradual pollution policy was not necessary as gradual pollution coverage was already provided in the CGL (the pollution exclusion's restrictions not being approved in 1970). Therefore, by approving the ISO pollution liability policy, West Virginia conversely acknowledged its long-standing recognition that there was no existing mechanism in 1983 to protect gradual pollution exposures, the pollution exclusion having taken away gradual coverage in West Virginia back in 1970.

In any event, any confusion generated by the West Virginia scenario as to what insurance commissioners across the country were told and understood about the restrictive nature of the pollution exclusion is laid to rest by the overwhelming nationwide evidence documented and presented to the reader herein. Quite frankly, the broad extrapolations policyholders divine from the West Virginia file are simply incorrect. Even a brief look at the "big picture" of the insurance commission understandings in the United States and Puerto Rico make it evident that insurance commissioners participated in the common knowledge of brokers, policyholders, underwriters, trade organizations and insurance trade commentators that the pollution exclusion did not, and was never meant to, afford coverage for gradual pollution discharges.

POSTSCRIPT: THE NEED TO DEVELOP AND UTILIZE GENERIC DISCOVERY

Surely, certain of the court decisions favorable to policyholders have been based upon the lack of adequate presentation of generic proofs by defendants or upon acceptance of the handful of incomplete proofs proffered by policyholders. Perhaps certain of these decisions were rendered primarily to target the proverbial "deep pocket". Whatever the reasons, it is submitted that it is absolutely necessary to present the courts with the "big picture" of the common knowledge of the insurance community, the lack of any objectively reasonable expectation of gradual pollution coverage by the policyholders, and the intent of the drafters of the pollution exclusion. It is also necessary to present the true and complete "big picture" of the state insurance commissioner filings, one small part of which being so artfully and repeatedly emphasized out of proportion and context by policyholders. Finally, this article suggests that it is necessary to advise our courts that policyholders and their brokers are keenly aware that courts are finding coverage for policyholders (where it was never written) by misinterpreting the plain language of the pollution exclusion.

With so many millions of dollars at stake, one could almost understand the motivation of policyholders to file such lawsuits. However, it is impossible to condone the endless filing of litigation where it is known in advance that such litigation is "frivolous", based upon hopes of continued "misinterpretation" of policy language or based on providing courts with a

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targeted "deep pocket". The instant discussion of the pollution exclusion began with a series of informative and instructive quotes from American Cyanamid's Director of Corporate Insurance. That risk manager acknowledged the common knowledge of the insurance community that there was never any intent of any party to the CGL insurance contract to cover gradual pollution claims under the pollution exclusion. He further criticized courts for "grossly mistreating" insurance underwriters and chastised policyholders for bringing "frivolous" lawsuits. It is thus distressing to report that American Cyanamid has recently filed an environmental insurance lawsuit in New Jersey against virtually all of its liability insurance carriers.⁷⁷ The pollution exclusion is among the issues being contested. A commentary by an attorney was reported publicly when the suit was filed:

The Courts know the insurance industry is huge and wealthy and can always pay off by raising premiums.⁷⁸

The filing of such suits and the making of such comments seems to ignore the fact that insurance companies are not immune from financial disaster and, more importantly, the fact that insureds never paid a penny in premiums for coverage of gradual pollution discharges excluded by the pollution exclusion.

Several thousand documents have been assembled which reflect the insurance community's common knowledge of the coverage restriction expressed in the pollution exclusion. Many of these documents are protected from public disclosure by confidentiality protective orders. It is submitted, however, that even a partial sampling of the unprotected documents is more than sufficient to demonstrate that policyholders could never at any time have entertained any objectively reasonable expectation of coverage for gradual pollution discharges. Certainly, policyholder brokers were so attuned to this reality they commented on the courts which failed to comprehend what every insurance man knew about the plain meaning of the pollution exclusion language. Clearly, powerful industry groups, like the CMA, the American Petroleum Institute, National Solid Waste Management Association, and the American Iron & Steel Institute were intensely attuned to the temporal meaning of the pollution exclusion as well as to why and when gradual pollution coverage was taken away from the CGL. Moreover, the powerful risk manager insurance association, RIMS, representing many thousands of policyholder corporations and their risk managers, acknowledged what every risk manager knew - that "sudden" and "gradual" were temporal pollution concepts and that the CGL did not cover gradual pollution events. All of these sources further recognized that a "gap" was created in CGL coverage because the pollution exclusion took something away from previously afforded coverage. They recognized that the "gap" created by the exclusion was one of gradual pollution discharge coverage. They recognized that this "gap" was serious. Finally, they all recognized that only an EIL policy could fill this coverage "gap".

Even if any particular policyholder's risk managers did not have the benefit of an international insurance broker, or the centralized voices of an industry association, or a risk manager insurance association, they would still have been appropriately informed of the restriction by the wealth of information being disseminated by the broker community to

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potential clients and to the insurance world at large in pamphlets and pollution seminars. They would also have been educated by the information being disseminated by publishers of insurance trade publications in quite explicit articles. Such a policyholder, to claim ignorance of what was going on, would also have had to turn a deaf ear to the similar operating premises and acknowledgements in articles and quotes by his policyholder risk manager brethren in trade magazines and newspapers.

It is quite emphatically suggested that the time has come to put a stop to the policyholder pollution exclusion games being played in the courts. The pollution exclusion bars coverage for all but truly sudden and accidental discharges and everybody knew (and knows) it. Presentation of the foregoing generic materials should preclude any court from accepting the proposition that policyholders lived hermits' existences in caves of isolation or in plastic bubbles shutting out the insurance world at large. Aggressive and intelligent use of generic evidence should also prompt courts to wonder where policyholders ever got the notion that their claims are anything other than "frivolous".

ENDNOTES

1. Thomas A. Caldwell of American Cyanamid, whose remarks are taken from his article published in the September, 1986, issue of the International Insurance Report.
2. Jackson Township v. Hartford Accident and Indemnity Company, 186 N.J. Super. 156 (1982).
3. September 23, 1983, J&H memorandum authored by Elten Diehlmann.
4. Id.
5. "Pollution Exclusion Dissected During Bruton Deposition," Mealey's Insurance Litigation Reports, Vol. IV, Series #8, February 27, 1990.
6. There are many background documents. A sampling is included:
 - (a) "Accident v. Occurrence," by John M. Briggs, Bests Fire and Casualty News, December, 1953 describing an accident as a "sudden and unforeseeable event. . . (which is) designed to exclude damages which occur over a period of time - involves a 'boom element'."
 - (b) "Taking the Suddenness out of Accident", by Richard A. Schmalz (undated article): The concept of the classic accident: "a sudden, identifiable loss-causing event happening without anyone's foresight, expectation or design." Drafting challenge: to "preserve with respect to gradually caused losses all the virtues of caused by accident' in its classical concept."

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(c) Property and Liability Insurance, Huebner, Black and Cline, Prentice Hall, Inc. (1968):

ACCIDENT VERSUS OCCURRENCE. Historically, liability policies were written on an accident basis wherein accident is defined as "a sudden and unforeseeable event". The disadvantage of this term is that the insured was without protection if the event causing liability were not sudden. Today, most liability policies are being written on an occurrence basis . . . Under this (occurrence) definition, the event causing the injury need not be sudden, but will cover those which take place over a period of time . . . (30/PublicLiability: I/page 379) (emphasis in the original)

(d) Comparison, 1955-1966 Comprehensive General Liability Policies, by Robert F. Bauer, LLB, Johnson & Higgins, released to J&H clients, October 15, 1969. The "limits of liability" section "was intended by underwriters to apply to the exposure or gradual injury case, and not the boom-type loss" (page 95). "The definition (of occurrence) provides coverage for the classical accident - sudden and unexpected. By referring to 'injurious exposure' the requirement that the injury be sudden in character has been eliminated" (page 33).

7. "Insured Counsel Doubletalk: The Fallacies in Anderson and Pauamante's Arguments Concerning the Interpretation of 'Sudden and Accidental' in Boiler and Machinery Policies", by James M. Johnstone and Frederick S. Ansell, Mealey's Insurance Litigation Reports, Vol. 5, Issue #10, January 15, 1991.

8. Dictionaries that list the common meaning of a word first are in accord that the meaning of "sudden" is "quick". See, for example, any dictionary published by Random House.

9. November 21, 1988, report submitted in J.T. Baker v. Aetna, Paragraph 11.

10. Stewart expert testimony given in the J.T. Baker litigation; TR. 725-18 to 25.

11. See, for example, June 13, 1979, issue of Frank B. Hall "Newsletter"; "For those not familiar with EIL coverage, it has been designed to provide insurance for gradual pollution such as the PCB contamination of the Hudson River . . . and the Kepone case in Virginia . . . all uninsured because pollution/contamination was not "sudden and accidental". (emphasis added)

12. August 7, 1981, issue of Frank B. Hall "Newsletter".

13. October 29, 1984, article in Business Insurance. Hall newsletters also reflect that RSI frequently made pollution presentations, including pollution seminars to policyholder risk managers across the country.

14. September 1981, issue of Clayton Environmental Consultants Inc. newsletter.

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15. "Is Insurance Pollution For You"; undated informational literature authored by Richard J. Powols, Assistant Vice President, Waste Management Services.
16. See, for instance, William A. Mahoney article "A Risk Manager's Guide to Pollution Liability Policies" published in July 1982, issue of Risk Management. See also Mahoney article "Insuring Hazardous Wastes: Analyzing the New EPA Regulations" published in April 1981, issue of Risk Management.
17. March/April 1990, issue of "M", entitled "Environmental Awareness".
18. See Endnote 3.
19. Id.; "One of the grave dangers in relying on the decisions as cited is the fact that the courts in the jurisdiction in which you may be involved will interpret the policy exclusion as it was intended by the underwriters and there will be no coverage."
20. November 28, 1983, issue of Business Insurance.
21. J&H manual entitled "Pollution Insurance and Statutory Requirements Under RCRA"; July 1981.
22. J&H seminar material entitled "Pollution Liability Legislation and Insurance".
23. See Endnote 1.
24. See May 3, 1982, issue of Business Insurance, "Risk Managers Design Own Pollution Liability Form".
25. See January 31, 1983, issue of Business Insurance.
26. Id.
27. August 24, 1981, issue of Business Insurance.
28. July 15, 1980, correspondence forwarded by RIMS to the EPA.
29. See RIMS seminar materials, April 21, 1982 "Rims Seminar - Update of Environmental Impairment Insurance."
30. July 18, 1980, CMA submission of comments to the EPA.
31. July 12, 1983, CMA submission of comments to the EPA.
32. May, 1970, issue of John Liner Letter; "such language will obviously rule out coverage of many occurrences which would likely be insured under current language".

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33. "Pollution and Insurance," by G.R.E. Bromerick, Risk Management Magazine, April 1971.

34. February 24, 1973, issue of Weekly Underwriter.

35. Reprint from the 1977 Weekly Underwriter. The article goes on to state:

"It could be accidental but not very sudden, undetected over a period of time. . . .
An unintended event can be sudden or gradual."

36. November 1979, issue of Rough Notes; "Without question, this exclusion leaves the insured with a serious gap in coverage for his pollution liability exposures. If the discharge is not both sudden and accidental, there is no coverage under the CGL. Thus, a discharge which is accidental, but not sudden (such as a slow leakage undetected over a period of time) would not be covered by the CGL."

37. See, for example, Footnotes 1, 2 and 13.

38. August 1985, issue of Rough Notes.

39. Id.

40. September 1985, issue of Risk Management.

41. May 18, 1984, issue of Insurance Week.

42. Background Document - Resource Conservation and Recovery Act - Subtitle C - Hazardous Waste Management.

43. Id.; reference pages II-7 and II-8.

44. Id.; reference Appendix B, appendix Page B-3.

45. Id.; reference Tables II and IV of Appendix B found on appendix Pages B-5 and B-11.

46. See Endnotes 30 and 31.

47. See Endnote 28.

48. July 17, 1980 and March 17, 1981 submissions of NAIB to EPA.

49. See July 18, 1980, submission of the API; March 13, 1981, submission of the AISI; March 27, 1981, submission of the NSWMA.

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50. Letter from MacArthur at ISO to Montague at the REA, November 17, 1970.

51. The identical 1970 pollution exclusion endorsement Explanation, which accompanied the pollution exclusion endorsement, was filed with all state insurance commissioners. Its text is as follows:

Explanation

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 except that no coverage will be provided under certain operations for injuries arising out of discharge or escape of oil into any body of water. (emphasis added)

52. Reference Endnote 51.

53. Even in 1991, for instance, Rupp's Insurance & Risk Management Glossary distinguishes an "accident" from an "accidental occurrence" as an accident is "sudden and at a definite time and location".

54. "Occurrence" means an accident, including injuries exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

55. NBCU filing of 1966 CGL policy with all state insurance commissioners "Explanatory Memorandum of Changes".

56. Id. . . . by the addition of coverage for "injurious exposure to conditions" eliminates the connotation of suddenness previously intended as respects coverage on an "accident" basis. (emphasis added)

57. Explanatory Memorandum of Changes - November 1, 1971, Standard Provisions for General Liability Policies-Jacket, reference:

Definition of "occurrence"

The language "occurrence means an accident, including injurious exposure to conditions" has been changed editorially to "occurrence means an accident, including continuous or repeated exposure to conditions" to meet criticism of the old language that it might be construed as limiting exposure situations to the limiting factors of "accident", i.e., that the old language still required suddenness

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(a boom) as to time and place. Thus, under the revised language, the intent under the 1966 policy is made clear that the definition encompasses not only the usual "accident" but also exposure to conditions which may continue for a period of time. (emphasis added)

58. Endnote 6, supra.

59. (a) "What Role Will the Insurance Industry Play in the Fight against Pollution", by Dan R. Anderson, Ph.D., CPCU Annals, Volume 25, No. 1, March 1972:

The presence of the exclusion has the effect of converting that portion of the liability policy from a "per occurrence" to a "per accident" basis. This was accomplished by including the phrase "sudden and accidental". By accepted insurance terminology both an accident and an occurrence are unintended (page 27).

(b) "Insurability of the Water Pollution Risk and Current Industry Practices in Meeting This Exposure", by Numan A. Williams, CPCU Annals, March 1973: article discusses a questionnaire sent to three groups:

The requisites were first listed for coverage on an accident basis and then related for coverage on an occurrence basis. "Accident" was defined as a sudden, unintended event, and "occurrence" was defined as an unintended event, either gradual or sudden (pages 17 and 19).

(c) "Insurability of the Water Pollution Risk: Public Policy Questions and Methods of Accomplishment", by Numan A. Williams, Assistant Professor of Insurance, CPCU Annals, Volume 26, No. 3, September 1973: "An accident, in insurance usage, is sudden; an occurrence can be either sudden or gradual" (page 105).

(d) Property and Liability Insurance, Second Edition, Huebner, Black and Cline, Prentice-Hall, Inc. (1976). The same discussion of "Accident versus Occurrence" which appeared in the 1968 edition [reference en. 6(c)] is repeated. 30/Public Liability:I/page 438. A discussion follows (442-443) relating to the pollution exclusion, new to this edition, which states:

The effect, as far as the named peril of pollution is concerned, is to revert to an "accident" basis. (Page 443)

(e) Id., Third Edition (1982). The same discussion on "Accident versus Occurrence" as is contained in the 1976 and 1968 editions is repeated with minor stylistic changes (26/Public Liability:I/pages 359-360). The same discussion of the pollution exclusion as is contained in the 1976 edition is also repeated (pages

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363-364). The comments in the 1982 edition conclude that gradual pollution coverage is available through specialty (EIL) markets and that EPA action mandating such (non-sudden) coverage is expected soon (364) (emphasis in the original).

60. Documents relevant to the understandings of the commissioners are found not only, to some extent, in the still existing files of individual state insurance commissioners but in the files of ISO. For convenience, all relevant documents will be generically referred to as if from a single source.

61. June 19, 1970, Aetna memorandum.

62. Id.; "Walker indicated that we could make individual risk form filings, attaching a copy of the endorsement and a letter from the insured stating in essence that he understands that the endorsement is a restriction of coverage, that it has his approval and requesting its acceptance by the Commissioner." (emphasis added).

63. April 20, 1970 correspondence; "(the exclusion) . . . will apply to bodily injury or property damage arising from pollution caused injuries except when pollution results from the classical accident". (emphasis added)

64. See Bruton letter of June 5, 1970 discussed in drafting history portion of this article.

65. "Property damage liability insurance," meaning insurance against legal liability of the insured, and against loss, damage or expense incident to a claim of such liability, arising out of the loss or destruction of, or damage to, the property of any other person, but not including any kind of insurance specified in paragraph thirteen or fifteen. Policies issued to commercial or industrial enterprises providing insurance against the legal liabilities specified in this subdivision shall expressly exclude therefrom liability arising out of pollution or contamination caused by the discharge, dispersal, release or escape of any pollutants, irritants or contaminants into or upon land, the atmosphere or any water course or body of water unless such discharge, dispersal, release or escape is sudden and accidental. Senate Bill 6080, (A.6952).

66. Niagara Mohawk Power Corporation letter to the Executive Chamber in Albany, June 17, 1971: "A discharge or release may be, in some cases, accidental but gradual and not immediately detectable. The rigid language of the bill would seem to render such occurrences uninsurable."

67. September 21, 1981 correspondence of the New York Department of Insurance to ISO.

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68. In regards to the 1971 New York statute, policyholders typically argue that it only repeats the language of the pollution exclusion and "sudden", as used in the statute, still means "unexpected". The evidence, however, demonstrates an understanding in New York that "sudden" had a temporal meaning. Consistent with this understanding, in the course of efforts to have the 1971 statute repealed, the participants in these efforts expressly acknowledged that the opposite of a (covered) "sudden" pollution event was a (not covered) "gradual" event. For instance, the following sampling of 1982 correspondence and documents found in the files of the New York Insurance Commissioner made the specific request that "gradual" insurance coverage be permitted in the State of New York by repealing the 1971 statute.

1. July 14, 1982 Budget Report on Bill (Bill would allow coverage for industrial facilities that discharge pollutants "on a regular basis"; allows insurance companies to provide "gradual pollution coverage").

2. July 15, 1982 correspondence from New York Superintendent of Insurance, Albert B. Lewis to Counsel to the Governor ("the Insurance Department notes that there has been an increased interest in recent years in obtaining insurance to cover gradual pollution").

3. July 19, 1982 Manufacturers Association of Central New York correspondence to Governor Carey (legislation allows purchase of coverage for "gradual or continuous discharge of pollutants").

4. July 12, 1982 correspondence of Insurance Brokers of New York (IBA/NY) to Counsel to the Governor ("insurers in New York are unable to provide coverage for gradual pollution liability").

5. July 16, 1982 correspondence of The Business Council of New York State to Counsel to the Governor (legislation allows coverage for "gradual or continuous discharge of pollutants").

New York unquestionably understood, then, that the pollution exclusion constituted a restriction of existing gradual pollution coverage.

69. May 12, 1972 correspondence.

70. February 27, 1970 correspondence.

71. March 13, 1970, correspondence.

72. September 17, 1981, correspondence of New Hampshire Insurance Department.

73. November 11, 1970 correspondence from ISO and February 4, 1983, correspondence from Vermont Insurance Commission.

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74. "Lawyers Say Insureds Are Attempting to Reinvent History" by Timothy C. Russell, Thomas S. Schaufelberger and Alan C. Nessman, Mealey's Insurance Litigation Reports, Vol. #2, Issue #10, March 23, 1988.

75. Hearing notes, West Virginia's 1970 Insurance Commissioner's record. Comment is by Larry L. Skeen, Executive Secretary, Independent Oil & Gas of West Virginia.

76. West Virginia Hazardous Regulations, Title 47, Department of Natural Resources (effective April 24, 1982).

77. See July 26, 1991, Bergen Record front page article.

78. Id.

Tab 3

Pollution and Insurance

by G. R. E. Bromwich

Responsibility for Pollution and other aspects of production, which may adversely affect the public at large, is potentially the most devastating single hazard risk faced by management today. Risk managers should play a vital role in minimizing this problem. Mr. Bromwich, who is Manager of the Research Department at Reed Shaw Osler Limited in Toronto, discusses the nature of the pollution problem, the general non-availability of insurance as a panacea and the role of the risk manager.

The pollution liability insurance situation is both simple and complex. Limitations on coverage can be understood quickly; unfortunately, if not amended or eliminated they often leave the risk manager with a serious uninsured exposure. The background is more complicated, but must be understood if one is to make the best out of a bad business. Most of the examples given here refer to Canada and Canadian law but they are applicable in the United States because the questions involved are fundamental.

Insurers Concerned

do not think there is any doubt that the insurance market, both direct and reinsurers, is perturbed about the possibility of large pollution liability claims. Their immediate reaction has been to introduce endorsements which attempt to define the limited extent of coverage they wish to give for most risks and to exclude virtually all liability for pollution in the case of risks associated with the petroleum industry. I believe Lloyd's was first to introduce what it called Seepage, Pollution and Contamination clauses which went beyond previous similarly named clauses. This was in the early part of last year and INA was not far behind with its clause termed, Environmental Pollution Exclusion. Other versions put out by insurers have such titles as Environmental Exclusion.

Insurers rarely react immediately to any situation and the origins of the present concern over pollution go back for some years.

For example, any fisherman will confirm that for years people writing about fishing have been bemoaning the extent to which rivers and lakes have become polluted. Attempts have been made to counteract this but conservation, as far as I am aware, never made a great deal of headway.

Torrey Canyon Aroused Interest

was not until the tanker Torrey Canyon went aground off the south coast of England and the oil spill fouled the coasts of England and France that

general interest in pollution was aroused. The British Navy attempted unsuccessfully to salvage the wreck; the R.A.F. tried to set the oil on fire by bombing it, also without success. Subsequently, a sister ship was "arrested" in Singapore harbor and eventually the British and French governments recovered about \$7.8 million from the charterers, Union Oil Company of California, who apparently owned the vessel through a subsidiary.

Then came the enormous spill from a drilling rig operated by Union Oil in the Pacific Ocean near Santa Barbara, California. Representatives of the parties damaged, which included fishing and boating industries, beach front property owners and the beach-using public, have filed suit for \$1.3 billion (not million) damages against the four companies involved (although Union Oil was operating the rig, it was in partnership with Mobil Oil, Gulf Oil and Texaco). There have been other smaller spills in Canada and elsewhere. One of these "smaller" spills involves suits for \$100 million against Chevron Oil Company for damage done to shrimp and oyster fishing in the Gulf of Mexico.

Voluntary Action

As a result of various oil spills from tankers, an arrangement was reached between the majority of the world's tanker owners to provide compensation to governments who incur expense in clean-up. This arrangement is known as TOVALOP (Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution). There is a corresponding scheme for owners of cargo — CRISTAL (Contract Regarding Interim Supplement to Tanker Liability for Oil Pollution).

A special Canadian act, The Arctic Waters Pollution Prevention Act, has been passed in recognition of the fact that oil pollution in arctic areas would take far longer to disperse than in a warmer climate. Although passed by Parliament the Act will not come into force until proclamation and it is mainly "skeleton" legislation to be fleshed out by regulations. Provision is made, among other matters, for evidence of financial responsibility by way of insurance to be required of developers, ship owners, etc. The Arctic Waters Act is complementary to the proposed changes in the Canada Shipping Act.

Other Causes, Effects

There are, of course, other types of water pollution. For instance, there has been a good deal in the news recently about mercury, which discharged as a result of the industrial process, is poisoning fish in the Great Lakes. Subsequently, warnings have ensued

about eating fish from these waters. As a result the livelihood of commercial fishermen has been affected and the tourist fishing industry has suffered a blow. The discharge of great quantities of domestic detergents, which contain phosphates, is also a problem.

Near the city of Elliot Lake, Ontario, radioactivity has been discovered in certain waters to an undue extent as the result of uranium mining. Various industries have unfortunately allowed their effluents to flow into waters of lakes or rivers in quantities that foul the waters and prevent safe swimming. Insufficiently treated sewage has caused the rivers and lakes near some of our big cities to become polluted. Regulations have been introduced recently forbidding pleasure boats over a certain size to dump their sewage in the waters they use.

In conjunction with the proposed changes in the Canada Shipping Act to control water pollution (Bill C-2), an attempt is being made to obtain U.S. agreement so as to lead to some international standards regarding sewage disposal from commercial vessels. Incidentally, this same bill will likely impose heavy fines for the discharge of oil or other pollutants and set up a fund to compensate anyone whose property is affected by such discharges, the money being obtained from a levy on oil imported into Canada.

Liability under the Act, as amended by the bill, would be absolute. No proof of negligence would be necessary, but there would be a limit of \$140 per ton of the ship's tonnage with a total limit of \$14 million. Of course it is not yet known what will be the final terms of the bill when passed. In the U.S. the Water Quality Control Act has been passed to handle similar matters though the Canadian bill appears broader in scope.

Air Pollution

Another Area of concern is over air pollution. In Toronto and many other large cities a special watch is kept on the extent of air pollution and when it reaches a certain level, industry is warned to reduce its activities. Recently a number of large concerns were cited as being warned about the extent of the emissions they were permitting and the press report stated that relatively speaking the emissions by smaller concerns were probably just as bad, but it was impossible to identify them individually.

Airliners can be seen every day trailing black smoke from their engines and this undoubtedly adds to the air pollution. Attempts are being made to reduce the extent of the fouling of the air from this cause. Then there is pollution from automobile exhausts. Los Angeles, for example, has had particu-

lar problems with smog and has taken steps against the pollution caused by automobile exhausts. Various devices have been developed by auto manufacturers to reduce the exhaust emissions and the intention is to make the installation of these compulsory in new model cars. Lead free gas, which has been the subject of advertising campaigns by certain oil companies and counter-campaigns by others, is another attempt to reduce the emissions from car exhausts.

Not only is water and air being polluted, but the ground and even the animals we use for food can be affected. Governments have become satisfied with DDT, although of great use in killing dangerous in large quantities taken to ban its use.

The above gives some idea of the problem and the fact that it crops up in so many different situations.

Public Interest Awakened

Some of the pollution which is now being so widely publicized is inevitable. It is the price of living in urban areas which supply the types of service and comforts to which we have become accustomed. Also, pollution has crept up over a period of generations and it will take a long time and a great deal of money to reverse the trend and improve matters to an acceptable level.

We have to face the fact that pollution is one of the social concerns of the day and a happy hunting ground for politicians. It's like motherhood; one cannot be against motherhood. Who can be against purer environment?

Just recently the Canadian Government announced the formation of a new department, to be controlled by the present Minister of Fisheries, that will be called the Department of the Environmental and Renewable Resources. This development appears to be in line with the increased interest in what is loosely called consumer protection. Industry of all kinds, I feel, is going to be under increasing pressure to reduce pollution and will be subject to considerable penalties where it seems to have fallen short.

Another trend which is appearing over the horizon in Canada is the "class action," a legal action by one or a few persons on behalf of a number of others having the same interest. The enormous suit arising out of the oil drilling spills off the California coast and that in the Gulf of Mexico are class actions.

Thus we have on the one hand a recent awakening of the public to the extent of pollution and the continued dramatization of this in the media coupled with legislative pressure on industry to reduce it by all possible means, and perhaps increasing opportu-

nities for actions for damages where pollution does occur. It is this combination of circumstances which provides the background to the action taken by the insurers in restricting their policies.

Position of General Liability Policies

I believe that we are going to see endorsements placed on most General Liability policies restricting the coverage provided in respect of pollution. This may become as routine as exclusions relating to nuclear risks.

Some policies will no doubt continue in force without any special restriction and it is well to consider how far pollution liability may be covered by these policies. Of course, we can only deal in general terms, but even this has some value.

First of all, inevitable damage is not covered under any type of wording. The relevant legal cases have usually been concerned with policies providing coverage on an accident basis. But even in policies extended to include occurrence basis property damage, there is normally some provision which requires that the damage must be unexpected.

Accordingly, a couple of Ontario decisions are relevant. The first one was *Crisp v. Great American* (CILR 1-046 1961) in which the insured contractor undertook to grind terazzo tiles at a customer's house. The contractor took virtually no precautions with the result that dust permeated throughout the house causing considerable damage to the furnishings. Although there was no doubt that the contractor was liable to the homeowner, he failed to recover under his Liability policy on the grounds that what he had done inevitably led to the damage. In the case of *McCollum v. Economical Mutual* (CILR 1-084 1962), the insured was cleaning the outside of a building by sandblasting. Some of the windows of the building were damaged in the very center, which indicated that the workmen had made no use at all of wooden shields which were provided to protect the windows. Again the decision was that no recovery was allowable since damage was virtually certain.

Must Be Accidental

It, therefore, seems that coverage will not apply if an insured has made pollution damage virtually inevitable by his act or omission. Further, while unexpected damage will be covered, unless the insured takes prompt steps as soon as he realizes that damage has arisen, subsequent damage will not be covered.

With property damage coverage on an accident basis, some insurers maintain that an accident must take place at a specific point in time and if unintentional pollution occurred over a period of time with-

out being discovered, the policy would not apply. While most insurance companies would use this contention, it is doubtful whether it is correct in law and I do notice that most of the endorsements relating to pollution, where they permit limited coverage, require what happens to be sudden as well as accidental, indicating that the word accident or accidental does not necessarily imply suddenness.

In summary and in general terms, if you have liability coverage without any special endorsement — and how long this state of affairs will be enjoyed is questionable — you almost certainly do not have coverage if the actions of your company inevitably lead to pollution and no reasonable steps have been taken to avoid it. If you have accident rather than occurrence basis property damage insurance you will be faced probably with a further contention that only a sudden happening is covered.

Endorsements Limiting Coverage

A number of different endorsements are now being used by various insurers to limit or exclude their liability for pollution risks. They seem to have taken separate legal advice on what to say. Lloyd's produced one set of clauses, INA produced another, and still other versions have been set forth by Great American and other insurers. Perhaps eventually we shall have some type of standardization. In the meantime here is a general review of common features although it is most important to examine thoroughly the wording actually employed in a particular instance.

These endorsements generally exclude completely any liability in connection with the oil business and sometimes the gas business — often closely connected with oil.

As regards other types of risks, they tend to provide coverage for a happening which is accidental and sudden, although the exact wordings vary. Some spell out what is meant by pollution in detail (references to smoke, gases, alkalis, acids etc.) and some deal with it in general terms only, so that in examining a clause at least three questions should be borne in mind.

- (1) Does it eliminate all coverage for pollution caused by oil and gas? If so, how is this phrased?
- (2) Are pollution, contamination or other similar words defined and if so, in what terms? If not defined, how far would the general terms extend in the circumstances involved?
- (3) Is coverage limited to sudden and accidental happenings?

Short Term Phenomenon

Taking first the trades which are fortunate enough to have been left with some form of coverage, it seems clear that if damage is inevitable, owing to the actions of the insured, there is no coverage. As explained previously, this almost certainly exists even if there is no special endorsement, but the situation is now spelled out. It is usually stated that the damage must be sudden and this certainly is new to the majority of insureds who have property damage coverages on an occurrence basis. What seems to be the intent is to provide for some very short term phenomenon, for example, a breakdown in some filtering apparatus which permits the discharge of a pollutant into a river or a lake. How far the use of such a word as "sudden" limits the time during which damage must occur is uncertain, but it does seem that the insured must take prompt steps to remedy whatever led to the pollution. Perhaps some form of device which would give warning of pollution over the minimum acceptable limit is implied by the wording.

The imposition of these endorsements has been so recent that no cases on the subject have yet come to court which makes it virtually impossible, even for lawyers to say what their exact effect will be.

What Can Be Done About Pollution

We are in the early stages of dealing with pollution as an insurance problem. There appears to be no

chance of an overall solution which would apply to all insureds. Rather, I believe that whenever the question of restricting or eliminating pollution liability coverage is raised by an insurer, and it is likely to be raised in virtually every instance where there is any chance of the risk arising, that each case must be dealt with on its own merits. We, if I may speak for a moment for our competitors in the agency and brokerage field as well as my own firm, will have to be very energetic on your behalf in making representations to the insurers and I am confident that we shall be.

You as risk managers should, I suggest, provide us with some additional ammunition. We shall have a much better chance negotiating if we can say that A.B.C. Company is very much alive to the pollution problem, although it has perhaps never had a claim made against it on these grounds. We should like to be able to say, for instance, something to the effect that a senior company official has been given the task of preventing pollution and that under his direction a special survey of the company's operations has been carried out to pin-point types of pollution which might occur and to eliminate any weak spots where it could take place. If definite amounts of money have been spent for special machinery such as filters of some sort, this would certainly be a help. We should also like to think that there is, if the circumstances are appropriate, some special monitoring device from

Continued on page 38

POLLUTION AND INSURANCE

Continued from page 19

which a warning is immediately given if an acceptable level is exceeded. If special investigation has been made by the company's research staff, or by some outside firm at its request, or perhaps by a trade association, with a view to changing methods so that pollution is made less likely, this too will be helpful.

If we can jointly put together a case which shows considerable activity by your particular group, then we can go to the insurer with a good hope of success. You may think that this sounds as though the insurer will only give cover when there is very little likelihood of a claim, but no amount of precaution will eliminate all chance of something going wrong and I suggest that the procedure I have outlined

is in accordance with one of the basic risk management philosophies: to eliminate risks as far as possible and only insure what cannot be eliminated.

Probably insurers will gradually come to realize that the risk in some industries is far less than in others and we may be able to secure better terms for some of our clients accordingly. It may be that the use of considerable deductibles will eventually provide partial answers where insurers still oppose wide forms of coverage.

Out of our efforts to obtain improvements, we can hope there will gradually evolve a more logical and less restrictive approach to the problem of pollution as an insurable risk.

Tab 4

DEFENSE MEMO

POLLUTION - THE RISK AND INSURANCE PROBLEM

WARREN G. BROCKMEIER*

INTRODUCTION

Through the centuries man has proceeded on the assumption that there are untold acres of land on which to dump refuse; that there are billions of gallons of water in the rivers, lakes and oceans to dilute any effluent placed in them; that there is a great blue sky whose winds can disperse whatever is thrust up there by our chimneys and smokestacks.

Today such assumptions are being questioned in our social and political arenas in which the controversy over environmental pollution is being fought. In more immediate and particular terms, the pollution question may be posed by the president of a company asking the treasurer: "Our insurance manager knows which insurance policy applies to this pollution claim, doesn't he?" And meanwhile, back at the office, underwriters are busy formulating underwriting programs with respect to the hazards of pollution and contamination.

This Defense Memo will discuss in part the history and development of pollution insurance with respect to the general liability policy. However, this is only a part of the total impact of the pollution problem on industry and risk management. In fact, pollution and its attendant problems are truly problems in industrial risk management and not problems in insurance. Industrial management must be involved in the identification of the risk, in the elimination or reduction of the hazard, in the decision of whether or not to assume the risk and in the determination of how the risk might be transferred, if at all.

"ACCIDENT" BASIS COVERAGE

Most of the attention relative to insurance coverage for pollution damages has been focused on the general liability policy.¹ Prior to the 1966 revised comprehensive general liability contract, the insurance industry was not particularly concerned about pollution from an underwriting standpoint. Most of the coverage prior to the 1966 revision was on an "accident" basis. Unless a large, sudden, accidental discharge of a pollutant took place, there was no coverage under the "accident" basis policies.² Larger, preferred insureds usually had "occurrence" coverage, either on a manuscript policy or by endorsement of the standard policy.

Sometimes "occurrence" was not defined and an endorsement would simply state that wherever the word

"accident" appeared in the policy, the word "occurrence" was substituted. Other endorsements defined "occurrence" simply to mean an event or happening. Still others defined "occurrence" to mean an event, or continuous or repeated exposure to conditions, which unexpectedly causes injury during the policy period.

During the late 1950's and early 1960's, the granting of "occurrence" coverage by underwriters became more frequent and was easier to secure. A common premium requirement during those years was 1% of the bodily injury coverage and 5% of the property damage coverage. The granting of bodily injury "occurrence" coverage was effected with few questions asked and little or no reinsurance by the underwriters. The granting of property damage "occurrence" coverage was a little more difficult, as indicated by the higher premium requirement. However, there were few problems in securing property damage occurrence coverage. Exceptions to this general rule were posed by an occasional pronounced exposure situation, such as a nursery adjoining an asphalt plant, or a contractor using large machinery and causing continuous heavy vibrations.

Claims were confined to common law liability. The following examples illustrate the types of "occurrences" which gave rise to typical damage claims: flooding as a result of earth movement by a grading contractor; cracked walls as a result of a contractor's use of heavy equipment (including dump trucks) in proximity to affected buildings; pollution of a water well from seepage of a gasoline underground tank of a service station.³

"OCCURRENCE" BASIS COVERAGE

With the advent of the 1966 revised comprehensive general liability policy, virtually all insureds were placed on an "occurrence" basis. Underwriters talked of restricting coverage on risks who had large potential property damage occurrence exposures. As a result of such restrictions, "occurrence" property damage coverage would be amended by endorsement back to "accident" coverage. Such restrictions, however, affected only an insignificantly small number of insureds. Renewal coverage was denied to some insureds. However, this was done principally with respect to accounts who had poor loss experience and who probably would not have been renewed on an "accident" basis.

Another approach was to impose a modest property damage deductible with respect to accounts with frequent property damage claims. This was a technique employed by astute underwriters for many years.

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¹See DRI monograph, *The New Comprehensive General Liability Policy - A Coverage Analysis* (Nov 1969)

²See briefs from DRI Brief Bank Case File No. 64-57, for an interpretation of the word "accident" in a case involving an insurance coverage dispute over damages as a result of dumping operations

³See briefs from DRI Brief Bank Case File No. 63-246 and 63-246a for an interpretation of the clause, "caused by accident," in a case involving seepage from crude oil operations which allegedly polluted an underground stream

prior to the 1966 policy revision. Painting contractors' policies, for example, were commonly written with a property damage deductible of \$100 or \$250 per accident.

POLLUTION CONTROVERSY DEVELOPS

However much more was happening during the 60's than merely the appearance of the revised comprehensive general liability policy. Environmental pollution, once the concern of only a few small and ineffectual groups, developed into an issue of world-wide social and political concern.¹ Widely read books and periodicals have spelled out the consequences of continued fouling of our environment in a nation where each year the population increases in an amount equal to that of Rhode Island, Delaware, Idaho, Montana and Nevada combined; where conspicuous consumption and planned obsolescence are parts of our way of life; where in 100 years the amount of land per person has declined from 48 acres per person to 10 acres per person with only 2.5 acres of cropland per person.

The Torrey Canyon disaster gave definition and impetus to the vague general concern of the public. This disaster was followed by others. Oil spills in 1970 from wells in the Gulf of Mexico were attended by wide publicity regarding the lack of safety devices. That event, following the California off-shore drill oil spill in 1969, caused concern among underwriters which substantially led to the present restrictive endorsements employed by Lloyd's and by most domestic insurers.

POLLUTION COVERAGE EXCLUSIONS

Most domestic insurers are now using two standard endorsements designed by the Insurance Rating Bureau.²

The first, which follows the Lloyd's restriction, is Standard Provision Endorsement IRB-G336. It is a restricting endorsement applicable to contamination or pollution as a result of oil and natural gas lease operations, oil pipeline operations (including maintenance), and oil rig or derrick erecting or dismantling. Coverage is excluded for bodily injury or property damage arising out of the discharge, dispersal, release or escape of oil or other petroleum substances or derivatives (including oil residues or oil mixed with wastes) into or upon any water course or body of water. Coverage is excluded whether or not such discharge, dispersal, release or escape is sudden and accidental. It is noteworthy that this exclusion applies only to discharge into a water course or body of water. This special endorsement is entitled "Contamination or Pollution-Described Operations-Supplementary Exclusion."

¹See Hirsch, *Environmental Law and the Defense Lawyer*, 11 *For The Defense* 19 (May 1970) for a discussion of the expanding awareness of environmental problems; see also Conley & Parnes, *Basic Aspects of Defending Pollution Suits*, *Defense Memo*, 12 *For The Defense* 53 (May 1971) for a thorough discussion of the defense of such suits, citing many statutes, cases and authorities.

²See *Pollution Coverage Exclusions*, 11 *For The Defense* 75 (Sept 1970) for an analysis of these endorsements.

It supplements Bureau Endorsement IRB-G335, entitled "Contamination or Pollution Exclusion." The latter endorsement excludes 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. However, this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental. Therefore, even with these two endorsements, coverage would be afforded for a spilled oil leak on land providing the occurrence was sudden and accidental."

OIL INDUSTRY RESPONSE

These restrictions were obviously of momentous concern to petroleum insureds, particularly to shippers of petroleum products by boat or barge and by operators of oil drilling platforms over water.³

The impact of pollution on the oil industry and its insurance coverage, and the industry's response to the situation are worth considering in some detail. This is a striking and informative example of the far-reaching consequences which can affect an industry as a result of concern over environmental problems. The restrictive endorsement problem, along with rising costs of insurance, caused a number of oil companies to form a new company (Oil Insur. Co. Limited). This company affords insurance to indemnify an insured for all risk of loss or damage to its property up to \$70,000,000; in addition, such expenses as suit and labor costs, well control costs and debris removal costs are covered. The policy also indemnifies or pays on behalf of the insured any sum or sums for which the insured may be legally liable (whether assumed under contract or imposed by law), as a result of bodily injury or loss of or damage to property of any kind occurring or alleged to have occurred as a result of seepage, pollution or contamination.

The Oil Insurance Limited policy does not cover watercraft or their cargoes owned or chartered by the insured except watercraft normally used in exploration, drilling and producing operations. Other exclusions are as follows: any business interruption loss or extra expense; injury or destruction caused by intentional or wilful introduction of waste products into any soil or inland or tidal waters unless caused by accident; liability for fines or penalties; or any loss, damage, or expense caused by or resulting from inherent defect, wear and tear, or gradual deterioration.

Coverage is therefore provided for on-shore and off-shore property and for pollution damages - up to \$70 million during any one policy year. Coverage is subject to deductibles of \$1,000,000 to \$10,000,000 depending on the assets of the insured. It should be noted that this venture involves: (1) a very high deductible, and (2) a loss pay-back agreement which is intended to provide only chronological stabilization, rather than any true transfer of risk over the long term.

³See Leber, *Oil Pollution: If Coastal Inland Waters*, 38 *Ins Counsel* J 40 (Jan 1971).

Another development has been the formation of TOVALOP (Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution). This agreement is available to tanker owners throughout the world. It provides a participating arrangement to reimburse national governments for expenses reasonably incurred to prevent or clean up pollution of coast lines as the result of the negligent discharge of oil from tankers. The agreement provides for reimbursement of costs up to a maximum of \$100 (U.S.) per gross registered ton of the tanker, or \$10,000,000 (U.S.) whichever is less. TOVALOP also provides for reimbursing a tanker owner for expenses reasonably incurred to prevent or clean up pollution from a discharge of oil. Coverage applies only to physical contamination to land adjoining waters navigated by tankers. Coverage does not extend to fire or explosion damage, consequential damage or ecological damage.

These two infants of the '70's, OIL and TOVALOP, were born of the immediate and urgent insurance needs of the petroleum industry and the tanker owners. Protection was required which was unavailable from private insurers and beyond the financial capacity of an individual petroleum company or a ship owner to self-insure. These developments give testimony to what may well become common practice in the '70's, namely the creation of an industry captive. There were some indications in 1969 when Lloyd's announced its restrictive endorsements, that "clean up" coverage for oil spills would be made available, although the premium requirement would be severe. However, to the author's knowledge, no such coverage was written. Such reluctance on the part of insurers may be expected to force the affected industry into consideration of a captive for sharing of large and infrequent losses. Substantial deductibles are a prerequisite in theory (as well as in fact, to date) for the success of such an undertaking. Other industries, currently less pressed by the pollution crisis, may yet follow the lead of the oil industry. They may be forced by economic necessity to form insurance companies to indemnify against the risk of loss by environmental pollution, or to form agreements along the lines of TOVALOP.

THE "CONTAMINATION OR POLLUTION EXCLUSION"

We have considered in some detail the difficulties and the response of the oil industry as an example of an industry operating under severe pressure caused by pollution problems. We now turn to some considerations primarily of concern to other industries, particularly the exclusion of coverage for contamination or pollution other than through oil or gas operations.

Underwriters claim that Endorsement IRB-G335, the "Contamination or Pollution Exclusion," does not take away any coverage that was formerly intended to be provided and that, in fact, the endorsement is merely for clarification.¹ The endorsement specifies that the exclusion does not apply if the discharge, dispersal, release or escape is "sudden and accidental."

¹See *Pollution Coverage Exclusions*, note 5 *supra*.

Underwriters maintain that this is merely an explanation of the definition of "occurrence," which reads in part: "an accidental exposure to conditions which results during the policy period in bodily injury or property damage which is neither expected nor intended from the standpoint of the insured." The emission of fumes into the air or discharge of harmful waste products into a stream which an insured knows is occurring continuously and which he can reasonably conclude will cause property damage or bodily injury is not a proper subject matter of insurance. Arguably, it would be against public policy to afford such insurance. An insured who knowingly emits into the air or discharges into a stream waste products which contain harmful elements, and who chooses to purchase insurance rather than to eliminate such emission or discharge, would find few sympathizers if insurance protection becomes unavailable. With these underwriting aims we must all agree.

However, the exception to the exclusion states that the dispersal, release or escape must be "sudden and accidental." In other words, it must be both sudden and accidental rather than either sudden or accidental. However, there can be emissions or discharges which are accidental but may not be sudden, in that they continue for a period of time before being detected. For example, one such incident was recently reported in Wisconsin. A leak of mercury into a watercourse had gone undetected for some time, and therefore was not a sudden dispersal, release or escape. However, it was accidental and unintended to the degree that there was no intent to discharge this quantity of mercury into the stream as waste. Purely as an economical measure, systems have been established to recover as much mercury as possible. To account for such situations, it is arguable that coverage should be worded "not intended by the insured" in lieu of "sudden and accidental." This type of problem gets us back close to the policy definitions and has caused insurance buyers to ask, "Why is the endorsement necessary?" Rather than clarifying coverage, it appears to becloud the already nebulous definition of "occurrence."

Fitting a definition of "accident" to fact situations may also be quite difficult where one is dealing with pollution control devices. These are inherently high maintenance devices. Dry precipitators and scrubbers involve considerable maintenance activity, without which they become increasingly less effective and on occasion will suffer total breakdown. If a steel plant starts emitting clouds of dirty and noxious grime due to a breakdown in its pollution control system, caused by poor maintenance, a serious question may arise as to the applicability of insurance coverage.

POLLUTION LITIGATION AND LEGISLATION

The single example of legal and coverage problems created by mercury pollution alone is highlighted by recent litigation. Large demands have been made (for example, by the Ohio Association of Commercial Fishermen) for mercury pollution of areas of Lake Erie. The mercury problem caused governmental bans and restrictions on commercial fishing in certain areas. It seems fairly certain that the '70's will see many

more of such claims. Astronomical amounts in compensatory and punitive damages will be involved; large defense costs seem a certainty.⁹ Whether many awards will actually be made is uncertain, but based on the present social and political climate, some appear likely.

The 70's will certainly witness a number of new laws, both state and federal, imposing greater liabilities on polluters. In the state of Illinois, as an example, we have the Environmental Protection Act,¹⁰ whose purpose is to provide a unified state-wide program. This act creates an environmental protection agency with the duty and authority to inspect, establish a program of surveillance and investigate violations. The act also creates a state water pollution agency and a pollution control board. Recent examples of federal concern include the Federal Water Pollution Control Act,¹¹ the Clean Air Act¹² and the Water Quality Improvement Act of 1970.¹³

It seems certain that pollution claims will go beyond outright claims for damages as a direct result of negligently caused pollution. Pollution *de facto* will be alleged as a sufficient basis for liability. For example, last November a chartered airliner carrying 37 members of the Marshall University football team plus twelve members of the university staff and several civic leaders approached the Huntington, West Virginia airport. The night was rainy and very poor visibility prevailed — a not unusual condition in an area subject to heavy fogs and industrial haze. The plane crashed on the mountainside short of the runway, with no survivors. A suit has subsequently been filed on behalf of the estates of most of those killed in that crash. The suit names as parties defendant the twelve leading industrial firms of the Ashland-Interton area upwind from the airport, alleging that the air pollution generated by these firms caused the poor visibility which resulted in the airplane crash.

This is no claim for mere property damage, nor is there any allegation that the emission of pollutants was sudden or accidental, although the claim arises out of an accident allegedly caused by the pollution. This, then, gives rise to an interesting area of speculation as to the meaning of "accident" in relation to pollution coverage.

⁹See also *Ohio v. Wadsworth Chem. Corp.*, 91 S Ct 1086 (1971), DRI Brief Bank Case File No. 70-234, in which the United States Supreme Court declined to take original jurisdiction of a case involving mercury pollution in Lake Erie; see also *High Court Denies Original Jurisdiction*, 12 For The Defense 49 (May 1971) for an analysis of the case.

¹⁰Ill. Rev. Stat. Ann. Chap. 111½, §1001 et seq. (1970).

¹¹33 USC 466 et seq.

¹²42 USC 1857 et seq.

¹³Act of April 3, 1970, PL91-224, 84 Stat. 91, amending Federal Water Pollution Control Act.

The insurance industry and the industrial risk manager will, of course, be concerned with areas of pollution insurance other than public liability. Presume for a moment that you are the risk manager of a conglomerate with a foundry division. One of your foundries is forced to shut down because of inability to comply with pollution control laws. Are you prepared to explain to your management why the business interruption insurance you carry does not apply to this? Suppose, however, that the plant is shut down because of excessive emission of smoke due to electrical breakdown of the circuits serving the dry precipitation system in your stacks. Let us also assume that you have comprehensive boiler and machinery insurance (including use and occupancy coverage) but excluding production machinery. Is the pollution control system part of the production machinery? Is the loss caused by the breakdown of the system, or by the application of a law or ordinance? These are some of the interesting coverage questions which might be raised.

Each industrial concern can take certain steps to limit its risks and to minimize its potential insurance and legal problems. The first step is to undertake a thorough examination of the sources of pollution in the operations of the company. After identifying these risks, the risk manager should work with the operating management of the company to reduce them insofar as they may be reduced. The risk manager should then be able to give management a clear identification of what risks remain and the extent to which they are self-assumed, as well as the extent to which insurance might be applicable. Following this, management at every level has an obligation to the company to remain involved in a continued effort to cope with the problems in this field which the company faces.¹⁴

CONCLUSION

We must perhaps face the fact that the results of pollution are, by and large, really not a subject of insurance. For one thing, the results of certain activities are fairly foreseeable in many instances. Secondly, pollution may be viewed as a dynamic risk rather than a static risk. In this context, we must realize that a certain degree of pollution is inevitable in any industrial society. The balance between the benefit to society resulting from carrying on the industrial activity in a particular manner must be weighed against the loss to society due to the resulting decrease in the quality of the environment. This balancing process will be largely a matter of the consensus of society to be arrived at through the political process.

¹⁴See *Moves to Thwart Industrial Polluters*, 12 For The Defense 9 (Jan 1971).

Tab 5

AFFIDAVIT

I, Melvin L. Summerhays, do depose as follows:

1. I began my insurance career in 1951 as a casualty agent for State Farm Insurance Company. In 1959 I left State Farm and joined an independent insurance agency in Salt Lake City, Utah. I joined the State of Utah Department of Insurance ("the Department") in 1970 as the general liability rates and forms analyst. I held that position until I retired in 1979.
2. We were a small department in those days. I handled all of the general liability filings myself. I discussed these matters with Commissioner Ottesen, but he always took my recommendations. Our job was to protect the public. At the same time we were mindful to consider proposed Bureau filings fairly. [I use "Bureau" to mean the Insurance Rating Board (IRB) which later changed its name to ISO.] We had an on-going dialogue with the local Bureau office. If a problem developed over a Bureau matter I would just call and work it out with them.
3. While I do not actually recall the "sudden and accidental" pollution exclusion, it would have been handled by me. I have now reviewed that exclusion and the Bureau's Explanation.
4. The pollution exclusion the Explanation are simple, clearly worded documents. They used language in 1970 that I was long familiar with. "Sudden" was something "abrupt" or "quick". An "accident" was a sudden event which happened by chance. An "occurrence" was defined in the policy to cover gradual damage and also an "accident". "Sudden and accidental" referred to an "accident", not to an "occurrence".
5. In 1970 I would certainly have understood these pollution exclusion documents in line with the way I understood the words they used. The language was so obvious there would have been no reason for me to ask the Bureau office what it meant. Clearly, coverage for gradual pollution discharges would be excluded. The only exception was coverage for "sudden and accidental" pollution discharges. The Explanation also said the only thing now covered was a pollution "accident". It was the same thought.
6. It is hard for me to understand how this language can be said to be confusing. To read it any other way is to just disregard plain policy language. I can say without any reservation that I would not have been misled by the Bureau's Explanation. There is no basis whatsoever for anyone to think I was misled.
7. While I am sure pollution was taking place at that period of time, I don't think we ever had a pollution claim. I always thought repetitive business pollution was a cost of doing business. The damage it caused would most likely be expected. The first sentence of the Explanation indicates the Bureau thought so also.
8. Of course on-going business pollution also causes gradual pollution discharges in addition to expected damage. As stated in the Explanation the exclusion clearly "clarifies" the existing situation that pollution would not be covered. Certainly the exclusion would also apply as well

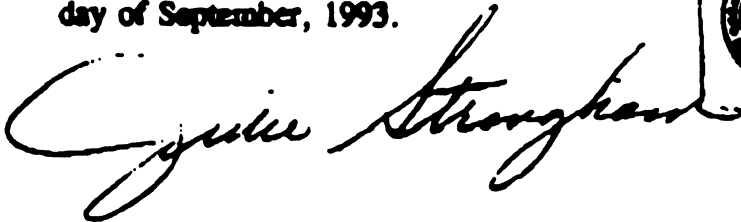
to any unexpected gradual pollution discharges, if any.

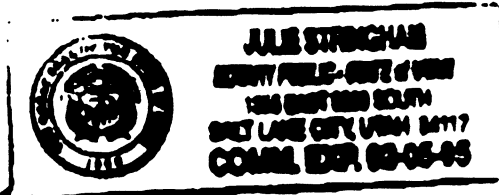
9. Since the restriction of coverage to only sudden pollution accidents did not really reduce the actual amount of existing coverage under an "occurrence", no rate reduction would have been warranted. With no loss experience for pollution claims even under "occurrence" language, a premium adjustment for the gradual pollution exclusion would not have been considered.

10. My approval of this exclusion helped contain the cost of insurance. Besides, businesses did not expect to have pollution coverage under their general liability policies except for a true "accident". The exclusion was fair and appropriate for endorsement to policies in Utah.


MELVIN L. SUMMERHAYS

Subscribed and sworn to
before me, this 2nd
day of September, 1993.





Tab 6

MEALEY'S LITIGATION REPORTS

INSURANCE

July 1, 1993

Vol. 7, #33

A CASE OF MISPLACED RELIANCE: ANDERSON & MIDDLETOWN LUMBER COMPANY REVISITED

By Victor C. Harwood, III

[Editor's Note: The author's New Jersey law firm, Harwood Lloyd, routinely represents insurers in environmental insurance coverage litigation. The author's views are his own. The author would like to thank his partner, Edward Zampino, for his assistance in the preparation of this article. Responses to this commentary are welcome.]

For policyholders to succeed in their battle for insurance coverage for their decades of environmental pollution under post-1970 CGL policies, they must convince courts that the clear language of the pollution exclusion says something it doesn't. One would expect that an insurance clause excluding coverage for harms caused by pollution discharges, excepting only damage stemming

COMMENTARY

from a "sudden and accidental" pollution discharge, would not cover gradual pollution discharge claims.¹ However, policyholders have persuaded some courts that the pollution exclusion is ambiguous. Their position is that the pollution exclusion merely

restates the limitation of coverage under the occurrence definition to damage that is "neither expected nor intended."² In other words, policyholders contend the pollution exclusion excludes exactly nothing. The policyholder fallback position is, even if the "discharge" focus of the exclusion is to be recognized, "sudden" must be interpreted as "unexpected," without according it any temporal component.

The partial success of the policyholders on the latter position has been made possible by one segment of the judiciary's patent misuse of dictionaries, and by some courts accepting the meritless argument that "sudden and accidental" had been construed as "unexpected" under boiler and machinery policies prior to the drafting of the pollution exclusion in 1970.³ (Thus, the drafters of the pollution exclusion are "presumed" to have intended to provide coverage in accord with this purported judicially determined meaning.)⁴

In many respects, the main ingredient in this policyholder pollution coverage recipe has been a single 1959 boiler and machinery case from the State of Washington, Anderson & Middletown Lumber Co. v. Lumberman's Mutual Casualty Company, 333 P.2d 938 (Wash. 1959) (hereinafter "Anderson").

The purpose of this article is to demonstrate that the Anderson analysis was factually and fatally flawed, and that the assertions made by policyholders about it are unfounded. Most important, the reliance in turn placed upon Anderson by various courts has been seriously misplaced, resulting in a small but distressing body of unreliable law.

MEALEY'S LITIGATION REPORTS INSURANCE

Vol. 7, #33

July 1, 1993

A. Lexicographic Confusion

1. Misuse of Dictionaries

The factual scenario in Anderson involved a bandsaw wheel that began to oscillate. Two days later it started to vibrate. Three days later, the vibrations were so severe that the saw was shut down. Inspection revealed cracks in the spokes. The boiler and machinery insurance policy covered loss caused by "the sudden and accidental breaking" of the wheel.⁵ The carrier contended the breaking was not sudden, rather it constituted a gradual process.⁶ The court agreed the breaking process was "... not instantaneous, even though the last stage occurred in an instant."⁷ However, it still found coverage for the insured.

The focus for Anderson's analysis of the "sudden and accidental" clause was grounded in a purely academic inquiry. The court purported to accord policy language its "ordinary meaning" by extracting one word, "sudden," and turning to dictionaries to elicit that ordinary meaning. Thus, Anderson's lexicographic analysis was flawed at the outset.

First, dictionaries caution against examining the meaning of a word in a vacuum. They emphasize contextual significance. For example, as dictionaries typically state:

Any effort to tailor all words to fit a rigid pattern of definition would result in distortion rather than clarification of meaning. Instead of following a standard formula for defining, the editors have constantly kept in mind the need to study the meanings of words in phrases. . . .⁸

Second, in their listing possible meanings of a word, dictionaries do not suggest that all such listings reflect common usage. Rather, most dictionaries establish a time sequence for the ordering of word meanings. Some dictionaries order meanings of a word by common usage (such as Funk & Wagnall's and Random House dictionaries). Thus, the common, ordinary meaning of a word is listed first in those dictionaries. Other dictionaries (such as Merriam-Webster's dictionaries) list meanings of a word in the order of historical usage. Thus, the earliest known usage of a word would be listed first in such dictionaries. The ordinary meaning of a word would follow the historical definitional entry for the word.

The Anderson court was clearly unaware of the differing usage instructions set forth in the dictionaries it referred to. Thus, it misapprehended the ordinary meaning of "sudden." It misfocused on the (historical) "unforeseen" sense of "sudden" listed first in the historically-ordered Webster's New International Dictionary (2d Ed.). It downplayed the (ordinary meaning) temporal definition listed first in the common meaning-ordered Funk & Wagnall's Standard Dictionary Of The English Language.⁹

There can be no disputing that the Webster's dictionary cited in Anderson (as with all Merriam-Webster's dictionaries) advised its readers in its usage instructions that the order of arrangement of senses was historical.

In general the arrangement of meanings of words of many meanings in this dictionary has been according to the following practice. The

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earliest meaning ascertainable is always first, whether it is literary, technical, historical, or obsolete. Meanings of later derivation are arranged in the order shown to be most probable by dated citations and semantic development.¹⁰

Thus, unbeknownst to the Anderson court, the ordinary temporal meaning of "sudden" was actually set forth in sense number five of Webster's, which provides:

5. Hastily prepared, arranged, effected, etc.; very quickly made, provided, or brought about; as a sudden cure, departure, trip, or dinner.¹¹

The common meaning-ordered Funk & Wagnall's Standard Dictionary of the English Language International Edition confirms that the ordinary definition of "sudden" includes a temporal element:

1. Happening quickly and without warning:
sudden death.¹²

Accordingly, even when taken in the abstract and out of context, "sudden" is clearly expressed in the Anderson-cited dictionaries (and all dictionaries) as having an ordinary temporal meaning, provided that the express usage instructions of those dictionaries are not ignored.¹³

2. Lexicographic Lemmings

Anderson's misapprehension of this lexicographic reality has, unfortunately, led the way for other lemming-like decisions to parade into an ocean of semantical confusion.¹⁴

A few courts rely upon Anderson, but take dictionary misuse even a step further. In Just,¹⁵ the Wisconsin Supreme Court compared Webster's and Random House's definitions, commenting that "... [t]he very fact that recognized dictionaries differ on the 'primary' definition of 'sudden' is evidence in and of itself that the term is ambiguous."¹⁶ Of course, when used properly, these dictionaries do not "differ." Rather, they corroborate that the ordinary meaning of "sudden" has a temporal element.¹⁷ Thus, it is simply not proper to ascribe more than one reasonable (common) meaning to "sudden."¹⁸

Another pro-policyholder case, Hecla Mining,¹⁹ improperly utilized Webster's Third New International Dictionary and the Random House Dictionary of the English Language in the same manner as did Just. The Colorado Supreme Court also erroneously assumed that major dictionaries "differ" on the ordinary meaning of "sudden" when, if used correctly, they actually confirm the word's ordinary temporal meaning.²⁰ Accordingly, Hecla Mining's multiple "reasonable" meanings echo is likewise flawed. Id. at 1092.

In Claussen,²¹ the Georgia Supreme Court misapprehended that the "primary" definition of "sudden" is "unexpected," misciting Webster's Third New International Dictionary (1986). This error led that court to incorrectly characterize "sudden's" ordinary temporal meaning as only "secondary" (even though the Court recognized the temporal meaning of "sudden" as "... common in the vernacular").²²

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In Broadwell,²³ the New Jersey Appellate Division construed "sudden" to mean unexpected, which the court inaccurately stated was "... consistent with the common meaning of the word in everyday parlance."²⁴ It cited and misused, as did Anderson, Webster's New International Dictionary, 2nd ed. (1954).

An interesting situation has developed in Anderson's home, the State of Washington. The Court of Appeals in Queen City Farms²⁵ purported to follow Anderson, citing to it in great detail. However, its analysis of "sudden" is unreliable.²⁶ Queen City Farms did not question the correctness of Anderson's use of dictionaries (nor Anderson's comment on the purported "purpose," i.e. drafting intent, of "sudden and accidental" language in boiler and machinery policies -- see discussion, infra).

Queen City Farms cited Claussen as an example of courts which have found "sudden" to be ambiguous "... in and of itself."²⁷ However, as pointed out by the Massachusetts Judicial Supreme Court in Belleville,²⁸ Claussen fell into error (as did Anderson, and Queen City Farms which relied upon Anderson) by construing "... 'sudden' in isolation without recognizing the significance of the companion word 'accidental.'"²⁹

The Washington Supreme Court has granted certification.

B. The Drafting Intent Behind, And Public Understanding Of, Coverage Provided In Boiler And Machinery Policies

1. Misplaced Reliance Upon Couch

Couch's treatise is often cited authoritatively by policyholders to fortify their position that the primary meaning of "sudden" is "unexpected," not "instantaneous."³⁰ However, Couch cites only Anderson and a 1953 decision of the Massachusetts Judicial Supreme Court, New England Gas,³¹ to support its statement. First, Couch merely paraphrases comments from those cases, echoing their joint misuse of dictionaries as to what is obviously Webster's first listed "historical" definition of "sudden."³² Couch made no independent analysis, mechanically perpetuating the dictionary misuse.³³

Moreover, Couch inexplicably failed to cite the uniform construction of "sudden and accidental" in many other boiler and machinery cases which accorded that language its temporal limitation.³⁴ Indeed, the Massachusetts Judicial Supreme Court has recently made clear that New England Gas has no bearing on the interpretation of the pollution exclusion.³⁵ (That court has also interpreted the exclusion as constituting a temporal restriction of coverage for pollution discharges.)³⁶ Thus, Anderson is the only boiler and machinery case in the country that is arguably inconsistent with the reality that "sudden and accidental" expressed a temporal element.³⁷ Applying the observations of Couch on boiler cases to a pollution exclusion interpretation, as confirmed by the Massachusetts Judicial Supreme Court, is simply wrong.

In fact, any court examining why and how "sudden and accidental" language was utilized and understood in boiler and machinery policies would find that the goal of underwriters was to impose a temporal restriction of coverage -- and that this reality was clearly understood by the policyholder community.

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2. Pre-Anderson Historical Perspective

The Anderson court was clearly unaware of the reasonable coverage expectations of corporate insureds and insurers in the real world. It was also totally uninformed about the "purpose" or drafting intent behind the boiler and machinery policy language, and its "assumption" on that score compounded its error.

"Sudden and accidental" has always been used in boiler policies to express the "classical accident" concept -- describing a quick and unexpected situation. The Anderson court inexplicably felt, without any cited basis, that it was "more reasonable to assume" that "sudden" was not limited to an instantaneous event, but would cover "a crack which developed over a period of time . . . as long as its progress was undetectable."³⁸

Four years before Anderson was decided, Walter R. White Jr., Second Vice President for Lumberman's Mutual Casualty Company (the defendant company in that case) wrote an article in the National Insurance Buyer on boiler and machinery insurance for the benefit of policyholder purchasers.³⁹ Therein he explained "sudden and accidental's" temporal context, and the lack of coverage for "progressive," slowly developing "cracks."

Usually, though, such cracks [in a steam chest or cylinder head] are progressive and not sudden and accidental and, therefore, are not usually covered under the definition of accident. (emphasis added).⁴⁰

The general expansion of coverage in boiler and machinery policies in 1961 to insure a classical accident breakdown of the machinery from many new causes, including "cracking,"⁴¹ was reflected in 1955 Bureau⁴² drafting minutes. It was pointed out that the proposed new "sudden and accidental" coverage for cracks would still not cover those which developed gradually.

The Chairman distributed copies of a letter from a member asking that consideration be given by the committee to broadening the definition of Accident for Machinery Objects to include sudden and accidental cracking. This member pointed out that at times cracking failures occur which are of a sudden, unexpected and truly accidental nature and not of a gradual development. (emphasis added).⁴³

That the element of temporal abruptness, characterized as "sudden," was always a prerequisite for boiler and machinery coverage is also illustrated in an early treatise which explained old boiler policies in England.⁴⁴ Therein, it was clearly expressed that such policies covered liability "... due to explosion or collapse as hereinafter defined of any boiler . . ."⁴⁵ "Explosion" was defined to mean the "... sudden and violent rending or tearing apart of the permanent structure of a boiler . . ." (emphasis added).⁴⁶ "Collapse" was defined to mean the "... sudden and dangerous distortion by bending or crushing . . . by force of steam or fluid pressure . . . it shall not mean the slowly developing deformation of a plate or plates due to any cause." (emphasis added).⁴⁷ Specifically excepted from coverage were gradual situations such as

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... [d]efects due to wearing away or wasting of the materials of a boiler or other apparatus whether by leaking corrosion or by the action of the fuel or otherwise the grooving . . . deterioration generally or the development of cracks, blisters, laminations and other flaws; or for fracture failures . . . (unless such defects, fractures or failures result in 'explosion' or 'collapse' as hereinafter defined). . . .⁴⁸

Thus, decades of temporal usage of "sudden and accidental" in boiler and machinery policies preceded Anderson. That historical usage convincingly refutes Anderson's erroneous "assumption" that the only "purpose" for placing "sudden and accidental" in the insurance contract was the exclusion of coverage for unforeseen (but not instantaneous) breaks.⁴⁹

3. Post-Anderson Historical Perspective

Several years after Anderson was decided, policyholders were given a detailed explanation of changes in boiler policies. At an address before the Annual Insurance Conference sponsored by ASIM's Delaware Valley Chapter in October of 1961, risk managers were reminded that the "old machinery definitions of accident" (the definition considered in Anderson) required a "breaking into two or more parts."⁵⁰ The "intent" behind coverage was ". . . to limit the machinery accident to those occurrences where there was actual breaking."⁵¹ The intent to provide limited coverage was accomplished by utilizing the traditional insurance concept of the "classical accident," as expressed in the language "sudden and accidental." This risk manager/policyholder audience was told that, while the new form granted coverage in more situations, it still required a precipitating "sudden accidental breakdown." The temporal requirement for a covered event was highlighted in the new policy definition, which specifically excluded coverage for gradual, undetected and unforeseen progressive failures such as depreciation, deterioration, corrosion, erosion, wear and tear and leakage.⁵²

In the 1970s, a small, select group of policyholders, "Highly Protected Risks" ("HPR"), were offered a variety of property insurance coverage, including a different type of boiler policy, by insurers. These policies afforded even broader coverage than that written under standard policies.⁵³ These "HPR's" were "preferred" risks with "superior underwriting characteristics." They were provided ". . . broad coverage at reduced cost in exchange for minimal risk of loss to the underwriter . . ."⁵⁴ A key ingredient in qualifying as an "HPR" was "management's attitude toward loss prevention. A conscientious and systematic effort to protect property . . . [and] reduce the chance of loss . . . is essential."⁵⁵ The Factory Mutual boiler policy extended gradual coverage on an "occurrence basis" for "undetectable" and "unforeseen" situations.⁵⁶ These "unforeseen" situations are of the type Anderson had erroneously permitted to be covered under the earlier "sudden and accidental tearing asunder" standard form.⁵⁷

The fact that broad boiler "occurrence" coverage (where the only limitation was an "unforeseen" limitation) eventually came to be offered on a selective basis for special "HPR" policyholders further refutes Anderson's "assumption" in 1959 that the temporal limitation expressed in the traditional boiler policy could be ignored. The historical evidence also belies Anderson's assumption that the underwriting risk (and cost of insurance) for all policyholders was the same whether the breaking was instantaneous or merely undetected ". . . over a period of time."⁵⁸

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Indeed, although the boiler policies purchased by most policyholders have undergone many changes over the years to cover additional situations, standard coverage continues to be available on a "classical accident" basis, and a policyholder may still obtain by special endorsement traditional "Limited Coverage" that covers only boiler explosions.⁵⁹

4. The Consistent Temporal Application Of "Sudden and Accidental" In Diverse Underwriting Efforts

The historical "classical accident" basis for underwriting standard boiler and machinery coverage, utilizing "sudden and accidental" language, was further recognized by insurers in their exclusion of such losses in other types of property policies.

In 1983, one insurance trade publication explained:

Essentially, Boiler and Machinery insurance is designed to cover losses resulting from: (1) explosion of boilers and other types of pressure vessels . . . and (2) accidental breakdown of boilers and other mechanical or electrical equipment. Such losses are not covered under standard Property policies. Nor are they covered under most non-standard "all-risk" contracts, such as a Difference in Conditions policy. (emphasis added).⁶⁰

Accordingly, the inter-relationship of special boiler coverage with other types of first-party property coverages was always expressed with a recognition of the temporal "classical accident" feature of boiler coverage.

Anderson has sometimes been used successfully by policyholders as providing a basis for demonstrating how "sudden and accidental" was purportedly understood by the drafters of the pollution exclusion when they picked up their pens in 1970. However, the contemporaneous pollution exclusion drafting documents demonstrate that the express aim of utilizing "sudden and accidental" language was to accomplish a restriction of coverage along the lines of the "boom" or "classical accident" concept. The drafters' subsequent testimony also confirmed they were unaware in 1970 of any court that purportedly interpreted "sudden and accidental" in a boiler policy without a temporal element. This evidence has been addressed at length elsewhere.⁶¹

Moreover, the insurance world was always well aware that "sudden and accidental" operated in the same temporal way in both boiler policies and in CGL policies containing a pollution exclusion. For example, an insurance trade consultant in 1973 told its readers that the CGL covered pollution which is both "sudden and accidental and unintentional." It also stated that the boiler policy could only cover pollution losses caused by a "sudden and accidental breakdown of an insured object."⁶²

POLLUTION LAWS AFFECT BOILER-MACHINERY PROGRAMS

The strong anti-pollution statutes that have been enacted in recent years have created a number of problems for risk managers. One major question, for example, is the extent to which Liability policies cover pollution damage. We discussed this in depth in February 1970, and our feeling then and now is that pollution damage which is sudden

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and accidental and unintentional on the part of the insured is covered under the standard C.G.L. The pollution exclusion which became part of the new Comprehensive General Liability policy in 1973 supports this view. It states clearly that injury of damage caused by pollutants is covered if the "discharge, dispersal, release, or escape" of such pollutants is "sudden and accidental."

There is also coverage of accidental pollution liability under Boiler and Machinery contracts. We understand that the insurance companies subscribing to the Boiler and Machinery division of the Insurance Services Office have taken the position (without issuing a formal pronouncement) that pollution losses caused by a sudden and accidental breakdown of an insured object are covered. The insured object may be any type of equipment . . . not merely an anti-pollution device or installation. (emphasis added).⁶³

The insurance usage of "sudden and accidental" language in the exception clause of the CGL's "failure to perform" exclusion "(m)," was also temporally oriented along "classical accident" lines. An ISO Legal Review Committee memorandum in 1981 succinctly comments upon the drafting intent of exclusion (m):

An exception to the exclusion [(m)] provides that it does not apply to "loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the named insured's products or work performed by or on behalf of the named insured after such products or work have been put to use by any person or organization other than an insured."

The thought behind this exception is that if a classic accident arises out of the use of the named insured's products or work, then the loss of use of other tangible property not physically injured or destroyed is covered. On the other hand, no coverage is intended if the insured's product or work gradually sustains physical injury resulting in the loss of use of other tangible property that is not destroyed. (emphasis added).⁶⁴

Therefore, the history of "sudden and accidental" in boiler and machinery policies, in the CGL's pollution exclusion, and in the CGL's failure to perform exclusion, confirms a consistent temporal usage and understanding of that phrase in all insurance underwriting efforts over many decades.

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CONCLUSION

Anderson's suggestion in 1959 that "sudden" has no temporal component was contrary to the definition that the proper use of dictionaries would disclose. Further, Anderson was defective in its considering the meaning of "sudden" in isolation and out of the contextual phrase within which it was contained. The pro-policyholder pollution coverage cases which have subsequently used dictionaries to ascertain the meaning of "sudden" have not given proper consideration to the correct usage of the dictionaries upon which they purported to rely.

Anderson's conclusions were also contrary to the temporal drafting intent behind, and public understanding of, the "sudden and accidental" language as used in boiler and machinery policies. Indeed, Anderson's interpretation of "sudden and accidental" prior to 1970 constituted a unique minority, and its ruling was unsupported by other boiler and machinery cases. Anderson's observations are further contrary to the temporal insurance usage of the phrase "sudden and accidental" in policy language other than boiler and machinery policies, such as the CGL's pollution exclusion and the CGL's "failure to perform" exclusion.

Understandably, Anderson continues to be heavily relied upon in the briefs of policyholders and their amici submitted to courts across the country. Regrettably, some courts are being persuaded that Anderson has an important bearing on how the pollution exclusion should be interpreted. For a single boiler and machinery case decided in 1959 to so greatly affect the litigation of environmental insurance cases in the 1990s is more than a bit disconcerting. This is especially so when that case's purported analysis of the ordinary meaning of "sudden," and the underwriting purpose behind "sudden and accidental" language in boiler policies, was patently erroneous in so many respects.

Insurers are therefore encouraged to urge courts to reject the flawed boiler and machinery and dictionary assumptions behind Anderson, and to reject Anderson's extension to a pollution exclusion interpretation as wholly insupportable. The Massachusetts Judicial Supreme Court has recognized that its 1953 boiler case, New England Gas, was flawed and irrelevant in interpreting the pollution exclusion. It is hoped that the Washington Supreme Court will take advantage of the opportunity presented in Queen City Farms to do likewise.

ENDNOTES

- 1.) The text of the "sudden and accidental" pollution exclusion states:

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

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2.) An ordinary speaker of the English language knows otherwise. Basic grammar and sentence structure suggest only one conclusion. "It strains at logic" to perceive ambiguity in this clause. Waste Management of Carolinas, Inc. v. Peerless Insurance Company, 340 S.E.2d 374, 379 (N.C. 1986). Indeed, the "language is clear and plain, something only a lawyer's ingenuity could make ambiguous." United States Fidelity and Guaranty Co. v. Star Fire Coals, 856 F.2d 31, 34 (6th Cir. 1988), quoting American Motorists Ins. Co. v. Gen. Host Corp., 667 F. Supp. 1423, 1429 (D. Kansas 1987).

3.) See, e.g., article of policyholder counsel, Anderson and Passannante, Insurance Industry Doubletalk: The Real and Revisionist Meanings of "Sudden and Accidental." 12 Ins. Litig. Rptr. 186, 191 (May 1990) (hereinafter "Doubletalk").

4.) Doubletalk at 191. This "presumption" has been convincingly rebutted by the contemporaneous documents and subsequent testimony of the pollution exclusion drafters. See § B4, *infra*.

5.) Anderson, supra, 333 P.2d at 939.

6.) Id. at 940.

7.) Id.

8.) See Funk & Wagnall's Standard Dictionary of the English Language International Ed. (1958), excerpt from the "front matter" usage instructions, "Semantic Change," at VII.

9.) Anderson, supra, 333 P.2d at 937, 938. Anderson does not identify the date or edition of the Funk & Wagnall's it utilized, but merely refers to it as "Standard Dictionary of the English Language." Id. at 940. However, Funk & Wagnall's published a dictionary with that title in 1898 which contains the same first listed (ordinary meaning) definition of "sudden" (at 1796) which Anderson sets forth. "Happening quickly and without warning; coming unexpectedly or in an instant; as sudden death; sudden dismissal." The front material of explanatory information in that dictionary states: "If a word has two or more meanings, the most common meaning has been given first; that is, preference is given to the order of usage over the historical order . . . nothing has been permitted to stand between the vocabulary word and its most obvious or important current meaning." (original emphasis). Funk & Wagnall's Standard Dictionary of the English Language (1898), Introductory page xi.

10.) Webster's New International Dictionary of the English Language, 2d Ed. Unabridged (1959), "Introduction," at xv (emphasis added).

11.) Webster's, supra at 2519.

12.) Funk & Wagnall's Standard Dictionary of the English Language International Ed. (1958) at 1252. Even the second listed definition of "sudden" in the 1958 edition was grounded in temporality: "2. Hurriedly or quickly construed, used or done; hasty." Id.

13.) Anderson incorrectly concluded that sudden's ". . . primary meaning, in common usage, is not 'instantaneous' but rather 'unforeseen and unexpected.'" Id., 333 P.2d at 941. According to Random House, the search for a word's "primary" meaning would entail ascertaining which of its meanings was the "first or highest in rank of importance; chief; principal." See Random House Dictionary of the English Language (2 ed. unabridged) at 1537. (This dictionary lists definitions in order of frequency of usage, with "less common" meanings following. Id. at xxxii.) See also Webster's, supra, second listed (common meaning) of "primary": "first in rank of importance" (at 2519).

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According to Anderson's own stated approach, there can only be one "primary" (common) meaning for any word, and it is totally irrelevant that there may be other "secondary" meanings of that word. The mere presence of multiple dictionary entries does not render a word ambiguous, as policyholders also routinely assert. Upjohn Co. v. New Hampshire Insurance Co., 476 N.W.2d 392, 398 n.8 (Mich. 1991). See also discussion, infra, n.16.

14.) Some of the policyholder cases cite to Black's Law Dictionary to support their dictionary analysis. However, it should be obvious that use of a specialty legal dictionary is not appropriate to determine the common ordinary meaning of words. As the "Preface to the First Edition" (which is carried forward in all subsequent editions) states: "It [the dictionary] does not invade the province of the text-books, nor attempt to supersede the institutional writings. Nor does it trench upon the field of the English dictionary, although vernacular words and phrases, so far as construed by the courts, are not excluded from its pages." (emphasis added). Id. at VIII. Indeed, the definition of "sudden" in Black's merely reflects one court's misuse of Webster's. See Black's Law Dictionary (1968 ed.), citing Hagaman v. Manley, 42 P.2d 946, 949 (Kan. 1935) (which in turn ignored the usage instructions of Webster's New International Dictionary and chose the "historical" listed meaning for "sudden" rather than its common meaning.)

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

16.) Id. at 573. Although Just cites to Anderson's erroneous conclusion that the unambiguous common meaning of "sudden" is "unforeseen," 456 N.W.2d at 576, Just adds a new dimension to the lexicographer error. Just concludes that "sudden" has multiple primary meanings. Id. at 573. The court concluded (unlike Anderson) that "sudden" is ambiguous because it is "susceptible to more than one reasonable meaning." See also Queen City Farms, infra, New Castle County v. Hartford Acc. and Ind. Co., 933 F.2d 1162, 1197-1198 (3rd Cir. 1991) and CPC International, Inc. v. Northbrook Excess & Surplus Ins. Co., 962 F.2d 77, 94 (n.45)-95 (1st Cir. 1992), which also erroneously cited to Anderson to support an analysis of the word's "ambiguity."

17.) See evidence referred to in articles of insurer counsel, The 'Frivolity' of Policyholder Gradual Pollution Discharge Claims ("Frivolous Pollution Claims"), 5 Mealey's Ins. Lit. Rpts. No. 40 (Aug. 27, 1991), at 24, and The Emperor's Illusionist: Policyholders Retreat From Pollution Exclusion Extrinsic Evidence ("Emperor's Illusionist - Part Two"), 6 Mealey's Ins. Lit. Rpts. No. 26 (May 12, 1992) at 26-27 and n.113.

18.) Just, 456 N.W.2d at 576.

19.) Hecla Mining Co. v. New Hamp. Ins. Co., 811 P.2d 1083, 1091 (Colo. 1991).

20.) Anderson's erroneous conclusion on sudden's "primary meaning in common usage" was likewise followed in Time Oil Co. v. Cigna Property & Cas. Ins. Co., 743 F. Supp. 1400, 1408 (W.D. Wash. 1990).

21.) Claassen v. Aetna Cas. & Sur. Co., 380 S.E.2d 686 (Ga. 1989).

22.) Id. at 688.

23.) Broadwell Realty v. Fidelity & Cas. Co. of N.Y., 528 A.2d 76 (N.J. Super. App. Div. 1987).

24.) 528 A.2d at 83. However, an earlier New Jersey Court, without the confusion of a dictionary analysis, noted that an "... occurrence need not be a sudden event but may be a process ..." thereby highlighting "sudden's" commonly understood temporal meaning. Deodato v. Hartford Ins. Co., 363 A.2d 361, 365 (N.J. Super. Law Div. 1976), aff'd, 381 A.2d 354 (N.J. Super. App. Div. 1977).

25.) Queen City Farms, Inc. v. Central National Ins. Co., 827 P.2d 1024 (Wash. App. 1992).

26.) Id. at 1048-1049.

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27) 827 P.2d at 1048.

28.) Lumberman's Mut. Cas. Co. v. Belleville Industries, Inc., 555 N.E.2d 568 (Ma. 1990).

29) Id., at 571. Likewise intentional discharge of pollutants cannot constitute an "accidental" discharge even when there is no intent to cause environmental harm. To do so would improperly render the pollution exclusion "... meaningless in context." See, Technicon Electronics Corp. v. American Home Assurance Co., 542 N.E.2d 1048, 1050-1051 (N.Y. 1989).

30.) See, e.g., Doubletalk at 190, citing G. Couch, 10A Cyclopedia of Insurance Law 2d, § 42.396 (1982). "When coverage is limited to a sudden 'breaking' of machinery the word 'sudden' should be given its primary meaning as a happening without previous notice, or as something coming or occurring unexpectedly, as unforeseen or unprepared for."

31.) New England Gas & Electric Ass'n v. Ocean Acc. & Guar. Corp., 116 N.E.2d 671 (Ma. 1983).

32.) See New England Gas, supra, 116 N.E.2d at 680.

33.) This Anderson/New England Gas/Couch rhetoric was repeated, also without any analysis, in New Castle County, supra, 933 F.2d at 1197, and in CPC International, supra, 962 F.2d at 94, n.45.

34.) See insurer article, Johnstone and Ansell, Insured Counsel Doubletalk: The Fallacies in Anderson and Passannante's Arguments Concerning the Interpretation of "Sudden and Accidental" in Boiler and Machinery Policies, 5 Mealey's Ins. Litig. Rpts. No. 10 (Jan. 15, 1991). This article discusses numerous such boiler and machinery cases.

35.) See Belleville, supra, 555 N.E.2d at 572.

36.) Id.

37.) See Johnstone and Ansell, supra, at 21 which suggests Anderson's lexicographic conclusion is "dicta." The policyholder authors of Doubletalk also cite Cozen, Insuring Real Property, § 503(2)(b) (1969) for the proposition that boiler and machinery policies prior to 1970 had "uniformly" interpreted "sudden and accidental" to mean "unexpected and unintended." However, Cozen cites no authority for that sweeping proposition, and no case Cozen refers to supports it. Indeed, Cozen mentions only two cases which actually contain an (erroneous) dictionary reference to "sudden" as "unexpected." New England Gas, supra, and Cyclops Corp. v. Home Ins. Co., 352 F. Supp. 931 (W.D. Pa. 1973). Significantly, and in spite of their error in dictionary usage, both cases contrast "sudden" with "gradual." New England Gas, 116 N.W.2d at 680; Cyclops, 352 F. Supp. at 937, 933. Furthermore, Cozen acknowledges "... [a]s a general rule, as long as the manifestation of the defect occurs quickly, the defect itself may gradually lead to failure" Id. (emphasis added).

38.) Anderson, supra, 333 P.2d at 940 (emphasis added).

39) Walter R. White Jr., What is Wrong With Boiler Insurance Today, The National Insurance Buyer (June 1955). This periodical (subsequently re-named Risk Management) was published by the American Society of Insurance Management (ASIM), which subsequently changed its name to Risk and Insurance Management Society (RIMS). RIMS is the national policyholder risk-manager trade association. Mr. White addressed his audience as "the buyers" of insurance. Id. at 24.

40.) Id. at 12.

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- 41.) Id. at 34-35.
- 42.) The "Bureau" as used here means the Insurance Services Office (ISO) and its predecessor organizations, such as the National Bureau of Casualty Underwriters (NBCU).
- 43.) Minutes, Rating Committee of the Boiler and Machinery Division of the NBCU, December 7, 1955, at 3.
- 44.) H.R. Sketch, Engineering Insurance (Second Ed.), Buckley Press Ltd., London (1935).
- 45.) Id. at 43.
- 46.) Id. at 48 (emphasis added).
- 47.) Id. at 49 (emphasis added).
- 48.) Id. at 44-45.
- 49.) Anderson, supra, 333 P.2d at 940.
- 50.) George West, New... Boiler and Machinery Coverages, The National Insurance Buyer (January 1962) at 34. The author was Vice President of the Mutual Boiler and Machinery Insurance Company.
- 51.) Id. (emphasis added).
- 52.) Id. at 35.
- 53.) See Property Insurance for "Highly Protected Risks," 12 The John Liner Letter No. 12 (November 1975) (last page).
- 54.) Id. at 1.
- 55.) Id. at 3.
- 56.) See New Boiler and Machinery Policies, 24 The John Liner Letter 8 (July 1987) at 4: "Such coverage does not require that there be visible evidence of damage at the time of the occurrence."
- 57.) 333 P.2d at 940.
- 58.) Id.
- 59.) See New Boiler and Machinery Policies, supra, at 4:

"ACCIDENT" DEFINED IN BASIC COVERAGE FORM

A covered "accident" under the new Boiler and Machinery Coverage form is defined in essentially the same manner as it is under the older blanket group description schedules:

"Accident" means a sudden and accidental breakdown of the "object" or a part of the "object." At the time the breakdown occurs, it must manifest itself by physical damage to the "object" that necessitates repair or replacement.

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The definition excludes losses resulting from such perils as corrosion, wear and tear, breakdown of computer equipment, leakage at valves, fittings, etc. Separate definitions of accidents to turbine units are included in the endorsement used to provide coverage for losses stemming from such equipment.

Generally, underwriters use an alternate definition of "accident" to restrict coverage on older, cast-iron boilers. This so-called "Limited Coverage" insures against only those losses arising out of explosion -- or the "sudden and accidental tearing asunder" -- of the object. Such limited protection was written under the older policy as an optional blanket group description for boilers and other fired vessels. Under the new Boiler program, Limited Coverage may be provided by separate endorsement." (emphasis added)

60.) Boiler and Machinery Insurance: An Update, 20 The John Liner Letter 11 (October 1983) at 1.

61.) See Emperor's Illusionist - Part Two at 22-24, and Frivolous Pollution Claims at 21-25.

62.) See Timely Tips, 10 The John Liner Letter No. 5 (April 1973). Insurance trade publications repeatedly pointed out the temporal significance of the pollution exclusion's "sudden and accidental" language. See discussion in Frivolous Pollution Claims at 32-34.

63.) Timely Tips, *supra* at 1-2.

64.) The temporal history of the CGL's exclusion (m) is discussed in detail in Emperor's Illusionist (Part Two), *supra* at 24-26. It was drafted in 1970, the same year as the pollution exclusion.