Comment, the Sudden and Accidental Exception to the Pollution Exclusion Solution?

INTRODUCTION

Approximately one of every four Americans lives within a few miles of an active Superfund site.[1] According to United States Environmental Protection Agency Administrator Carol Browner, approximately 1300 sites are on the National Priorities List for Superfund[2] cleanup and it is estimated that a total of 3000 sites will eventually be a federal cleanup priority.[3]

Many hazardous materials were generated and deposited into hazardous waste sites decades before these substances were designated as hazardous and before there was any scientific information available regarding disposal practices and the groundwater migration of hazardous waste.[4]

Prior to 1986, when most of the hazardous waste generation and disposal activity took place, many companies maintained General Comprehensive Liability ("GCL") insurance. Disputes over these policies are currently a major source of litigation costing approximately $300 million per year.[5] A recent study by the Rand Corporation states that one-third of all the money spent by potentially responsible parties at Superfund sites went toward legal fees and other costs not related to the cleanup of the sites.[6]

Much of the controversy concerns pre-1986 GCL insurance policies that provide for the indemnification of Comprehensive Environmental Response, Compensation and Liability Act of 1980[7] ("CERCLA") related cleanup costs and liabilities for insureds provided that the discharge or discharges giving rise to liability were "sudden and accidental."[8]

A great deal of scholarly debate and commentary have focused on the interpretation of the "sudden and accidental" exception to the pollution exclusion

---

[1] *Proposals to Reauthorize the Superfund Program: Hearings on H.R. 3800 Before House Subcommittee on Energy and Commerce*, 103rd Cong., 1st Sess. (February 3, 1994) [hereinafter *Browner*] (testimony of Carol M. Browner, Administrator United States Environmental Protection Agency).

[2] Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") 42 U.S.C. § 9601 *et seq.* (1980).

[3] Browner, *supra* note 1.

[4] *See, e.g.*, New Castle County v. Hartford Accident & Indemnity Co., 778 F. Supp. 812 (D. Del. 1991), *rev'd.*, 970 F.2d 1267 (3rd Cir. 1992), *cert. denied*, 113 S.Ct. 1846 (1993).

[5] Testimony of Carol M. Browner, Administrator, United States Environmental Protection Agency, House Subcommittee on Energy and Commercial/Transportation and Hazardous Materials Proposals to Reauthorize Superfund Program (February 3, 1994).

[6] *Id.*

[7] 42 U.S.C. § 9601 (1980).

[8] Insurance Services Organization ("ISO), GCL Policy. From 1970 through 1986, all GCL policies contained a pollution exclusion clause which provides that: 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 course or body of water; but this exclusions does not apply if such discharge, dispersal, release or escape is sudden and accidental.

clause appearing in all GCL policies,[9] and as of this writing, there is no noticeable trend nor majority position on this issue.[10] The differing interpretations of the terms "sudden and accidental" reflect a split among literally dozens of courts, including almost half the state supreme courts, and federal appellate courts.[11]

Many jurisdictions that have found liability for insurers on these pre-1986 GCL policies have focused on, among other things, the ambiguity of the term "sudden and accidental," the contemporaneous representations to state insurance commissioners when this language was included in GCL policies, and the expectations of insureds.[12] Some commentators,[13] and courts,[14] have been highly critical of what has been described as a "deep pockets bias"[15] against insurers, and have suggested that the courts that have found liability have struggled to find coverage and create ambiguity where none exists.[16]

Insurance companies who "have lost about half these cases" and are faced with "multibillions of dollars in potential claims by their policyholders" are suddenly resorting to Congress to use the reauthorization of CERCLA to preempt state law and abrogate their contractual liabilities to insureds at Superfund sites.[17]

On November 22, 1993, Representative Rick Boucher of Virginia stated on the floor of the United States House of Representatives that the Superfund program[18] is in "deep trouble . . . [I]t is a harsh, punitive, and unfair system that has set off a chain reaction of lawsuits, leading to the meltdown of the entire cleanup program."[19] In 1994, based on the recommendations of the insurance industry, United States Environmental Protection Agency Administrator, Carol M. Browner, advocated the establishment of a new Environmental Insurance Resolution Fund ("EIRF") to "ensur[e] resolution of insurance

---

[9]Nancy Ballard and Peter McManus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610 (1990); Robert Chessler, *Patterns of Judicial Interpretation of Insurance Coverage of Hazardous Waste Site Liability*, 18 RUTGERS L.J. 9 (1986); Richard Hunter, *Pollution Exclusion in the Comprehensive General Liability Insurance Policy*, 1986 U.ILL. L. REV. 897; Thomas Reiter, *The Pollution Exclusion Clause Under Ohio Law: Staying the Course*, 59 U. CIN. L. REV. 1165 (1991); E. Joshua Rosenkranz, *The Pollution Exclusion Through The Looking Glass*, 74 GEO. L. J. 1237 (1986).

[10]*See infra* notes 202-257, and accompanying text for discussion.

[11]TNT Bestway Transp., Inc. v. Truck Indus. Exch., No. CA-CV 92-0128, 1994 Ariz. App. LEXIS 186 at *7, (Ariz. Ct. App. Aug. 30, 1994); *See also infra* notes 256-61, and accompanying text for discussion.

[12]For a discussion of these factors and prior holdings *see* Morton Inter. Inc. v. General Accident Insurance Co. of Amer., 629 A.2d 831, 858-865 (N.J. 1991), *cert. denied*, 114 S. Ct. 2764 (1994).

[13]*See supra* note 9.

[14]*See infra* notes 208-28 and accompanying text for discussion of those courts finding the term "sudden" to have a temporal meaning.

[15]Rosenkranz, *supra* note 9, at 1280.

[16]ACL Technologies Inc. v. Northbrook Property & Casualty Ins. Co., 17 Cal. App. 4th 1773, 1778-1783 (1993). The Court in ACL Tech. Inc. has been the most critical of the search for ambiguity by other courts in interpreting the "sudden and accidental" language.

[17]*Issues Relevant to Superfund Liability: Hearings Before the Subcommittee on Environmental Energy, and National Resources Committee of the House Committee on Government Operations*, 102nd Cong., 2d Sess. (1993) [hereinafter *McCory*] (testimony of Martin A. McCrory, Senior Attorney to the National Resources Defense Council).

[18]42 U.S.C. § 9601-75.

[19]139 Cong. Rec. E 3118 (November 24, 1993) (statement of Rep. Boucher).

claims related to Superfund liability for pre-1986 disposal of waste [to] ensur[e] interstate equity in such resolutions."[20] Administrator Browner's proposal was incorporated in H.R. 3800, the proposed Superfund Reform Act sponsored by Representatives Swift, Dingell, Mineata, Rostenkowski and Applegate.[21] The Bill proposed a 30 percent assessment to be taxed on the gross premiums collected on all commercial insurance contracts, and proposes to distribute these funds to potentially responsible parties[22] ("PRPs") provided that they can demonstrate insurance for pre-1986 discharges on the basis their actual cleanup costs and the Fund's determination the favorablity of state insurance law is in the PRP's state.[23]

On January 4, 1995, an identical version of H.R. 3800, H.R. 228, the Superfund Reform Act Of 1995, was referred to the House Commerce Committee without co-sponsorship where it is likely to remain.[24] Moreover, the proposed EIRF will not likely to reduce environmental insurance litigation because it fails to address state choice of law concerns[25] in an environment where nine states have not considered the issue,[26] and where in 1994 alone, four states have either changed their position on the meaning of "sudden and accidental clause"[27] or have disposed of these cases on alternative grounds.[28]

This article proposes that if insurance is to have any utility, all but intentional discharges[29] by active polluters[30] should be covered under pre-1986 GCL policies. Such a policy is consistent with CERCLA's legislative goals of prevention and deterrence,[31] will provide a clear, certain and workable frame-

---

[20]Browner, *supra* note 1.

[21]H.R. 3800, 103rd Congress, 1st Sess. (1994).

[22]42 U.S.C. § 9607 defines a potentially responsible party ("PRP") as
(1) the owner and operator of a vessel or a facility,
(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
(3) any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release or threatened release which causes the incurrence of response costs, of a hazardous substance.

[23]H.R. 3800. This Bill proposed to distribute funds on the basis of 6.2(a)(v): 20%, 40% or 60% depending on how favorable state law in each jurisdiction is towards the insured. *Id.* § 802(g).

[24]H.R. 228; 104th Cong., 1st Sess. (1995).

[25]*See infra* notes 79-94 and accompanying text for a discussion of state choice of law.

[26]*See infra* notes 251-57 and accompanying text for a discussion of the nine states that have not considered this issue.

[27]*See infra* notes 258-70 and accompanyinmg text for a discussion of the states that have chabged their position on the menaing of "sudden and accidental clause."

[28]*See infra* notes 245-50 and accompanying text for a discussion of the states that have disposed of these cases on alternative grounds.

[29]*See infra* notes 329-53 and accompanying text for a discussion of intentional discharges.

[30]*See infra* notes 335-53 and accompanying text for a discussion of active polluters.

[31]The Senate Committee report on the original CERCLA legislation reported "By holding the factually responsible party liable [the bill] encourages that person -whether a generator, transporter, or disposer of hazardous substances- to eliminate as may risks as possible." S. Rep. No. 848, 96th Cong. 2d Sess. 33 (1980), *reprinted in* Percival, Environmental Regulation, Law, Science and Policy 294 (1992).

work, which hopefully will help dispose of environmental insurance litigation, eliminate the need for EIRF, and most importantly, further the goal of expeditiously cleaning up the environment.

To support this proposition, Part I of this article examines CERCLA's strict liability provisions, and the insurer's general duty to provide coverage for environmental clean-up costs. Part II of this article examines the history of the "sudden and accidental" pollution exclusion clause and analyses how the clause has been interpreted among the various state and federal courts, often with divergent results. Part III examines the proposed Environmental Insurance Resolution Fund provisions contained in the 1995 Superfund Reauthorization Act, and particularly why it is destined for failure. Finally, Part IV analyzes the policy reasons underlying a variety of the more cogent state and federal court decisions on the meaning of the clause, and suggests a clear, workable framework for providing or refusing coverage that is consistent with the goal of expeditiously cleaning-up pre-1986 hazardous waste sites.

PART I

The Liability Provisions of CERCLA

Comprehensive Environmental Response and Comprehensive Liability Act ("CERCLA") or "Superfund," imposes strict liability for environmental clean up on all potentially responsible parties ("PRPs") regardless of any causal relationship or fault.[32]

Hazardous waste generators,[33] transporters,[34] and facility owners or operators,[35] as well as subsequent third party purchasers of land[36] and secured credi-

---

[32]*See supra* note 22 for the definition of a PRP.

[33]A "generator" is: [A]ny person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of [or] any person who by contract, agreement or otherwise arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . 42 U.S.C. § 9607(a)(2),(3).

[34]A "transporter" is defined as: [A]ny person who by contract, agreement or otherwise arranged for the disposal or treatment, or arranged with a transporter for for transport for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . 42 U.S.C. § 9607(a)(3).

[35]The term "owner or operator" includes any person owning or operating a facility. 42 U.S.C. § 9601(20)(A)(ii). "Facility" is defined as: [A]ny building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any site or area, where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . 42 U.S.C. § 9601(9).

[36]A "third party purchaser" includes any facility where title or control of which was conveyed pursuant to a contractual relationship. 42 U.S.C. § 9601(20)(A)(iii). The term "contractual relationship" includes, but is not limited to:

> [L]and contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility is concerned or located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii) or (iii) is established by a preponderance of the evidence:
>
> (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of, on, in, or at the facility.

tors[37] are all potential responsible parties and strictly liable for remediation costs under CERCLA.[38]

Should the EPA find that there is a reasonable basis to believe that there may be release or threat of release of a hazardous substance or pollutant or contaminant it may exercise its investigatory authority under § 104, and request a PRP to disclose all information regarding its operations.[39] If the EPA finds that a release has occurred, or is about to occur, which poses a substantial threat to the environment, the public health or welfare, the EPA may issue an injunction or administrative order requiring the abatement of actual or potential releases under § 106.[40] Alternatively, the EPA may undertake the actual clean up and hold that party responsible for all costs incurred including assessment costs, natural resource costs, and health assessments under § 107.[41]

(ii) The defendant is a government entity which acquired the facility by escheat, or through any involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation. (iii) The defendant acquired the facility by inheritance or bequest.

42 U.S.C. § 9601 (35)(A).

[37]A secured party is included in the definition of "owner or operator" where "title or control was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment or similar means . . . but does not include a person who, without participating in the management of the vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 U.S.C. § 9601 (20)(A).

[38]United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991) (creditor's involvement with management sufficient to impose liability where it could affect disposal practices if it chose to); O'Neil v. Picillo, 883 F.2d 176 (1st. Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990) (pig farmer strictly liable for operating facility where drum and bulk waste were accepted for burial); United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373 (8th Cir. 1989) (defendant who produced pesticide and delivered it to a third party for formulation held responsible as a "generator" under 42 U.S.C. § 9607); New York v. Shore Realty Corp., 759 F.2d 1032 (2nd Cir. 1985) (purchaser held liable where it was aware of previous tenant's activities, and could have reasonably foreseen presence of hazardous waste on site); United States v. Mottolo, 695 F. Supp. 615 (D.N.H. 1988) (transporter liable for hazardous substance transported to facility where release occurred and where the waste present at site was same type as those sent by generator).

[39]42 U.S.C. § 9604(e)(2) provides that:

> Any officer, employee, or representative . . . may require any person who has or may have information relevant to any of the following to furnish, upon reasonable notice, information or documents relating to such matter:
>
> (A) The identification, nature, and quantity of materials which have been or are generated, treated stored, or disposed of at a vessel or facility.
>
> (B) The nature or extent of a release or threatened release of a hazardous substance or pollutant or contaminant at or from a vessel or facility, or transported to a vessel or facility.
>
> (C) Information relating to the ability of a person to pay for or to perform a cleanup.

[40]42 U.S.C. § 9606(a) and (b)(1) provides, in pertinent part, that:

> [W]hen the [E.P.A.] determines that there may be an imminent and substantial endangerment to the public health or welfare of the environment because of an actual or threatened release of a hazardous substance from a facility, [the EPA] may require such relief as necessary to abate such danger or threat . . . including but not limited to, issuing such orders as may be necessary to protect the public health welfare and environment. 42 U.S.C. § 9606(b)(1) provides that: Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with any order under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

[41]42 U.S.C. § 9607(4) provides that PRPs (*see supra* note 22) shall be held liable for:

> (A) all costs of removal or remediation action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

Insurer's General Duty to Provide Coverage for Environmental Clean-Up Costs

Before a policyholder may recover expenses incurred under CERCLA, it must overcome several hypertechnical legal distinctions.[42] The interpretation of insurance contracts is a function of state law.[43] General Comprehensive Liability policies only indemnify the payment of "damages" to "third parties" from "suits" during the policy period.[44]

A. Occurrence

In order to obtain coverage for environmental clean-up costs, the insured first has to demonstrate that there was an "occurrence" during the policy period. As of this writing, there are at least seven theories used in different jurisdictions for determining when an "occurrence" policy provision is "triggered."[45] The first theory, the "wrongful act theory," holds that the occurrence occurred when the spill occurred. The second theory, the "exposure theory," holds that the occurrence causing the property damage takes place when the substances were released into the environment.[46] The third theory, the "injury-in-fact" theory, holds that the occurrence causing damage to property takes place at the time of injury or contamination of the environment.[47] Fourth, the "manifestation theory" holds that the occurrence takes place when the damage becomes "reasonably capable of . . . diagnosis."[48] Fifth, the "first discovery" theory, holds that the occurrence takes place only when the owner has actual knowledge of the pollution.[49] The sixth theory is a combination of the fourth and fifth, and deems the occurrence to have happened when the

---

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under § 9604(i) of this title.

[42]These distinctions include "occurence," "suits," "damages," and "third parties."

[43]*See infra* notes 79-94; *See also,* McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1994).

[44]An "occurrence" is defined as:

> [A]n accident, including a continuous or repeated exposure to conditions, which results, . . . in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

GCL policies are "third party" liability insurance policies that protect policyholders against liability that they become obligated to pay others as distinguished from first party policies which reimburse policyholders for losses the directly incur.

"Suits" are not defined in pre-1986 GCL policies. However, the term "suits" is used in GCL policies with respect to the triggering of coverage, and the duty to defend "any suit against the insured seeking damages on account of . . . property damage." Insurance Services Organization ("ISO"), GCL Policy.

[45]CPC Int'l., Inc. v. Northbrook Excess & Surplus Ins. Co., No. 95-1276, 1995 U.S. App. LEXIS 1389, *28 (1st Cir. Jan. 25, 1995). *See generally,* Lumbermens Mut. Casualty. Co. v. Belleville Indus., Inc., 938 F.2d 1423, 1428-30 (1st Cir. 1991), *cert. denied*, 502 U.S. 1073 (1992); In re Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution, 725 F. Supp. 1264, 1274-75 (D. Mass. 1989) ("Auchnet River").

[46]*CPC Intl., Inc.*, 1995 U.S. App. LEXIS 1389, at *28 (1st Cir. Jan. 25, 1995) (quoting Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co., 811 F.2d 1180, 1189 (8th Cir. 1987), *modified on other grounds after hearing en banc*, 842. F.2d 977 (8th Cir. 1988), *cert. denied*, 488 U.S. 821 (1988)).

[47]*Id.* (quoting American Home Prod. Corp. v. Liberty Mut. Ins. Co., 748 F.2d 760, 765 (2d Cir. 1984)).

[48]*Id.* (quoting Eagle Picher Indus., Inc. v. Liberty Mutual Ins. Co., 682 F.2d 12, 25 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983)).

[49]*Id.* (quoting Pittsburgh Corning Corp. v. Travelers Indem. Co., No. 84-3985, 1988 WL 5291 (E.D. Pa. Jan. 21, 1988)).

owner "knew or should have known."[50] Finally, the seventh theory, the "continuous trigger," theory holds that the occurrence takes place at both the time of exposure and at the time of manifestation.[51]

Moreover, to qualify as an "occurrence," the policyholder must demonstrate that the "occurrence" was "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[52]

B. Damages

Next, even if the policyholder can demonstrate an "occurrence" during the policy period, the policyholder must also demonstrate that it has incurred "damages" as a result of undertaking or being forced to pay for environmental clean-up measures.[53] One court has reasoned that the clean-up of a hazardous waste cite is a government imposed "cost of doing business" and is no more recoverable by way of insurance as is the cost of installing fire extinguishers as required under the Occupational Health and Safety Administration.[54] Even if the policyholder can overcome this reasoning, in some jurisdictions it must also show that damages are substitution for a loss suffered and not mere restitution.[55]

In addition, the cost of complying with injunctions and administrative orders, in some jurisdictions, has been found not to amount to "damages."[56] Furthermore, "damages," in some cases, can not exceed the value of the property damaged,[57] and does not include the cost of remediation or health assessments.[58] Three Federal Circuit Court of Appeals, applying state law, have

---

[50] *Id.* (quoting *In re Acushnet River*, 725 F. Supp. at 1274-75 (D. Mass. 1989).

[51] *Id.* (quoting Keene v. Ins. Co. of N. America, 667 F.2d 1034, 1047 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982)).

[52] Insurance Services Organization ("ISO"), GCL Policy § (f).

[53] *See infra* notes 53-67, and accompanying text. Some courts have held that "damages" include cleanup costs incurred by administrative order. *See e.g.*, *Continental Insurance Co.* 811 F.2d at 1180; Avondale Indus., Inc. v. Travelers Indemnity Co., 697 F. Supp. 1314 (S.D.N.Y. 1988), *aff'd.*, 877 F.2d 1200 (2nd Cir. 1989), *cert. denied*, 496 U.S. 906 (1990); New Castle County v. Hartford Accident & Indemnity Co., 673 F.Supp. 1359 (D. Del. 1987); Hazen Paper Co. v. U.S. Fidelity & Guaranty Co., 555 N.E. 576 (Mass. 1990); C.D. Spangler Construction Co. v. Industrial Crankshaft & Engineering Surety Co., 388 S.E.2d 5567 (N.C. 1990); Boeing v. Aetna Casualty & Sur. Co., 784 P.2d 507 (Wash. 1990); CPS Chemical Co. Inc. v. Continental Ins. Co., 536 A.2d 311 (N.J. Super. 1988); Other courts have held that damages do not include costs incurred for compliance with administrative orders. *See e.g.*, Continental Ins. Co. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977 (8th Cir. 1988), *cert. denied*, 488 U.S. 821 (1988). Maryland Casualty Co. v. Armco Inc., 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

[54] Aetna Casualty & Sur. Co. v. Gulf Resources & Chemical Corp., 709 F. Supp. 958, 962 (D. Ida. 1989), *reversed, sub. nom.*, Aetna Casualty & Sur. Co. Pintlar Corp., 948 F.2d 1507 (9th Cir. 1991).

[55] Maryland Dep't. of Human Resources v. Dept. of Health & Human Services, 763 F.2d 1441, 1446 (D.C. Cir. 1985) (the term "damages" under the Administrative Procedures Act means restitution, not substitution "the very thing the plaintiff lost").

[56] Aetna Casualty & Sur. Co. v. F.H. Hanna, 244 F.2d 499 (5th Cir. 1955). *Contra* Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1215 (Ill. 1992) ("damages" is unambiguous and its ordinary, plain meaning includes injunctions or response costs). *See infra* notes 68-71, and accompanying text for discussion on § 106, under which the EPA may issue an administrative order that contaminated site be cleaned-up in conformity with the National Contingency Plan.

[57] *Continental Ins. Co.*, 842 F.2d 983-87.

[58] Lutz v. Chromatex, Inc., 718 F. Supp. 413, 417-18 (M.D. Pa 1989).

concluded that environmental-remediation costs are not covered damages under GCL policies.[59] The Supreme Judicial Court of Maine has reached the same result.[60] The rationale for the viewpoint that "damages" does not include equitable relief such as payment of environmental-response costs is expressed plainly by the Eighth Circuit in *NEPACCO*:[61]Viewed outside the insurance context, the term "damages" is ambiguous: it is reasonably open to different constructions. Webster's Third New International Dictionary 571 (1971) defines "damages" as "the estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for wrong or injury caused by a violation of a legal right." The dictionary definition does not distinguish between legal damages and equitable monetary relief. Thus, from the viewpoint of the lay insured, the term "damages" could reasonably include all monetary claims, whether such claims are described as damages, expenses, costs, or losses. In the insurance context, however, the term "damages" is not ambiguous, and the plain meaning of the term "damages" as used in the insurance context refers to legal damages and does not include equitable monetary relief. The CGL policies require Continental to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies caused by an occurrence. The obligation of the insurer to pay is limited to 'damages,' a word which has an accepted technical meaning in law. Although not defined in the CGL policies, "the word 'damages' is not ambiguous in the insurance context. Black letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability insurance contracts.[62]

The clear weight of authority, however, among both federal and state courts adopts the view that the undefined term "damages" in CGL policies should be accorded its plain, nontechnical meaning, thereby encompassing response costs imposed to remediate environmental damage.[63] In adopting the view that

---

[59]See Grisham v. Commercial Union Ins. Co., 951 F.2d 872, 875 (8th Cir. 1991) (Arkansas law); Parker Solvents Co. v. Royal Ins. Cos. of America, 950 F.2d 571, 572 (8th Cir. 1991) (Arkansas law); A. Johnson & Co. v. Aetna Casualty & Sur. Co., 933 F.2d 66, 69 (1st Cir. 1991) (Maine law); Cincinnati Ins. Co. v. Milliken & Co., 857 F.2d 979, 981 (4th Cir. 1988) (South Carolina law); Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977, 985 (8th Cir. 1988) (*en banc*) (Missouri law), *cert. denied*, 488 U.S. 821, (1988); Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1352 (4th Cir. 1987) (Maryland law), *cert. denied*, 484 U.S. 1008 (1988). A number of federal district courts have reached the same conclusion. *See* United States Fidelity & Guar. Co. v. Morrison Grain Co., 734 F. Supp. 437, 450 (D. Kan. 1990) (Kansas law); Verlan, Ltd. v. John L. Armitage & Co., 695 F. Supp. 950, 953-55 (N.D. Ill. 1988) (Illinois law); Hayes v. Maryland Casualty Co., 688 F. Supp. 1513, 1515 (N.D. Fla. 1988) (Florida law); Travelers Ins. Co. v. Ross Elec., 685 F. Supp. 742, 744-45 (W.D. Wash. 1988) (Washington law).

[60]*See* Patrons Oxford Mutual Ins. Co. v. Marois, 573 A.2d 16, 18-19 (Me. 1990).

[61]Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 985 (8th Cir.) (*en banc*) (Missouri law), *cert. denied*, 488 U.S. 821 (1988).

[62]*Id.* at 985 (quoting Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. 430, 432 (D. Md. 1987), *aff'd.*, 822 F.2d 1328 (4th Cir. 1987)).

[63]Aetna Casualty & Sur. Co. v. Pintlar Corp., 948 F.2d 1507, 1513 (9th Cir. 1991) (applying Idaho law); Gerrish Corp. v. Universal Underwriters Ins. Co., 947 F.2d 1023, 1030 (2d Cir. 1991) (applying Vermont law), *cert. denied*, — U.S. — , 112 S. Ct. 2939 (1992); Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 292 U.S. App. D.C. 19, 944 F.2d 940, 947 (D.C. Cir. 1991) (applying Missouri law), *cert. denied*, — U.S. —, 112 S. Ct. 1777 (1992); New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1184-91 (3d Cir. 1991) (applying Delaware law), *on remand*, 778 F. Supp. 812 (D. Del. 1991), *rev'd on other grounds*, 970 F.2d 1267 (3d Cir. 1993), *cert. denied*, — U.S. —, 113 S. Ct. 1846 (1993); Avondale Indus., Inc. v. Travelers

"damages" includes environmental remediation costs, the Washington Supreme Court observed: These cases have found that cleanup costs are essentially compensatory damages for injury to property, even though these costs may be characterized as seeking "equitable relief." Or put another way, "coverage does not hinge on the form of action taken or the nature of relief sought, but on an actual or threatened use of legal process to coerce payment or conduct by a policyholder." In United States Fidelity & Guar. Co., the court found that once property damage is found as a result of environmental contamination, cleanup costs should be recoverable as sums that the insured was liable to pay. According to an earlier case, *United States Aviex Co. v. Travelers Ins. Co.*, the environmental cleanup costs are covered because they are equivalent to "damages" under state law: If the state were to sue in court to recover in traditional "damages," including the state's costs incurred in cleaning up the contamination, for the injury to the ground water, defendant's obligation to defend against the lawsuit and to pay damages would be clear. It is merely fortuitous from the standpoint of either plaintiff or defendant that the state has chosen to have plaintiff remedy the contamination problem, rather than choosing to incur the costs of clean-up itself and then suing plaintiff to recover those costs. The damage to the natural resources is simply measured in the cost to restore the water to its original state.[64]

The Third Circuit, applying Delaware law, reached the same conclusion on the issues of "damages": The competing lines of cases relied upon by CNA and the County demonstrate that resolution of this issue turns on whether the word "damages" should be given its legal, technical meaning or its plain, ordinary meaning. Given the precepts of Delaware law and the absence of a definition limiting the meaning of "damages" in CNA's policies, we think that to state the question is virtually to answer it. In our view, the ordinary, usual meaning of "damages," which we are bound to apply under Delaware law unless the policy clearly directs us to another meaning, does not convey the limitations suggested by CNA. In short, we believe that the Delaware Supreme Court would find the *Avondale-Boeing-Spangler* line of cases to be the better reasoned. We thus conclude that the term "damages," in the context of a standard CGL policy, should be interpreted broadly to encompass response costs and other equitable relief.[65]

Justice O'Hearn of the New Jersey Supreme Court best summarized the definition of "damages" in *New Jersey Department of Environmental Protection v.*

Indem. Co., 887 F.2d 1200, 1207 (2d Cir. 1989) (applying New York law), *cert. denied*, 496 U.S. 906 (1990); Township of Gloucester v. Maryland Casualty Co., 668 F. Supp. 394, 400 (D.N.J. 1987) (applying New Jersey law); AIU Ins. Co. v. Superior Court, 799 P.2d 1253, 1267-78 (Cal. 1990); Aerojet-General Corp. v. Superior Court, 209 Cal. App. 3d 973, 257 Cal. Rptr. 621, 628 (Ct. App. 1989); A. Y. McDonald Indus. v. Insurance Co. of North America, 475 N.W.2d 607, 615-22 (Iowa 1991); Hazen Paper Co. v. United States Fidelity & Guar. Co., 555 N.E.2d 576, 582-84 (Mass. 1990); United States Aviex Co. v. Travelers Ins. Co., 336 N.W.2d 838, 842-43 (Mich. Ct. App. 1983); Minnesota Mining & Mfg. Co. v. Travelers Indem. Co., 457 N.W.2d 175, 179-84 (Minn. 1990); C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co., 388 S.E.2d 557, 565-69 (N.C. 1990); Boeing Co. v. Aetna Casualty & Sur. Co., 784 P.2d 507, 510-15 (Wash. 1990); Compass Ins. Co. v. Cravens, Dargen & Co., 748 P.2d 724, 729-30 (Wyo. 1988).

[64]Boeing v. Aetna Casualty & Sur. Co., 784 P.2d 507, 511-12 (Wash. 1990) (additional citations omitted).

[65]New Castle County v. Hartford Acc. & Indem. Co., 933 F.2d 1162, 1188 (3rd Cir. 1991).

Signo Trading International, Inc.[66] Justice O'Hearn, dissenting on other grounds, stated: "Damages" means money to most people. Money is what DEP wants from [defendant] Springer. One United States District Court in New Jersey has perhaps stated it best: In assessing what an insured would reasonably expect from a CGL policy, it reasoned that "the average person would not engage in a complex comparison of legal and equitable remedies in order to define . . . 'damages', but would conclude based on the plain meaning of words that the cleanup costs imposed on [the insured] . . . would constitute an obligation to pay damages. The average businessman does not differentiate between 'damages' and 'restitution;' in either case, money comes from his pocket and goes to third parties. The average businessman would consider himself covered for cleanup expenditures applicable to others' properties.[67]

C. Payments to "Third Parties" and "Suits"

However, since GCL policies only cover payments to "third parties," if the policyholder undertakes or is ordered to undertake the cost of clean up pursuant to CERCLA § 106[68] these costs might not be recoverable.[69] Recently the New Jersey Supreme Court held in *Morton International Inc. v. General Accident Insurance Co. Of America*, that environmental-response costs and remediation expenses imposed on a company's predecessors in a prior litigation constitute sums that the company will have to pay "as damages" within the meaning of the GCL policy.[70]

Nonetheless, some courts have held that EPA administrative actions forcing the clean up of hazardous sites are not "suits" and therefore, do not include coverage for costs incurred to effect the necessary cleanup or to settle these matters.[71]

D. Construction of Insurance Contracts

Before departing into the meaning of the terms "sudden and accidental" and state choice of law issues, a review of the basic rules of insurance contract construction may be useful. Generally, irrespective of jurisdiction, language of an insurance policy must be given natural and ordinary meaning and courts cannot indulge in forced construction. The court cannot contort the plain meaning of a policy term under the guise of construing it.[72] For example, Oklahoma law requires the court to give effect to unambiguous language without resort to extrinsic evidence.[73]

---

[66]612 A.2d 932, 944 (1992) (Justice O'Hern, dissenting on other grounds, concluded that "environmental response costs are included wothin term "damages" in CGL policies).

[67]*Signo Trading*, 612 A.2d at 944.

[68]42 U.S.C. § 9606(a). *See supra* note 40 for complete text of § 9606(a).

[69]*See, e.g.*, Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); Continental Ins. Co. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977 (8th Cir. 1988), *cert. denied*, 488 U.S. 821 (1988).

[70]629 A.2d 831 (N.J. 1993).

[71]*See* Harter Corp. v. Home Indemnity Co., 713 F. Supp. 231 (W.D. Mich. 1989); Dextrex Chemical Indus. v. Employers Insurance of Wausau, 681 F. Supp. 438 (N.D. Ohio 1987).

[72]Apostas v. Allstate Ins. Co., 246 A.2d 923, 925 (Del. 1968).

[73]Oklahoma Publishing Co. v. Kansas City Fire & Marine Insurance Co., 805 F. Supp. 905, 910 (W.D. Okla. 1992).

Where a policy is ambiguous, such ambiguity must be resolved in favor of insured.[74] For example, under Texas law if a contract of insurance is susceptible of more than one reasonable interpretation, the court "must resolve the uncertainty by adopting the construction that most favors the insured."[75] Insurance policies, and particularly exclusions, are liberally interpreted against the insurer.[76] However, in Arizona, for example, a determination that a clause is ambiguous does is not the end of the inquiry, but the beginning.[77] Arizona courts are not compelled in each case of apparent ambiguity to blindly follow the interpretation least favorable to the insurer.[78]

E. Choice of Law

As stated above, the interpretation of insurance policies is a function of state law.[79] What emerges from these divergent holdings on even the threshold issues of what constitutes an "occurrence" "damages," "suits" and "third parties," is the notion that the choice of substantive state law to be applied in each of these cases is dispositive of coverage.

Choice of law is usually predicated on where the hazardous site is situated.[80] However, there are two main choice of law approaches: the uniform-contract-interpretation approach and the site specific approach.[81] Under the uniform-contract-interpretation approach, the law of a single forum governs the interpretation of coverage under a policy for multi-state claims arising from environmental damage in multiple jurisdictions.[82] Proponents of this approach contend that it deters forum shopping and advances predictability and the expectations of the parties.[83]

Under the site-specific approach, a policy should be interpreted under the substantive law of the state that the parties understood to be the principle

---

[74]Remington Arms Co. v. Liberty Mutual Ins. Co., 801 F. Supp. 1406, 1409 (D. Del. 1992).

[75]Circle "C" Ranch Co. v. St. Paul Fire & Marine Ins. Co., No. 3-91388-CV, 1993 Tex. App. LEXIS 1291, at *10 (Tex. App. May 5, 1993) (a case of first impression in Texas concerning aerial spraying of a ranch whereby the court afforded coverage under sudden and accidental exception to exclusion because damage to nearby cotton crops neither intended nor expected by insured).

[76]*Id.*

[77]TNT Bestway Transp., Inc. v. Truck Indus. Exchange, No. CA-CV 92-0128, 1994 Ariz. App. LEXIS 186, at *7 (Ariz. Ct. App. Aug. 30, 1994).

[78]*Id.* at *8. Also, not surprisingly, the Arizona Court of Appeals held that although the "sudden and accidental" language is ambiguous, "sudden" connotes a temporal meaning excluding coverage for all but abrupt occurrences. *Id.*

[79]*See supra* note 43 and accompanying text.

[80]*See, e.g.,* Triangle Publications v. Liberty Mutual Ins. Co., 703 F. Supp. 367 (E.D. Pa. 1989) (Pennsylvania courts apply the law of the state where the insurance contract was entered into. *But cf.* Gilbert Spruance Co. v. Pennsylvania Mfgs.' Assoc. Ins. Co., 629 A.2d 885, 887 (N.J. 1993) (New Jersey courts apply New Jersey law if the site is located in New Jersey irrespective of where the policy was issued); *See also* Johnson, Matthey, Inc. v. Pennsylvania Manufacturers' Assoc. Ins. Co., 593 A.2d 367 (N.J. App. Div. 1991) (where PA Corporation's waste is located in NJ, NJ has significant interest in litigation to apply NJ law); E.B. & A.C. Whiting Co. v. Hartford Ins. Co., 838 F. Supp. 863 (D. Vt. 1993) (Vermont Courts apply the law where the site is located).

[81]The Gilbert Spruance Co. v. Pennsylvania Mfgs.' Assoc. Ins. Co., 629 A.2d 885 (N.J. 1993).

[82]*Id.* at 889. This is also known as the general rule of *lex loci contractus*. For an analysis of the doctrine *lex loci contractus, see generally,* ARTRA Group v. Am. Motorists Ins. Co., 642 A.2d 896 (Md. App. 1994) (also indicating when other states may follow the substantive law of their respective states or another's instead of the law of the state where the contact was made).

[83]629 A.2d at 888.

location of the insured risk.[84] The New Jersey Supreme Court in *The Gilbert Spruance Co. v. Pennsylvania Mfgs.' Assoc. Ins. Co.*, applied the conflict of laws analysis as embodied in § 188 of the Restatement On Conflict of Laws, and held that the law of where the hazardous waste site is situate governs.[85] In so holding, the court in *Gilbert Spruance* followed the choice of law analysis contained in the Restatement,[86] and considered (a) the needs of the interstate and international systems; (b) the relevant policies of the forums; (c) the relevant policies of the other interested states and the relative interests of those states; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) the ease in the determination and application of the law to be applied.[87]

Choice of law considerations even become more complicated when federal courts sitting in diversity jurisdiction are forced to decide which particular state's substantive law is to be applied and determine whether that particular state's court would adopt the uniform-contract-interpretation approach or the site specific approach. For example, in *CPC International v. Northbrook Excess & Surplus Ins. Co.*, the First Circuit Court of Appeals was forced to decide whether a New Jersey court would apply the substantive law of Rhode Island because the site was situated in Rhode Island notwithstanding that the home of the insured was in New Jersey, and that the insurance contract was made in New Jersey.[88] At the close of plaintiff's case at the time of trial, defendant was granted judgment as a matter of law under substantive New Jersey law.[89] On appeal, the First Circuit, albeit in *dicta*, agreed with the plaintiff's argument that a New Jersey court would apply Rhode Island law. However, the court upheld the district court's choice of New Jersey law under "the law of the case" doctrine.[90] Other federal courts have applied the choice of law doctrine of the state where the district court sits to determine which state law is to be applied.[91]

Choice of law considerations become even more critical upon analysis of the divergence of judicial opinion as to the meaning of the terms "sudden and accidental" as those terms are used in pre-1986 GCL policies.[92] Even if a policyholder can show under the substantive laws of a particular state that an EPA action to recover remediation costs under CERCLA is a "suit" which requires the payment of "damages" to a "third party,"[93] to obtain coverage, the policy-

---

[84] *Id.*

[85] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188, cmt. 6, (1972).

[86] 629 A.2d at 854.

[87] *Id.* at 888-89.

[88] *CPC Int'l Inc.*, *supra* note 45, at 1389.

[89] *Id.* at *7.

[90] *Id.* at *15-22; *See also* United States v. Rivera-Martinez, 931 F.2d 148, 151 (1st Cir. 1991), *cert. denied*, — U.S. —, 112 S. Ct. 77 (1991) (a decision by an appellate court on a particular issue, unless vacated or set aside, governs the issue at all subsequent stages of the litigation).

[91] *See, e.g.,* Asbestos Removal Corp. of Am. v. Guaranty Nat'l. Ins. Co., 846 F. Supp. 33, 34 (E.D. Va. 1994); *See also* Klaxon Co. v. Stentor Elec. Mfg. Co. Inc., 313 U.S. 487 (1941).

[92] GCL § (f).

[93] *See supra* notes 69-71 and accompanying text for discussion.

holder must also show that the release of the contaminant or pollutant was "sudden and accidental."[94]

PART II

The History of the "Sudden and Accidental" Language

Prior to 1966, all GCL policies provided coverage for "accidents," and the term "accident" was undefined.[95] Coverage was provided if resultant loss was unexpected or unintended even if the act giving rise to the loss was intentional.[96] "Accident" was defined by its the plain dictionary meaning,[97] and injuries were held to be "accidental . . . according to quality of result, rather than quality of its causes."[98] Insurers bore the burden of proving non-coverage,[99] and ambiguities were construed against the insurer, especially where the ambiguity involved an exclusionary clause.[100]

A. Occurrence Based Coverage

In 1966, the National Bureau of Casualty Underwriters ("NBCU") and the Insurance Services Organization ("ISO"), rewrote all the GCL policies in the United States to provide coverage that was occurrence based.[101] This meant that coverage would be provided for: [a]n accident including continuous or repeated exposure to conditions which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.[102]

An "unexpected" occurrence was defined as unexpected damages rather than an unexpected event.[103] "Expected" required more than foreseeability but a substantial probability or likelihood that damages would follow.[104] In

---

[94]*See infra* notes 112-41 and accompanying text for discussion.

[95]Insurance Service Organization, General Comprehensive Liability Policy (1965); *See also* Beacon Textiles Corp. v. Employers Mut, Liability Ins. Co., 246 N.E.2d 671, 673 (Mass. 1969) ("accident" is an "unexpected happening without intention of design); Spindler v. Universal Chain Corp., 11 93 A.2d 171, 173 (N.J. 1952) ("accident" means "unintended or unexpected occurence").

[96]*See, e. g.,* Aetna Casualty & Sur. Co. v. Martin Bros. Container and Timber Products Corp., 256 F. Supp. 145 (D. Or. 1966) (emission of fly ash intentional however damage to property unexpected and coverage provided); City of Kimball v. St. Paul Fire & Marine Ins. Co., 206 N.W.2d 632, 638 (Neb. 1973) (unexpected pollution of groundwater due to malfunction of sewerage plant covered).

[97]*See* BLACK'S LAW DICTIONARY 15 (West 6th ed. 1991) ("Accident" is derived from the Latin verb "accidere" signifying "fall upon, befall, happen, chance."); *See also,* WEBSTER'S NEW WORLD DICTIONARY 9 (World Publishing Co. 1957) ("Accident" is defined as a happening that is not expected, foreseen, or intended, an unforeseen occurrence or mishap).

[98]Messersmith v. Am. Fidelity Co., 133 N.E. 432, 433 (N.Y. 1921) (Cardozo, J.).

[99]*See, e. g.,* Commercial Union Ins. Co. v. Albert Pipe & Supply Co., 484 F. Supp. 1153 (S.D.N.Y. 1980).

[100]*See, e. g.,* Insurance Co. of North Am. v. Howard, 679 F.2d 147 (9th Cir. 1982).

[101]For discussion of "occurrence" language in GCL policies, *see generally* New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162 (3rd Cir. 1991); Jackson Twsp. Mun. Util. Auth. v. Hartford Accident Co., 451 A.2d 990 (N.J. Super. 1982); Lansco v. N.J. Dept. of Environmental Protection, 350 A.2d 520 (N.J. Ch. Div 1975), *aff'd.*, 368 A.2d 363 (N.J. App. Div. 1976), *cert. denied*, 372 A.2d 322 (1977).

[102]GCL Policy § (f) (1965).

[103]See, e. g., Steyer v. Westvaco Corp., 450 F. Supp. 384, 388 (D. Md. 1978).

[104]*Id.* at 386.

City of Carter Lake v. Aetna Casualty & Surety Co.,[105] for example, the court held that although the city's sewage pump chronically failed on several occasions, the damage from the sewage system's backup was covered by an occurrence based policy because, despite its foreseeability. For coverage not to be provided, the insured either must have known or should have known loss would follow with "substantial probability."[106] Similarly, in *Auto Owners Ins. Co. v. Jensen*,[107] coverage was provided for a painter who, while painting a bridge, damaged nearby cars.[108] The court reasoned that the painters' acts constituted mere negligence, and were not expected as to bar coverage.[109]

Furthermore, in *Grand River Lime Co. v. Ohio Casualty Ins. Co.*, pollution from the ongoing business practice of discharging hazardous substances into the air and soil amounted to willful and intentional misfeasance but was covered so long as the ultimate loss was unintended and unexpected.[110] If the resulting damages could be viewed as accidental, the event was termed an "accident" and coverage was provided.[111]

B. Emergence of the "Sudden and Accidental" Language

However, with growing environmental concerns, as one commentator suggests,[112] as a result of the Torey Canyon disaster,[113] and the Santa Barbara oil spill in the late 1960's,[114] in 1970 the insurance industry introduced the pollution exclusion clause which bars coverage for all occurrences of pollution that are not "sudden and accidental."[115] However, the terms "sudden and accidental" were not new to the insurance industry in 1970 but were actually borrowed from "boiler and machinery" insurance policies that originated in this country at the turn of the century.[116]

Nonetheless, from 1970 through 1986, all GCL policies contained a pollution exclusion clause which provides that: 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 course or body of water; but this exclusions does not apply if such discharge, dispersal, release or escape is *sudden and accidental.*[117]

Some of the courts that first interpreted this exclusion clause properly focused on the expectedness of the actual discharge rather than the ultimate loss

---

[105]604 F.2d 1052 (8th Cir. 1979).
[106]*Id.* at 1059.
[107]667 F.2d 714 (8th Cir. 1981).
[108]*Id.* at 717.
[109]*Id.*
[110]Grand River Lime Co. v. Ohio Casualty Ins. Co., 289 N.E.2d 360, 365 (Ohio App. 1972).
[111]*See, e.g.*, Allstate Ins. Co. v. Klock Oil Co., 73 A.2d 486, (N.Y. 1980).
[112]Rosenkranz, *The Pollution Exclusion Clause Through The Looking Glass*, 74 GEO. L. REV 1231 (1986).
[113]*Id.* at 1237 n.3 (citing Hourihan, *Insurance Coverage For Environmental Damage Claims*, 15 FORUM 551m 5653 (1980)).
[114]*Id.*
[115]*See infra* notes 124-41.
[116]*See infra* notes 123-25.
[117]GCL § (f) (1965).

in the inquiry of intent or expectation.[118] Other courts have simply merged the sudden and accidental language with the pre-1970 occurrence coverage.[119]

For example, in *CPS Chemical Co. v. Continental Insurance Co.*,[120] the plaintiff instituted suit to compel a defense to an action instituted by the City of Philadelphia, alleging that the plaintiff's waste hauler had removed hazardous waste from its premises and, without the plaintiff's knowledge, had dumped the waste without authorization in a Philadelphia garbage dump. The carriers disclaimed coverage, relying in part on the pollution-exclusion clause.[121] The Law Division, citing *Jackson Township*,[122] observed that the clause had been construed simply as a restatement of the definition of "occurrence."[123] Concluding that the clause was ambiguous, the court construed the terms "sudden and accidental" as including unexpected and unintended events, and ordered the carriers to provide a defense.

As mentioned above, the terms "sudden and accidental" have been borrowed from boiler and machinery insurance policies.[124] In explaining the meaning of "sudden and accidental" in boiler and machinery policies, one treatise states that: "In order for the insured to recover under a boiler and machinery policy it must demonstrate that the occurrence was 'sudden and accidental.' Although the terms seem to imply that the immediate or instantaneous event must occur, courts have construed these terms more broadly. Utilizing the 'common meaning' doctrine, courts have uniformly held that the dictionary definition of the terms as 'unforeseen, unexpected, and unintentional' is controlling."[125]

"When coverage is limited to a sudden breaking of machinery, the word 'sudden' should be given its primary meaning as happening without previous notice, or as something coming or occurring unexpectedly, as unforeseen or unprepared for. That is sudden is not to be construed as synonymous with instantaneous."[126]

To interpret the meaning of "sudden and accidental," courts first resort to the dictionary definition, and can almost uniformly find that a number of recognized dictionaries differ on the meaning of the term "sudden."[127] *Webster's Third New International Dictionary*[128] attaches a number of definitions to

---

[118]*See, e.g.,* Riehl v. Travelers Ins. Co., 772 F.2d 19 (3rd Cir. 1984).

[119]*See, e.g.,* Jackson Twsp. Mun. Util. Auth. v. Hartford Accident & Indemnity Co., 451 A.2d 990 (N.J. Super. 1982); New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359 (D. Del. 1987).

[120]489 A.2d 1265 (N.J. Super. 1984), *rev'd on other grounds*, 495 A.2d 886 (N.J. App. Div. 1985).

[121]*Id.* at 1290.

[122]451 A.2d at 990.

[123]*CPS Chem.*, 489 A.2d 1265, 1270. *See also* Circle "C" Ranch Co. v. St. Paul Fire & Marine Ins. Co, No. 391388-CV1993, Tex. App. LEXIS 1291, (May 5, 1993) (in Texas case of first impression interpreting pollution exclusion clause "sudden and accidental" held to be synonymous with "occurrence and only requires that damage be unexpected and unanticipated by insured).

[124]George J. Couch, 10A COUCH ON INS.LAW 2d § 42:39 (rev. ed. 1982).

[125]Steven A. Cozen, Insuring Real Property § 5.03 (2) (b) (1989), *quoted in,* Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Co., 636 S.2d 700, 707 (Fl. 1993) (Justice Overton, dissenting).

[126]Couch, *supra* note 124, at § 42.39.

[127]*See e.g.,* Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686, 688 (Ga. 1989).

[128]WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 2284 (1986).

"sudden." *Webster's* first defines "sudden" as happening without previous notice . . . occurring unexpectedly . . . not foreseen." *Webster's* then lists synonyms for "sudden" that include "prompt" and "immediate."[129] *Random House Dictionary of the English Language*[130] defines the word "sudden" in a temporal sense as "happening, coming, made, or done quickly." *Black's Law Dictionary*[131] defines "sudden" as "[h]appening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen; unprepared for."[132] Although "sudden" can reasonably be defined to mean abrupt or immediate, it can also reasonably be defined to mean unexpected and unintended.[133] Since the term "sudden" is susceptible to more than one reasonable definition, the term is ambiguous, the cannons of contract interpretation in many states require that the phrase "sudden and accidental" be construed against the insurer to mean unexpected and unintended.[134] Similarly, the Georgia Supreme Court's frequently-quoted analysis of the meaning of "sudden" also relies on dictionary meanings and usages to support its conclusion that the primary sense of "sudden" is "unexpected."[135] As the court stated: [T]he primary dictionary definition of the word is "happening without previous notice or with very brief notice; coming or occurring unexpectedly; not foreseen or prepared for."[136] The definition of the word "sudden" as "abrupt" is also recognized in several dictionaries and is common in the vernacular.[137] Perhaps, the secondary meaning is so common in the vernacular that it is, indeed, difficult to think of "sudden" without a temporal connotation: a sudden flash, a sudden burst of speed, a sudden bang. But, on reflection one realizes that, even in its popular usage, "sudden" does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death. Even when used to describe the onset of an event, the word has an elastic temporal connotation that varies with expectations: Suddenly, it's spring. See also, Oxford English Dictionary, at 96 (1933) (giving usage examples dating back to 1340, e.g., "She heard a sudden step behind her"; and, "A sudden little river crossed my path as unexpected as a serpent comes.") Thus, it appears that "sudden" has more than one reasonable meaning. And, under the pertinent rule of construction the meaning favoring the insured must be applied, that is, "unexpected."[138]

However, courts that have found the phrase "sudden and accidental" to be ambiguous, and at the same time that have denied coverage by necessarily

---

[129]RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1900 (2nd ed. 1987).

[130]1900 (2nd ed. 1987).

[131]BLACKS LAW DICTIONARY 1284 (West 5th ed.1979).

[132]*Id.*

[133]Morton Int'l Inc. v. General Accident Insurance Co. of America, 629 A.2d 831, 847 (N.J. 1993) *cert. denied,* — U.S. —, 114 S. Ct.. 2764 (1994).

[134]*See* notes 228-243, *infra.*

[135]Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686, 688 (Ga. 1989) (footnote omitted).

[136]Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686, 688 (Ga. 1989) (footnote omitted) (quoting WEBSTER'S THRID NEW INTERNATIONAL DISCTIONARY at 2284 (1986); FUNK AND WAGNALLS STANDARD DICTIONARY at 808 (1980); BLACK'S LAW DICTIONARY at 1284 (4th ed. 1979)).

[137]380 S.E.2d at 688.

[138]*Id.*

finding that "sudden" connotes a temporal element,[139] have resorted to another rule of contract construction that all words in a contract be given effect. For example, Utah law assumes that all language in a contract to has a purpose and must be given effect.[140] To strip "sudden" of temporal element renders "accidental" mere surplusage.[141] The Third Circuit applying Pennsylvania law similarly reasoned: "To read 'sudden and accidental' to mean only the unexpected and unintended is to rewrite the policy by excluding one important pollution coverage requirement — abruptness of the discharge . . . [t]o define 'sudden' as 'unexpected or unintended' would render 'accidental' mere surplusage."[142] Despite the courts' acknowledgement that "sudden" can mean "unintended" or "unexpected," when coupled with the term "accident" "sudden" has been found to require temporality.[143]

C. Contemporaneous Representations to Insurance Regulators

An analysis of the regulatory history of the "sudden and accidental" clause, and the representations made to the various state insurance regulatory agencies at the time this language was introduced are persuasive proof of the clause's intended meaning.

Some courts, once finding that the "sudden and accidental" pollution exclusion clause is unambiguous, have refused to look to the clause's regulatory and drafting history.[144] However, other courts who have looked to the clause's regulatory and drafting history, almost uniformly find coverage based on insurance industry representations that the clause was a mere restatement of the "occurrence" based language that covered all but intentional discharges.[145] In

---

[139]*See infra* notes 209-29 and accompanying text.

[140]Hartford Accident & Indem. Co. v. USF&G, 962 F.2d 1484, 1489 (10th Cir. 1992), *cert. denied*, — U.S. —, 113 S.Ct 411 (1992).

[141]*Id.*

[142]Northern Ins. Co. v. Aardvark Assoc., Inc., 942 F.2d 189, 192 (3rd Cir. 1991) (Aardvark was in business of hauling industrial waste to sites where discharges discovered).

[143]Oklahoma Publishing Co. v. Kansas City Fire & Marine Insurance Co., 805 F. Supp. 905, 909 (W.D. Okla. 1992) (plaintiff sending 250,000 gallons of waste ink solvent to landfill over eight year period as part of printing operations not "sudden and accidental irrespective of intent to cause damage). "We think the annexation of 'sudden to accidental' is precisely the issue: reading 'sudden' without a temporal element renders 'accidental' redundant. While both conditions might include 'unexpected or unintended,' 'sudden' cannot mean gradual, routine or continuous" *quoting* Hartford Accident & Indemnity Co. v. USF&G, 962 F.2d 1484, 1489 n.12 (10th Cir. 1992)).

[144]Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Co., 636 S.2d 700, 705 (Fla. 1993). "We find language clear and plain, something only a lawyer's ingenuity could make ambiguous . . ." *quoting* American Motorists Insurance Co. v. General Host Corp., 667 F.2d 1423 (D. Kan. 1987). "Because it is clear we find it inappropriate and unnecessary to consider arguments concerning drafting history." *Id.*

[145]Buckeye Union Ins. Co. v. Liberty Solvents & Chemical Co., 477 N.E.2d 1227 (Ohio App. 1984) ("sudden and accidental can be interpreted as restatement of "occurrence," that is, that policy will cover claims were injury is unexpected and unintended); NCR Corp. v. Lumbermans Mutual Casualty Co., 1992 U.S. Dist. LEXIS 21047 (D. Del. 1992) (finding the term "sudden and accidental" to be ambiguous, and construing words most favorably to the insured, clause does not bar coverage where discharge of pollutant is unexpected)(solvents, chromium and degreasers used by company from 1965 to 1981, and either treated or hauled away, but later found in groundwater held to be sudden and accidental under Ohio law); Township of Jackson v. American Home Ins., No. L-29236-84, slip op. (N.J. Super. 1984), *reprinted in* 8 HAZARDOUS WASTE LIT. REP. 6220 (1984) ("Jackson Twsp. II") (treating the sudden and accidental pollution exclusion clause as the pre-1970 occurrence GCL policy, the *Jackson Twsp II* court found that all but knowing and intentional results from acts of pollution were not covered).

Morton Int'l., Inc. v. General Accident Ins. Co. of Am.,[146] the court found that the industry's presentation and characterization of the standard pollution-exclusion clause to state regulators constituted virtually the only opportunity for arms-length bargaining by interests adverse to the industry, insureds having virtually no choice at all but to purchase the industry-wide standard CGL policy. Accordingly, the *Morton* court deemed it appropriate to construe the pollution-exclusion clause in a manner consistent with the objectively-reasonable expectations of the New Jersey and other state regulatory authorities, because only those regulatory authorities were presented with an opportunity to disapprove the clause.[147]

In 1970, Charles Cox, president of INA announced before the Annual Conference of the American Society of Insurance Management his company's intention to adopt the pollution-exclusion endorsement with these comments: INA will continue to cover pollution which results from an accidental discharge of effluents—the sort of thing that can occur when equipment breaks down. We will no longer insure the company which knowingly dumps its wastes. In our opinion, such repeated actions— especially in violation of specific laws—are not insurable exposures. Moreover, we are inclined to think that any attempt to provide such insurance might well be contrary to public policy. We at INA hope that our antipollution exclusion may help encourage many companies to take the first, crucial steps toward improving their manufacturing processes—the steps that will lead eventually to a cleaner, healthier and, we hope, happier life for all.[148]

Similarly, the New York State legislature apparently shared that view of the pollution-exclusion clause's purpose, and enacted in 1971 a statute requiring policies issued to commercial or industrial enterprises to include the standard form pollution-exclusion clause.[149] The New York Legislature offered this explanation for its adoption: "a polluting corporation might continue to pollute the environment if it could buy protection from potential liability for only the small cost of an annual insurance premium, whereas, it might stop polluting, if it had to risk bearing itself the full penalty for violating the law."[150] Governor Rockefeller explained that "the bill would help assure that polluters bear the full burden of their own actions spoiling the environment, and would preclude any insurance company from undermining public policy by offering this type of insurance protection."[151]

In addition, after industry approval, the IRB and the Mutual Insurance Rating Bureau (MIRB) sought state regulatory approval to add the pollution-exclusion clause as an endorsement to standard CGL policies, apparently submitting to most if not all states in which approval was sought a standard

---

[146]629 A.2d 831 (N.J. 1993).

[147]*Id.* at 848.

[148]Charles K. Cox, Liability Insurance in the Era of the Consumer, Address Before the Annual Conference of the American Society of Insurance Management (Apr. 9, 1970), *quoted in* Robert S. Soderstrom, *The Role of Insurance in Environmental Litigation*, 11 FORUM 762, 767 (1976).

[149]N.Y. Ins. Law § 46(13)-(14) (McKinney 1972).

[150]Governor's Memorandum A.6952, Harris Ch. 765, *reprinted in* New York Legis. Ann. 353-54 (1971).

[151]*Id.* at 354.

explanatory memorandum that read in part as follows: 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.[152]

The MIRB's Explanatory Memorandum of Changes was also submitted to the New Jersey Department of Banking & Insurance in support of the proposed 1966 revision of the CGL policy. That memorandum stated: Coverage has been broadened to an "occurrence" basis which is defined in the jacket. The definition reinforces the intent that the injury be fortuitous from the insured's standpoint and by the addition of coverage for "injurious exposure to conditions" eliminates the connotation of suddenness previously intended as respects coverage on an "accident" basis.[153]

As noted by a Georgia federal court, the IRB informed the Georgia Insurance Department by letter of June 10, 1970, that: [T]he impact of the pollution exclusion clause on the vast majority of risks would be no change. It is rather a situation of clarification. Coverage for expected or intended pollution and contamination is not now present as it is excluded by the definition of occurrence. Coverage for accidental mishaps is continued [except for the risks described in the filing].[154]

In reliance on the industry's submissions, the West Virginia Insurance Commissioner approved the pollution-exclusion in a written order that stated in part: The said companies and rating organizations have represented to the Insurance Commissioner, orally and in writing, that the proposed exclusions . . . are merely clarifications of existing coverage as defined and limited in the definitions of the term "occurrence," contained in the respective policies to which said exclusions would be attached; To the extent that said exclusions are mere clarifications of existing coverages, the Insurance Commissioner finds that there is no objection to the approval of such exclusions[.][155]

Given these contemporaneous representations to the state insurance regulators, it becomes exceedingly clear that the "sudden and accidental" pollution exclusion clause was a mere restatement of the "occurrence" language, with the focus being on the discharge and not the resultant damage from the discharge.[156]

However, commentators have suggested that the "sudden and accidental" language from the perspective of the insurance industry is too frequently con-

---

[152]*Morton,* 629 A.2d at 851.

[153]*Id.* at 852.

[154]Claussen v. Aetna Casualty & Sur. Co., 676 F. Supp. 1571, 1573 (S.D. Ga. 1987) (quoting letter from R. Stanley Smith, Manager of the Insurance Rating Board, to the Georgia Insurance Department, June 10, 1970).

[155]Joy Technologies v. Liberty Mut. Ins. Co., 421 S.E.2d 493, 499 (W. Va. 1992).

[156]New Castle County v. Hartford Accident & Indem. Co., 970 F.2d 1267, 1269 (3rd Cir. 1992) ("New Castle VII") ("[t]he crux of this distinction is: [t]he occurrence clause provides coverage when the damage was unexpected and unintended, though caused by an intentional act, whereas the pollution exclusion clause excludes coverage except when the discharge is unexpected and unintended"), *cert. denied,* — U.S. —, 113 S.Ct. 1846 (1993).

strued in a strained or tortured fashion, and thereby "frustrates" the intent of the industry.[157]

As a result of claims experience, and the "explosion" of environmental litigation, the insurance industry in 1986 structured an absolute pollution exclusion, and today virtually no one can obtain pollution insurance at any price.[158] Recently, the United States Supreme Court in *Hartford Fire Ins. Co. v. California*,[159] held that insurance companies did not violate the antitrust laws[160] by conspiring to eliminate pollution coverage under the "absolute pollution exclusion clause."[161]

The Case Law

State and federal courts have interpreted the "sudden and accidental" language often with divergent results.[162] Frequently, these cases have been characterized as those that either find "sudden and accidental" to necessarily imply a temporal element that provides coverage for brief, and abrupt discharges, and those decisions which find "sudden and accidental" not to imply a temporal element and provide coverage for gradual discharges that unintended or unexpected from the standpoint of the insured.[163]

---

[157]Nancy Ballard and Peter McManus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610 (1990); Robert Chessler, *Patterns of Judicial Interpretation of Insurance Coverage of Hazardous Waste Site Liability*, 18 RUTGERS L.J. 9 (1986); Richard Hunter, *Pollution Exclusion in the Comprehensive General Liability Insurance Policy*, 1986 U. ILL. L. REV. 897; Thomas Reiter, *The Pollution Exclusion Clause Under Ohio Law: Staying the Course*, 59 U. CIN. L. REV. 1165 (1991); E. Joshua Rosenkranz, *The Pollution Exclusion Through The Looking Glass*, 74 GEO. L. J. 1237 (1986).

[158]Vantage Dev. Corp., Inc. v. American Envtl. Technologies, Corp., 598 A.2d 948, 954 (N.J. Super. 1991) (absolute pollution exclusion clear and unambiguous).

[159]— U.S. —, 113 S. Ct. 2891 (1993). In *Hartford Fire Ins. Co. v. California*, the Court reversed the United States Court of Appeals for Ninth Circuit's decision that insurance companies, regulated by the states enjoy antitrust immunity based on § 2(b) of the McCarran-Ferguson Act, 42 U.S.C. § 1012(b), and could not be held to have violated 15 U.S.C. § 1, by refusing to offer pollution coverage of any kind under the "absolute pollution exclusion clause." *Id.* at 2902.

[160]15 U.S.C. § 1 (1994). "Every contract, combination or conspiracy in restraint of trade is declared to be illegal."

[161]For further discussion of the absolute pollution exclusion clause *see supra* note 156.

[162]*See infra* notes 211-46 and accompanying text for discussion.

[163]New Castle County v. Hartford Accident and Indem. Co., 933 F.2d 1162, 1195 n. 61, (3rd Cir. 1991). There are those cases which focus on the sudden and accidental nature of the discharge Haynes v. Maryland Cas. Co., 688 F. Supp 1513 (N.D.Fla. 1988); Int'l Minerals & Chem. Corp. v. Liberty Mutual Ins. Co., 522 N.E. 2d 758, *appeal denied*, 122 Ill.2d 576; Barmet of Indiana, Inc. v. Security Ins. Group, 425 N.E.2d 201 (Ind. Ct. App. 1981); United States Fidelity & Guar. Co. v. Morrison Grain Co., 734 F. Supp. 437 (D. Kan. 1990), *aff'd.*, 999 F.2d 489 (10th Cir. 1993); American Motorists Ins. Co. v. General Host Corp., 667 F. Supp. 1423 (D. Kan. 1987), *aff'd.*, 946 F.2d 1482 (10th Cir. 1991); United States Fidelity & Guaranty Co. v. Five Star Coals, Inc., 856 F.2d 31 (6th Cir. 1988); Lumbermens Mut. Cas. Co. v. Beleville Indus. Inc., 555 N.E.2d 568 (Mass. 1990); F.L. Aerospace v. Aetna Cas. & Sur. Co., 897 F.2d 214 (6th Cir. 1990), *cert. denied*, — U.S. —, 111 S.Ct. 284 (1990); Fireman's Fund Ins. Co. v. Ex Cell-o Corp., 702 F. Supp. 1317 (E.D. Mich. 1988); Waste Mgmt. of Carolina v. Peerless Ins. Co., 340 S.E.2d 374 (N.C. 1986); Great Lake Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984); Technicons Elec. Corp. v. American Home Ins. Co., 542 N.E.2d 1048 (N.Y. 1989); Ogden v. Travelers Indem. Corp., 924 F.2d 39 (2nd Cir. 1991); EAD Metallurgical Inc. v. Aetna Casualty & Surety Co,, 701 F. Supp. 399 (W.D.N.Y. 1988), *aff'd.*, 905 F.2d 8 (2nd Cir. 1990); New York v. Amro Realty Corp., 697 F. Supp 99 (N.D.N.Y 1988); Borden Inc. v. Affiliated FM Ins. Co., 682 F. Supp 927 (S.D.Ohio 1987), *aff'd.*, 865 F.2d 1267, *cert. denied*, — U.S. —, 110 S.Ct. 68 (1989); Transamerica Ins. Co. v. Sunnes, 711 P.2d 212 (Or. Ct. App. 1985), *rev. denied*, 717 P.2d 631 (1986); Continental Ins. Co. v. Lumbermens Mutual Cas. Co., 677 F. Supp. 342 (E.D. Pa. 1987);

However, before embarking on the distinction made by most courts before providing or refusing coverage based on the "suddenness" of the pollution event, and whether the event was unexpected or unintended by the policyholder, an examination of the earlier case law on this issue is instructive.

The Superior Court of New Jersey was one of the first courts to attempt to decipher the meaning of the "sudden and accidental" pollution exclusion clause in *Lansco, Inc. v. Dept. of Environmental Protection of New Jersey.*[164] In *Lansco*, the plaintiff sought to establish coverage for the clean up of oil that leaked into the Hackensack River when vandals opened a storage valve.[165] Lansco's insurer, Royal Globe Insurance, denied coverage based on the GCL pollution exclusion clause § (f) because the occurrence was neither sudden nor accidental and because coverage did not extend to liability for damages recoverable by the State.[166] The *Lansco* court, referring to Webster's Dictionary definition of "sudden and accidental," found that coverage was provided for all occurrences happening without notice, unforeseen or unexpected from the standpoint of the insured, and that coverage is provided even if the vandals acted deliberately.[167]

Similarly, in 1982 a New Jersey court ruled in *Jackson Township Municipal Util. Auth. v. Hartford Accident & Indemnity Co.*,[168] that the sudden and acci-

---

Fischer and Porter Co. v. Liberty Mutual Insurance Co., 656 F. Supp. 132 (E.D.Pa. 1986); American Mutual Liab. Ins. Co. v Melville Chem. Co., 650 F. Supp. 929 (W.D. Pa. 1987); Lower Paxton Township v. U.S. Fidelity and Guaranty Co., 557 A.2d 393 (Pa. Super 1989); Techalloy Co. v. Reliance Ins. Co., 487 A.2d 820 (Pa. Super 1984); C.P.I. Int'l Inc. v. Northbrook Excess & Surplus Ins. Co., 759 F. Supp. 966 (D.R.I. 1991); U.S. Fidelity & Guaranty Co. v. Murray Ohio Mfg. Co., 693 F. Supp. 617 (M.D. Tenn. 1988), *aff'd.*, 875 F.2d 869 (6th Cir. 1989); and those that focus on the sudden and accidental nature of the resultant damage. *See* C.E.G. City of Northglen v. Chevron USA, Inc., 634 F. Supp. 217 (D. Colo 1986); Peppers Steel & Alloys Inc. v. U.S. Fidelity & Guaranty Co., 688 F. Supp. 1541 (S.D. Fla. 1987); Payne v. U.S. Fidelity & Guaranty Co., 625 F. Supp. 1189 (S.D. Fla. 1985); Claussen v. Aetna Casualty & Surety Co., 259 Ga. 333, 389 S.E.2d 686 (1989); U.S. Fidelity & Guaranty Co. v. Specialty Coating Co., 535 N.E.2d 1071 (Ill. App. 1988), *appeal denied*, 545 N.E. 2d 133 (1989); Reliance Ins. Co. v. Martin, 567 N.E.2d 287 (Ill. App. 1984); Allstate Ins. Co. v. Quinn Const. Co., 713 F. Supp. 35 (D. Mass. 1989); Travelers Indem. Co. v. Dingwell 414 A.2d 220 (Me 1980); Jonesville Products Inc. v. Transamerica Ins. Group, 402 N.W.2d 46 (Mich. App. 1986), *appeal denied*, 428 Mich. 895 (1987); Polkow v. Citizens Ins. Co., 447 N.W.2d 853 (Mich. App. 1989); Grinell Mutual Reinsurance Co. v. Washmuth, 432 N.W.2d 495 (Minn. App. 1988); United States v. Conversion Chem. Co., 653 F. Supp. 152 (W.D. Mo. 1986); Du/Wel Products Inc. v. U.S. Fire Ins. Co., 565 A.2d 1113 (N.J. Super. 1989), *cert. denied*, 583 A.2d 316 (N.J. 1990); Summit Assoc. Inc. v. Liberty Mutual Fire Ins. Co., 550 A.2d 1235 (N.J. Super. 1988); Broadwell Realty Services, Inc. v. Fidelity & Cas. Co., 528 A.2d 76 (N.J. Super 1987); Jackson Township v. Hartford Accident & Indem. Co., 451 A.2d 990 (N.J. Super. 1982); Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200 (2nd Cir. 1989), *cert denied*, — U.S. —, 110 S.Ct. 2588 (1990); National Grange Mutual Ins. Co. v. Continental Casualty Ins. Co., 650 F. Supp. 1404 (S.D.N.Y. 1986); Colonie Motors, Inc. v. Hartford Accident & Indem. Co., 145 A.2d 180 (N.Y. Sup. Ct. 1989); Allstate Ins. Co. v. Klock Oil Co., 73 A.2d 486 (N.Y. Sup. Ct. 1980); Kipin Ins. v. Am. Univ. Ins. Co., 535 N.E.2d 334 (Oh. App. Ct. 1987); Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co., 477 N.E.2d 127 (Oh. App. Ct. 1984); Benedicine Sisters of St. Mary's Hosp. v. St. Paul Fire Marine & Ins. Co., 815 F.2d 1209 (8th Cir. 1987); United Pacific Ins. Co. v. Vans Westlake Ins. Union, Inc., 644 P.2d 1262 (Wash. App. Ct. 1983), *rev. denied*, 100 Wash.2d 1018 (1983); Just v. Land Reclamation Ltd., 456 N.W.2d 570 (Wis. 1990); Compass Ins. Co. v. Cravens Dargan & Co., 748 P.2d 724, 724 (Wyo. 1988).

[164]350 A.2d 520 (N.J. Ch. Div 1975), *aff'd.*, 368 A.2d 363 (N.J. App. Div. 1976), *cert. denied*, 372 A.2d 322 (N.J. 1977).

[165]*Id.* at 281.

[166]*Id.*

[167]*Id.* at 282.

[168]451 A.2d 990 (N.J Super. 1982) [hereinafter "Jackson Twsp. I"].

dental exclusion was identical to occurrence based coverage, and accordingly, the court's only inquiry was whether the resultant damage was expected or intended from the standpoint of the insured.[169] Not surprisingly, the *Jackson Twsp. I* court read the policy as broad as possible and found that coverage was provided for all but the intended results of intentional acts.[170]

This reasoning was refined in *Township of Jackson v. American Home Ins.*,[171] ("*Jackson Twsp. II*") where the court held that the township was entitled to indemnification because the evidence was insufficient to label the loss "expected or intended from the point of the insured," notwithstanding that a prudent person with the Municipal Utility Authority's ("MUA") knowledge might have foreseen the loss.[172]

The distinction between whether the "sudden and accidental" language refers to the actual discharge, or the resultant damage caused by the discharge, is best illustrated by the 1978 decision of *Family Mutual Ins. Co. v. Bagley*.[173] In *Bagley*, the court found that the pollution exclusion clause was inapplicable to a farmer who sprayed chemicals on his oat field which carried on to his neighbor's land.[174] The court held that although the discharge of toxic chemicals was intentional, the dispersal on to the neighbor's land was unexpected and unintended to cause harm or injury, and therefore, was sudden and accidental.[175]

Over the years, in those jurisdictions that do not ascribe a temporal meaning to "sudden," the notion that coverage exists for all pollution events provided that the resultant damage is unexpected or unintended has been refined to only find coverage where the initial discharge was unintended or unexpected.[176]

This reasoning is best exemplified in the *New Castle County* line of cases.[177] In *New Castle I*,[178] the court found that the insurers were obligated to indemnify the county for unintended pollution emanating from county landfills. The *New Castle I* court found the term "sudden" to mean unexpected or unintended, and to lack a temporal element.[179] In addition, the court found that the sudden and accidental language was a mere clarification of the pre-1970

---

[169] *Id.* at 994.

[170] *Id.* at 995. However the court did state, in *dicta*, that "industry . . . which is put on notice that its emissions are a potential hazard to the environment and who continues those emissions is an active polluter excluded from coverage.

[171] No. L-29236-84, slip op. (N.J. Super. Ct. Law Div. 1984), *reprinted in* 8 Hazardous Waste Litig. Rep. 6220 (1984) [hereinafter "Jackson Twsp. II"].

[172] *Id.*, *slip op.* at 6.

[173] 409 N.Y.S.2d 294 (1978).

[174] *Id.*

[175] *Id.*

[176] *See infra* notes 248-54 and accompanying text for discussion.

[177] New Castle County v. Continental Ins. Co., 673 F. Supp. 1359 (D. Del. 1987) ("*New Castle I*"); New Castle County v. Continental Ins. Co., 685 F. Supp. 1321 (D. Del. 1987) ("*New Castle II*"); New Castle County v. Continental Ins. Co., 725 F. Supp. 800 (D. Del. 1989) ("New Castle III"); New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1163 (3rd Cir. 1991) ("*New Castle IV*"), *on remand*, 778 F. Supp. 812, 819-20 (D. Del, 1991) ("*New Castle V*"), *rev'd*, 970 F.2d 1267, 1270-73 (3d Cir. 1992) ("*New Castle VI*").

[178] New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359 (D. Del. 1987).

[179] *Id.* at 1364.

"occurrence" language.[180] *New Castle II* involved remaining summary judgment claims for damages emanating from the landfills,[181] and in *New Castle III*,[182] the court found coverage and ordered the insurance company to defend because the discharge of the pollution from the plaintiff's landfill was not expected, given the state of scientific knowledge both at the time of the landfill's construction and at the time of the insurance contract with the defendants.[183]

However, in *New Castle IV*[184] the Third Circuit Court of Appeals found that the district court erred in defining the pollution exclusion clause as a mere restatement of the definition of occurrence. The Court found that the terms "sudden and accidental" ambiguous, and determined that they must be construed to mean unexpected and unintended because the phrase modifies "discharge" even if the damage was unintended. As a result, coverage is unavailable unless discharge is unexpected and unintended.

In *New Castle V,* the case was remanded to the district court to determine whether discharge of leachate from county-operated landfills was unexpected and unintended.[185] Ultimately, that decision was reversed again by the Third Circuit in *New Castle VI* which held that knowledge of the contaminating quality of substance discharged is irrelevant, and construed the pollution-exclusion clause as imposing on the insured the risk of discharge of known contaminants.[186]

In contrast, courts that have rested their holdings on the concept that the terms "sudden and accidental" have a strict temporal meaning find their roots in earlier cases that denied coverage where the discharge was intentional[187] or was part of the insured's regular course of business.[188] However, notably, these courts could have refused coverage in these cases without reaching the issue of whether "sudden" necessarily connotes a temporal meaning.

For example, in one of the first cases on this point,[189] *Techalloy Co. v. Reliance Ins. Co.*,[190] the Pennsylvania Superior Court held that a claim seeking damages for injuries caused by intentional dumping of toxic waste over a twenty-five year period was ineligible for coverage under the "sudden and accidental" exception to the pollution-exclusion clause because "sudden" implied a temporal element.[191] While the *Techalloy* court could have disposed of the

---

[180] *Id.* at 1363-64. In addition, the court dealt with the issue of "damages" and found that it included the costs of clean up of pollution. *Id.* at 1365. *See supra* notes 69-72 and accompanying text.

[181] New Castle County v. Hartford Accident & Indem. Co., 685 F. Supp. 1321 (D. Del. 1988).

[182] New Castle County v. Continental Casualty Co., 725 F. Supp. 800 (D. Del. 1989).

[183] *Id.* at 803-13. In 1968, only one study existed concerning landfill leachate. *Id.* at 803.

[184] New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162 (3d Cir. 1991).

[185] New Castle County v. Hartford Accident & Indem. Co., 778 F. Supp. 812. 819-20 (D. Del. 1991).

[186] New Castle County v. Hartford Accident & Indem., Co., 970 F.2d at 1267, 1270-73 93rd Cir. 1992).

[187] *See infra* notes 191-201 and accompanying text for discussion.

[188] *See infra* notes 191-201 and accompanying text for discussion.

[189] Prior to 1984, some courts disposed of cases involving the sudden and accidental exception to the pollution exclusion clause on the basis that there was no "occurrence" during the policy period requiring payment of "damages" from a "suit" to "third parties." *See supra* notes 42-51 and accompanying text for discussion of these issues.

[190] 487 A.2d 820, 826-28 (Pa. Super. 1984).

[191] *Id.* at 826-28.

case without ascribing "sudden" a temporal meaning, the Third Circuit Court of Appeals,[192] four district courts,[193] and one other Pennsylvania Superior Court[194] have relied on *Techalloy* for the proposition that "sudden" eliminates coverage for all gradual discharges irrespective of whether they are unintended or unexpected.[195]

Similarly, in earlier cases in Oregon[196] and North Carolina[197] the "sudden and accidental" language was construed to connote a temporal meaning, notwithstanding that these cases could have been decided on the basis of whether the initial discharge was intentional. From these earlier decisions emerges a significant line of cases[198] holding that the term "sudden" would be redundant when used with the term "accident" if not construed in a temporal sense,[199] and refusing to provide coverage for gradual pollution even if unexpected.[200]

In contrast, a significant number of courts that have construed "sudden" as non-temporal often predicate their findings on the notion that the terms "sudden and accidental" are ambiguous.[201] Almost uniformly, courts that find ambiguity in the terms "sudden and accidental" find coverage when the discharge

---

[192]Northern Ins. Co. v. Aardvark Assoc., 942 F.2d 189, 193-95 (3d Cir. 1991).

[193]Fischer & Porter Co. v. Liberty Mutual Ins. Co., 656 F. Supp. 132, 140 (E.D. Pa. 1986); Centennial Ins. Co. v. Lumbermens Mut. Casualty Co., 677 F. Supp. 342, 348-49 (E.D. Pa. 1987); Federal Ins. Co. v. Susquehanna Broadcasting Co., 727 F. Supp. 169, 177 (M.D. Pa. 1989), *amended in part on other grounds*, 738 F. Supp. 896 (M.D. Pa. 1990), *aff'd.*, 928 F.2d 113 (3d Cir. 1991), *cert. denied,* 502 U.S.823 (1991).

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

[195]However, on May 16, 1994, the Supreme Court of Pennsylvania granted Petition for allowance of appeal in Central Dauphin School Dist. v. PA Mfg. Assoc. Ins. Co., No. 552, 1994 Pa. LEXIS 155, (1994) to decide whether insurers should be permitted to enforce policy exclusions in a manner inconsistent with the representations of insurers to gain approval for an exclusion's use, and whether the terms "sudden and accidental" are ambiguous.

[196]Transamerica Ins. Co. v. Sunnes, 711 P.2d 212, 214 (Or. App. 1985) (holding property damage caused by intentional discharges in the regular course of business of acid and caustic wastes into the city sewer line ineligible for coverage under "sudden and accidental" exception to the pollution-exclusion clause even if the damage had been unintended), *cert. denied*, 717 P.2d 631 (Or. 1986).

[197]Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374, 382-83 (N.C. 1986) (defining "sudden" as describing an abrupt or precipitant event, and holding that cleanup cost of contaminated groundwater resulting from insured's disposal over a six-year period of solid wastes at a landfill that leached into contaminated adjacent property ineligible for coverage under "sudden and accidental" exception to the pollution-exclusion clause).

[198]To date, 20 states have ascribed "sudden" a temporal meaning. For a further discussion of these state decisions, *see infa* notes 208-28 and accompanying text.

[199]Aetna Casualty & Sur. Co. v. General Dynamics Corp., 968 F.2d 707, 710-11 (8th Cir. 1992) (holding that because "accidental" means "unexpected," "sudden" would be redundant if not held to mean abrupt, and hence damage caused by discharges over several months of 300,000 gallons of bilge water by insured's waste hauler at city landfill and discharges of toxic wastes from trucks and deteriorating tanks at haulers disposal site were barred from coverage by the pollution-exclusion clause).

[200]Hartford Accident & Indem. Co. v. United States Fidelity & Guar. Co., 962 F.2d 1484, 1487-92 (8th Cir. 1992) (holding that "sudden" has a temporal element suggesting immediacy, abruptness, and quickness, thereby barring coverage under the pollution-exclusion clause for environmental damage caused by regular, intentional discharges over fifteen years of liquid wastes containing PCBs even though the insured was unaware that wastes included PCBs), *cert. denied*, — U.S. —, 113 S. Ct. 411 (1992).

[201]*See supra* notes 203-04.

was unexpected or unintended by the insured.[202] Some courts that have construed the terms "sudden and accidental" not to imply a temporal meaning have even provided coverage for intentional discharges, including the discharge of heavy metal sludge in mining activities[203] and the open dumping of hazardous wastes by negligent haulers.[204]

The controversy continues. Since 1994, ten state courts[205] three district courts,[206] and eight circuit courts[207] have spoken on the meaning of the "sudden and accidental" pollution exclusion clause, and have "joined the fray"[208] as to whether the "sudden and accidental" language is ambiguous, and whether "sudden" includes a temporal element.[209] As one court commented: "[t]he cases swim the reporters like fish in a lake. The Defendants would have this Court pull up its line with a trout on the hook, and argue that the lake is full of trout only, when in fact the water is full of bass, salmon and sunfish too."[210]

---

[202]*See, e.g.,* Benedictine Sisters of St. Mary's Hosp. v. St. Paul Fire & Marine Ins. Co., 815 F.2d 1209, 1210-12 (8th Cir. 1987) (determining that whether claims against insured arose from "sudden accident" in non-standard pollution-exclusion clause depends on whether the insured expected or intended damage at the time of discharge, and holding that the discharge of soot from hospital's boiler stack because of a malfunction, and on occasions subsequent to applications of soot removal compound, constituted "sudden accidents involving pollutants," requiring coverage under CGL policy).

[203]Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d at 1090-92 (construing "sudden and accidental" to mean unexpected and unintended, and holding that claims for property damage resulting from the surge of sedimentary sludge from a mining tunnel attributable partly to insured's discharge of heavy metals in course of mining operations subject to insurer's duty to defend based on "sudden and accidental" exception to the pollution-exclusion clause).

[204]United States Fidelity & Guar. Co. v. Specialty Coatings Co., 535 N.E.2d at 1075-78 (construing "sudden and accidental" non-temporally to mean unexpected and unintended, and holding that claims for remediation of property damage resulting from open dumping of hazardous wastes by hauler to whom insured and others had delivered industrial wastes for proper disposal covered by "sudden and accidental" exception to pollution-exclusion clause in insured's CGL policy).

[205]TNT Bestway Transp., Inc. v. Truck Indus. Exchange, No. CA-CV 92-0128, 1994 Ariz. App. LEXIS 186 (Ariz. App. Aug. 30, 1994); Carrier Corp. v. Home Ins. Co., No. CV-88-352383, 1994 Conn. Super. LEXIS 2438 (Conn. Super. Sept. 23, 1994); Bd. of Regents of the Univ. of Minn. v. Royal Ins. Co., 517 N.W.2d 888 (Minn. 1994); Central Dauphin School Dist. v. PA Mfg. Assoc. Ins. Co., No. 552, 1994 Pa. LEXIS 155 (May 16, 1994) (Petition for allowance of appeal to decide whether insurers should be permitted to enforce policy exclusions in a manner inconsistent with the representations of insurers to gain approval for exclusion's use, and whether the terms "sudden and accidental" are ambiguous); Greenville County. v. Ins. Reserve Fund, 443 S.E.2d 522 (S.C. 1994); Great Lakes Chem. Corp. v. Int'l. Surplus Lines Ins. Co., 638 N.E.2d 847 (Ind. App. 1994); Morton Int'l., Inc. v. Continental Ins. Co., No. C-930613, 1995 Ohio App. LEXIS 182 (Jan. 25, 1995); Cannelton Indus. v. Aetna Casualty. & Sur. Co. of Am., 1994 W. Va. LEXIS 233, No. 22015 (Dec. 8, 1994); Key Tronic Corp. v. Aetna Fire Underwriters Ins. Co., 881 P.2d 201 (Wash. 1994); Hutchinson Oil Co. v. Federated Serv. Ins. Co., 851 F. Supp. 1546 (D. Wy. 1994).

[206]American States Ins. Co. v. Hanson Indus., 1995 U.S. Dist. LEXIS 106 (S.D. Tex. 1995); States Mutual Assurance Co. of A. v. Lumbermans Mutual, 1995 U.S. Dist. LEXIS 770 (D. Mass. 1995); American States Ins. Co. v. Sacramento Plating, Inc., 861 F. Supp. 964 (E.D. Ca. 1994).

[207]St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195 (1st Cir. 1994); New York v. Blank, 27 F.3d 783 (2d Cir. 1994); Air Products & Chem. v. Hartford Accident & Indem. Co., 25 F.3d 177 (3d Cir. 1994); Meridian Oil Prod. v. Hartford Accident & Indem. Co., 27 F.3d 150 (5th Cir. 1994); Cincinnati Ins. Co. v. Flanders Elect. Motor Serv., 40 F.3d 146 (7th Cir. 1994); Modern Constructors, Inc. v. Continental Cas. Co., 38 F.3d 377 8th Cir. 1994); Aeroquip Corp. v. Aetna Cas. & Surety Co., 26 F.3d 893 (9th Cir. 1994); Red Panther Chem. Co. v. Ins. Co. of the State of PA, No. 93-6400, 1994 U.S. App. LEXIS 35690 (10th Cir. 1994).

[208]St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195, 1195 (1st Cir. 1994).

[209]*See infra* notes 126-45 and accompanying text for discussion.

[210]Pepper's Steel & Alloys v. United States Fidelity & Guar. Co., 668 F. Supp. 1541, 1549-50 (S.D. Fla. 1987).

To date, state and federal courts applying the law of twenty states construe "sudden" to imply a temporal meaning, and refuse coverage for all gradual pollution whether unexpected or unintended.[211] The state and federal Courts of California,[212] Alaska,[213] Arizona,[214] Connecticut,[215] Florida,[216] Kansas,[217] Maine,[218] Maryland,[219] Massachusetts,[220] Michigan,[221] Minnesota,[222] New

---

[211] *See infra* notes 209-227.

[212] Shell Oil Co. v. Winterthur Swiss Ins. Co., 15 Cal. Rptr. 2d 815, 841-42 (Cal. Ct. App. 1993) (construing "sudden and accidental" as conveying sense of unexpected event that is abrupt or immediate but not requiring that the polluting event necessarily terminate quickly or have a brief duration).

[213] Sauer v. Home Indem. Co., 841 P.2d 176 (Alaska 1992) (finding sewer line rupture caused by low temperatures "sudden and accidental" not requiring court to construe whether "sudden" necessarily connotes a temporal meaning or if coverage is included for all but intentional polluters).

[214] TNT Bestway Transp., Inc. v. Truck Indus. Exchange, No. CA-CV 92-0128, 1994 Ariz. App. LEXIS 186 (Ariz. App. Aug. 30, 1994) (sudden and accidental exclusion necessarily connotes a temporal quality excluding coverage for 18 month fuel leak in underground fuel lines).

[215] Carrier Corp. v. Home Ins. Co., No. CV-88-352383, 1994 Conn. Super. LEXIS 2438 (Conn. Super. Sept. 23, 1994) ("sudden" is a temporal concept; however, even an event such as a boxer's punch is sudden but expected).

[216] Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., No. 78293, 1993 Fla. LEXIS 1128 (Fla. July 1, 1993) n1 (construing "sudden and accidental" to be unambiguous and to include a sense of immediacy or abruptness, and holding that pollution-exclusion clause barred coverage for property damage caused by discharges of oil at a plant site in the regular course of business by a company to which the insured had sold used crankcase oil generated by insured's business); Hayes v. Maryland Casualty Co., 688 F. Supp. 1513, 1515 (N.D. Fla. 1988) (applying Florida law to construe pollution-exclusion clause to bar coverage for property damage caused by pollution extending over a substantial period of time and holding property damage caused by intentional deposits on insured's property of filtration material from dry-cleaning fluid over extended period ineligible for coverage under pollution-exclusion clause whether or not insured had expected or intended damage to occur).

[217] Farm Bureau Mut. Ins. Co. v. Laudick, 859 P.2d 410, 412 (Kan. App. 1993) (the term sudden and accidental is unambiguous, and "sudden" should be given a temporal meaning combining both the elements of without notice or warning and quick or brief in time). United States Fidelity & Guar. Co. v. Morrison Grain Co., 999 F.2d 489, 493 (10th Cir. 1993) (applying Kansas law to define "sudden" as combining elements of quickness and without warning, and holding that property damage caused by deteriorating drums containing chemicals and pesticides improperly stored at one site and improperly buried at a second site ineligible for coverage under pollution-exclusion clause, notwithstanding insured's lack of subjective knowledge that management of the enterprise, operated as joint venture, improperly had disposed of hazardous waste); American Motorists Ins. Co. v. General Host Corp., 667 F. Supp. 1423, 1428-31 (D. Kan. 1987) (construing "sudden" to mean unexpected and happening on brief notice, and holding that property damage arising from pollution of aquifer caused by discharges of salt brine in the course of regular operation of a salt plant over seventy-five years ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); *aff'd*, 946 F.2d 1482, *remanded after reh'g*, 946 F.2d 1489 (10th Cir. 1991).

[218] A. Johnson & Co. v. Aetna Casualty & Sur. Co., 933 F.2d 66, 72-76 (1st Cir. 1991) (applying Maine law, construing "sudden" to mean temporally abrupt, and holding that pollution-exclusion clause bars coverage for insured's share of cleanup cost at a waste-disposal facility that received hazardous-waste shipments from insured and others over thirteen years; the record demonstrated that contamination of the disposal site and adjacent property had occurred over extended period and not because of "sudden and accidental" discharges).

[219] ARTRA Group v. Am. Motorists Ins. Co., 642 A.2d 896, 901-02 (Md. App. 1994) (applying Maryland law, "sudden and accidental" not ambiguous and only includes events that are precipitous or abrupt), *cert. granted*, 648 A.2d 464 (1994); Bernhardt v. Hartford Fire Ins. Co., 648 A.2d 1047, 1050-51 (Md. 1994) (absolute pollution exclusion addresses legitimate concerns of insurance industry, and is not ambiguous).

[220] Polaroid Corp. v. Travelers Indem. Co., 610 N.E.2d 912, 912-16 (Mass.1993) (construing "sudden" to be without ambiguity and to have temporal meaning, observing that whether discharge of pollutants is "sudden and accidental" is determined from the perspective of discharger

rather than from the perspective of insured, and holding insured's claims for indemnity for cost of remediating property damage caused by intentional discharges of pollutants by insured's waste processor ineligible for coverage under pollution-exclusion clause); Liberty Mut. Ins. Co. v. SCA Servs., Inc., 588 N.E.2d 1346, 1349-50 (Mass. 1992) (construing "sudden" as having temporal element suggesting abruptness and holding that property damage resulting from routine business activity over several months during which barrels containing hazardous waste had been emptied into open trenches or dumped into trenches and flattened with bulldozer, ineligible for coverage under "sudden and accidental" exception to the pollution-exclusion clause); Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc., 407 Mass. 675, 555 N.E.2d 568, 572 (Mass. 1990) (deciding only legal issues certified by federal district court in In re Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution, 725 F. Supp. 1264 (D. Mass. 1989), answer conformed to 938 F. 1423 (1st Cir. 1991), cert. denied, — U.S. —, 112 S. Ct. 969 (1992), and holding that in context of pollution-exclusion clause "sudden" is unambiguous, has temporal quality, and abruptness of commencement of pollutant's discharge is crucial element); Lumbermens Mut. Ins. Co. v. Belleville Indus., Inc., 938 F.2d 1423, 1425-27 (1st Cir. 1991) (applying Massachusetts law, construing "sudden" to mean abrupt, and holding that where insured engaged in continuous, long-term discharge of known pollutants, coverage was not provided for isolated instances in which rainstorm and fire had caused specific discharges of pollutants), *cert. denied*, 112 S. Ct. 969 (1992); C.L. Hauthaway Sons v. American Motorists Ins., 712 F. Supp. 265, 267-69 (D. Mass. 1989) (applying Massachusetts law as construing "sudden" to have a temporal aspect and holding that property damage caused by a gradual escape of toluene from underground pipe at a slow rate over lengthy period ineligible for coverage under the "sudden and accidental" exception to the pollution-exclusion clause).

[221]Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392, 397-401 (Mich. 1991) (concluding that "sudden" is defined with "a temporal element that joins together conceptually the immediate and the unexpected" and holding that where tank-level measurements of storage tank with toxic by-product dropped from 475 gallons to 80 gallons in one day after 1700 gallons of by-product was added, and continued to show low-level readings over ensuing three weeks while 13,600 additional gallons of by-product were added, property damage caused by leakage of 12,000 to 18,000 gallons of toxic by-product was ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); Grant-Southern Iron & Metal Co. v. CNA Ins. Co., 905 F.2d 954, 956-58 (6th Cir. 1990)(applying Michigan law, construing pollution-exclusion clause as barring coverage for continuous or ongoing occurrences of pollution, but reversing summary judgment for insurer and remanding for factual determination of whether polluting events had been accidental and short in duration); FL Aerospace v. Aetna Casualty & Sur. Co., 897 F.2d 214, 219-20 (6th Cir. 1990) (determining that under Michigan law, sudden and accidental event occurs quickly, without warning and unintentionally, and holding that pollution-exclusion clause barred insured's claim for reimbursement of assessed cost of cleanup of industrial-waste site in absence of proof that damage had been caused by sudden and accidental discharges of hazardous waste), *cert. denied*, 498 U.S. 911 (1990); Ray Indus., Inc. v. Liberty Mut. Ins. Co., 728 F. Supp. 1310, 1319 (E.D. Mich. 1989) (applying Michigan law as construing "sudden and accidental" exception not to apply when discharges occurred regularly or continuously in course of insured's business, and holding property damage caused in part by insured's regular and continuous practice over thirteen years of depositing contaminated barrels and drums containing hazardous waste in landfill ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause), *aff'd. in part, rev'd. in part*, 974 F.2d 754 (6th Cir. 1992); Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 702 F. Supp. 1317, 1326 (E.D. Mich. 1988) (applying Michigan law to construe "sudden" as meaning "brief, momentary or lasting only a short time" but without resolving coverage questions and ultimately concluding after trial that insurers not obligated to indemnify insured for cost of cleanup of property damage resulting from chemical contamination in view of finding that damage had been expected or intended from standpoint of insured).

[222]Board of Regents of the Univ. of Minn. v. Royal Ins. Co., 517 N.W.2d 888 (Minn. 1994) (sudden means opposite of gradual and does not include release of asbestos fibers over 20 year period); Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., 40 F.3d 146 (7th Cir. 1994) (applying Missouri law, "sudden" maens unambiguous, and means abrupt, quick or immediate, as well as unexpected and unintended); *Cf.* United States v. Conservation Chem. Co., 653 F. Supp. 152, 160, 201-04 (W.D. Mo. 1986) (finding pollution-exclusion clause ambiguous, and denying insurers' motions for summary judgment based on contention that pollution-exclusion clause eliminated duty to defend claims for property damage asserted against four generators who had delivered wastes to Missouri waste-disposal facility from which hazardous wastes had migrated).

Hampshire,[223] North Carolina,[224] Oregon,[225] Pennsylvania,[226] South Carolina,[227] Tennessee,[228] Utah,[229] Virginia,[230] and Wisconsin[231] hold that the terms

---

[223]Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30, 33-34 (1st Cir. 1984) (applying New Hampshire law and holding that regular and continuous discharge of hazardous waste in ordinary course of drum-and-barrel reconditioning business was neither an "occurrence" nor a sudden and accidental discharge of pollutants under CGL policy).

[224]Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374, 382-83 (N.C. 1986) (defining "sudden" as describing an abrupt or precipitant event, and holding that cleanup cost of contaminated groundwater resulting from insured's disposal over a six-year period of solid wastes at landfill that leached into contaminated adjacent property ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause), *reh'g denied,* 346 S.E.2d 134 (N.C. 1986).

[225]Transamerica Ins. Co. v. Sunnes, 711 P.2d 212, 214 (Or. Ct. App. 1985) (holding property damage caused by intentional discharges in regular course of business of acid and caustic wastes into city sewer line ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause even if damage had been unintended), *cert. denied*, 717 P.2d 631 (Or. 1986).

[226]Pennsylvania Courts have only provided coverage for sudden and accidental pollution when the event was abrupt or brief. *See generally,* Lower Paxon Township v. United States Fidelity & Guar. Co., 557 A.2d 393, 402-04 (Pa. Super. Ct. 1989) (concluding that although "sudden" can include element of "unexpectedness," its use in conjunction with "accidental" reflects additional element of abruptness and brevity), *appeal denied*, 567 A.2d 649 (Pa. 1989); Techalloy Co. v. Reliance Ins. Co., 487 A.2d 820, 826-28 (Pa. Super. Ct. 1984) (holding that claim for personal injuries asserted against insured seeking damages for injuries caused by intentional dumping of toxic waste over twenty-five years ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); Northern Ins. Co. v. Aardvark Assocs., 942 F.2d 189, 193-95 (3d Cir. 1991) (applying Pennsylvania law, concluding that "sudden and accidental" describes unexpected discharges that are abrupt and last short time, and barring coverage for property damage caused by waste hauler's discharges of hazardous waste at disposal sites over several years); Federal Ins. Co. v. Susquehanna Broadcasting Co., 727 F. Supp. 169, 177 (M.D. Pa. 1989) (applying Pennsylvania law as construing pollution-exclusion clause to bar coverage for all damage caused by gradual pollution irrespective of whether insured had knowledge or participated in discharges, and denying coverage to insured for property damage caused over several years by improper hazardous waste disposal practices engaged in by hauler hired by insured), *amended in part on other grounds*, 738 F. Supp. 896 (M.D. Pa. 1990), aff'd, 928 F.2d 113 (3d Cir.), *cert. denied,* — U.S. —, 112 S. Ct. 86 (1991); Centennial Ins. Co. v. Lumbermens Mut. Casualty Co., 677 F. Supp. 342, 348-49 (E.D. Pa. 1987) (applying Pennsylvania law as defining "sudden" to exclude discharges occurring continuously or even sporadically over period of time and holding that property damage resulting from improper disposal by insured's hauler of waste shipments containing over 79,000 gallons of hazardous waste delivered to hauler over thirteen-month period ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); Fischer & Porter Co. v. Liberty Mutual Ins. Co., 656 F. Supp. 132, 140 (E.D. Pa. 1986) (applying Pennsylvania law as defining "sudden" to mean abrupt, without warning, and holding that property damage including contamination of wells and aquifers resulting from continuous dumping of toxic chemicals into drains that discharged on ground ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause). However, on May 16, 1994, the Supreme Court of Pennsylvania granted Petition for allowance of appeal in Central Dauphin School Dist. v. PA Mfg. Assoc. Ins. Co., No. 552, 1994 Pa. LEXIS 155 (Pa. May 16, 1994) to decide whether insurers should be permitted to enforce policy exclusions in a manner inconsistent with the representations of insurers to gain approval for exclusion's use, and whether the terms "sudden and accidental" are ambiguous.

[227]Greenville Cty. v. Ins. Reserve Fund, 443 S.E.2d 522 (S.C. 1994) (dispersal of pollutants from landfill gradual and not sudden since plain and ordinary meaning of sudden is temporal, and requires an abrupt or precipitant event to be covered).

[228]United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co., 693 F. Supp. 617, 620-22 (M.D. Tenn. 1988) (applying Tennessee law as defining "sudden" to have temporal meaning combining "unexpected" with "quick," and holding that property damage resulting from insured's delivery of hazardous waste over six-year period to hauler for disposal at hauler's site ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause), *aff'd.*, 875 F.2d 868 (6th Cir. 1989).

[229]Anaconda Minerals Co. v. Stoller Chem. Inc., 773 F. Supp. 1498, 1505-06 (D. Utah 1991) (applying Utah law as defining "sudden" to mean abrupt or instantaneous, and holding property

"sudden and accidental" necessarily imply a temporal element that precludes coverage for all but brief and abrupt discharges, thereby denying coverage for gradual discharges of any kind.

Conversely, state and federal courts applying the state law of sixteen states hold that the terms "sudden and accidental" are ambiguous, do not necessarily imply a temporal element, and that gradual discharges are not excluded from coverage. These states are: Alabama,[232] Alaska,[233] Colorado,[234] Delaware,[235]

---

damage caused by intentional discharges of thousands of tons of flue dust containing hazardous materials and discharges of other hazardous waste stored in drums and above-ground tanks ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); Hartford Accident & Indemnity Co. v. US Fidelity & Guar., 962 F.2d 1484 (10th Cir. 1992) (dumping condensed liquid waste containing Polychlorinated Biphnyls (PCBs) into unlined earthen pit from 1959 to 1974, in case of Utah first impression, not "sudden and accidental" because sudden cannot mean gradual, routine or continuous and cannot be defined without a temporal element).

[230]Asbestos Removal Corp. of Am. v. Guaranty Nat'l. Ins. Co., 846 F. Supp. 33 (E.D. Va. 1994) (deliberate discharge of contaminants over many years not "sudden" which means abrupt, instantly or within a very short period of time), *aff'd.*, No. 94-1192, 1995 U.S. App. LEXIS 4131 (4th Cir. Mar. 2, 1995).

[231]Just v. Land Reclamation Ltd, 456 N.W.2d 570 (Wis. 1990) ("sudden and accidental language ambiguous, and susceptible to meaning only that which is unexpected or unintended, not instantaneous); Patz v. St. Paul Fire & Marine Ins. Co., 15 F.3d 699 (7th Cir. 1994) (Posner, J.) ("sudden and accidental" may be read broadly to mean unintended or unexpected, consistently with drafting history of clause, thereby providing coverage for burial of paint sludge on property for 20 years period by insured), *reh'g, en banc, denied,* 1994 U.S. App. LEXIS 4963 (7th Cir. May 17, 1994); *Cf.* Milwaukee v. Allied Smelting Corp., 344 N.W.2d 523 (Wis. Ct. App. 1983) (pollution exclusion clause relieved insurance company from damages which arose from continuous discharge of acids into city sewer system because discharge was not sudden and accidental).

[232]Hicks v. American Resources Ins. Co., 544 So. 2d 952 (Ala. 1989)(pollution exclusion clause eliminates coverage for intentional spills or discharges, and does not cover industry-related activities); *See also* Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So. 2d 95 (Ala. 1977) (in case of first impression, Alabama Supreme Court after construing all ambiguities in favor of the insured, holds that only intentional discharges are excluded from coverage under "sudden and accidental" language).

[233]MAPCO Alaska Petroleum, Inc. v. Central Nat'l Ins. Co., 795 F. Supp. 941, 945-47 (D. Alaska 1991) (concluding that sudden "in everyday English" has temporal meaning, is also understood to mean "happening without warning," and that focus of phrase "sudden and accidental" is on unexpected or unforeseen nature of event holding that factual issue requiring trial was presented concerning whether discharge of benzene into groundwater from oil refinery operation characterized by innovative environmental-protection system had been unexpected and accidental).

[234]Broderick Inv. Co. v. Hartford Accident & Indemn. Co., 954 F.2d 601, 608 (10th Cir. 1992) (applying Colorado law, determining that phrase "sudden and accidental" is ambiguous, construing "sudden and accidental" to mean unexpected and unintended, and holding that property damage resulting from insured's intentional discharge of toxic chemicals into storage ponds was ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause), *cert. denied*, — U.S. —, 113 S. Ct. 189 (1992); Northglenn v. Chevron U.S.A., Inc., 634 F. Supp. 217 (D. Colo. 1986) (applying Colorado law, finding pollution-exclusion clause to be ambiguous, triggering rule requiring clause to be construed against insurer and holding that whether property damage caused by gasoline leakage from underground line connecting gasoline tanks to dispensers was ineligible for coverage under CGL policy's pollution-exclusion clause could not be determined without factual record).

[235]*New Castle*, 933 F.2d at 1198-1203 (applying Delaware law, finding phrase "sudden and accidental" ambiguous, construing it to mean unexpected and unintended, but because phrase modifies discharge, holding that even if damage was unintended, coverage was unavailable unless discharge is unexpected and unintended; remanding to district court to determine whether discharge of leachate from county-operated landfill was unexpected and unintended), *on remand*, 778 F. Supp. 812, 819-20 (D. Del, 1991) (holding that because leachate not known by county to be contaminant at time of discharge, discharge of leachate as pollutant was unexpected and unintended, invoking coverage under "sudden and accidental" exception), *rev'd*, 970 F.2d 1267, 1270-73 (3d Cir. 1992) (holding that knowledge of contaminating quality of substance discharged is

Georgia,[236] Illinois,[237] Indiana,[238] Kentucky,[239] Louisiana,[240] Massachusetts,[241] Michigan,[242] Minnesota,[243] Ohio,[244] Texas,[245] Washington,[246] Wyoming.[247]

---

irrelevant and construing pollution-exclusion clause as imposing on insured risk of discharge of known contaminants).

[236]*Claussen*, 380 S.E.2d at 688-90 (Ga. 1989) (construing "sudden" to mean unexpected, and holding that cost of remediating property damage caused by dumping over several years of industrial and chemical waste on fifty-two-acre site leased by insured to City of Jacksonville for use as landfill eligible for coverage notwithstanding CGL policy's pollution-exclusion clause). Lumbermens Mutual Cas. Co. v. Plantation Pipeline Co., 447 S.E.2d 89 (Ga. 1994) (petroleum leak from 1975 through 1984 covered because "sudden" means unexpected from standpoint of insured).

[237]Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204 (Ill. 1992) (resolving a split among Illinois Circuit Courts, Supreme Court of Illinois finds that "sudden" means unexpected or unintended, not "abrupt' which would create a contradiction when used with term "accident"); International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co., 522 N.E.2d 758, 768-70, (Ill. App. Ct. 1988) (construing "sudden" to mean "without or on brief notice, abruptly or hastily" and holding that property damage caused by insurer's activities in regular course of business including emptying used barrels of chemicals and toxic wastes on grounds of insured's premises ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); Reliance Ins. Co. v. Martin, 467 N.E.2d 287, 289-90 (Ill. App. Ct. 1984) (construing "sudden and accidental" non-temporally to mean unexpected and unintended, and holding that factual issues were presented concerning whether property damage and personal injuries caused by carbon monoxide and soot regularly escaping from parking garage and entering adjacent condominium unit were eligible for coverage under "sudden and accidental" exception to pollution-exclusion clause).

[238]Great Lakes Chem. Corp. v. Int'l. Surplus Lines Ins. Co., 638 N.E.2d 847 (Ind. App. 1994) (construction of insurance contract as to exclude pollution renders insurance illusory, and therefore, coverage cannot be excluded without reaching meaning of whether "sudden and accidental" necessarily implies temporal element); *Cf.* Barmet of Indiana v. Security Ins. Group, 425 N.E.2d 201, 202 (Ind. Ct. App. 1981) (emissions from aluminum recycling plant reducing visibility on highway causing death not "sudden and accidental" because discharge intentional).

[239]James Graham Brown Found. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273 (Ky. 1991) (waste water discharges at wood treatment plants covered because "intended and unexpected" language ambiguous and requires proof that insured expected or intended the damage) (the dissent sets out the overwhelming support for the notion that consideration of the intent of the discharge and not the damages (as the majority suggests) is required); United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31, 34-35 (6th Cir. 1988) (applying Kentucky law to define "sudden" by reference to temporal element that includes immediate and unexpected, and holding that property damage caused by regular and continuing discharges of coal dust over seven to eight years for which Kentucky air-pollution authorities had issued series of citations did not qualify for coverage under "sudden and accidental" exception to pollution-exclusion clause).

[240]S. Cent. Bell Tel. Co. v. Ka-Jon Food Stores of LA, 644 So.2d 357 (La. 1994) (non-environmental damages not barred by absolute pollution exclusion clause, but read under "sudden and accidental" exception and covered because gasoline leak destroying underground cables was not intended or expected by insured), *on reh'g, vacated, remanded*, 647 So.2d 1268 (La. 1994).

[241]Allstate Ins. Co. v. Quinn Constr. Co., 713 F. Supp. 35, 41 (D. Mass. 1989) (applying Massachusetts law and holding property damage caused by undetected leak in two-inch pipe discharging five to six gallons of gasoline five times weekly over six-year period eligible for coverage under "sudden and accidental" exception to pollution-exclusion clause), *vacated*, 784 F. Supp. 927 (D. Mass. 1990).

[242]United States Fidelity & Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139, 1155-61 (W.D. Mich. 1988) (rejecting temporal definition of term "sudden," and holding insurers obligated to provide defense to insured in underlying action alleging sudden and accidental discharge of hazardous waste in insured's regular course of operations absent showing by insurers that allegations seek coverage for discharges barred by pollution-exclusion clause).

[243]Board of Regents of the Univ. of Minn. v. Royal Ins. Co. of Am., 517 N.W.2d 888 (Minn. 1994) (sudden means opposite of gradual and does not include release of asbestos fibers over 20 year period) (overruling Grinnell Mut. Reins. Co. v. Wasmuth, 432 N.W.2d 495, 497-500 (Minn. Ct. App. 1988) (construing "sudden" to mean unexpected, and holding that property damage resulting from improper installation of insulation causing gradual emission of formaldehyde in residential premises eligible for coverage under "sudden and accidental" exception to pollution-exclusion clause)).

As of this writing, the courts of five states, Nevada,[248] New Jersey,[249] New York,[250] South Dakota,[251] Vermont[252] have decided that the sudden and acci-

---

[244]Morton Int'l, Inc. v. Continental Ins. Co., No. C-930613 1995, Ohio App. LEXIS 182 (Ohio Ct. App. Jan. 25, 1995) ("sudden and accidental" is a virtual restatement of the policy definition of occurrence in that coverage is provided so long as the damage was unexpected and unintended by the insured); *Cf.* Hybud Equip. Corp. v. Sphere Drake Ins. Co., 597 N.E.2d 1096 (Ohio Sup. Ct. 1992) ("sudden" not ambiguous and not synonymous with "expected" but has temporal meaning).

[245]Union Pac. Resources Co. v. Aetna Cas. & Sur. Co., No. 293219CV, 1994 Tex. App. LEXIS 3014 (Tex. App. Ct. Dec. 14, 1994) (routine and deliberate discharge of waste at landfill which precludes coverage as "sudden and accidental" a genuine issue of material fact barring summary judgment); *See also* Circle "C" Ranch Co. v. St. Paul Fire & Marine Ins. Co, No. 391388-CV, 1993 Tex. App. LEXIS 1291 (Tex. App. Ct. May 6, 1993) (in case of first impression as to meaning of "sudden and accidental," court held damage caused aerial spraying of crops to be "sudden and accidental" because damage unexpected and unanticipated by insured).

[246]Key Tronic Corp. v. Aetna Fire Underwriters Ins. Co., 881 P.2d 201 (Wash. 1994) (leaching of liquid waste from landfill sudden and accidental because event not expected nor intended by insured); United Pacific Ins. Co. v. Van's Westlake Union, Inc., 664 P.2d 1262, 1266-67 (Wash. Ct. App. 1983) (finding pollution-exclusion clause ambiguous, intended solely to bar coverage for active polluters, construing clause to bar coverage only for expected or intended events, and holding that claims for property damage caused by 80,000-gallon gasoline leak from small hole in underground pipe continuing over several months subject to CGL carrier's duty to defend under "sudden and accidental" exception to pollution-exclusion clause).

[247]Hutchinson Oil Co. v. Federated Serv. Ins. Co., 851 F. Supp. 1546 (D. Wy. 1994) (under Wyoming law, leaking oil at insured's recycling plant over a period of 20 years may be "sudden and accidental," creating insurer's duty to defend action).

[248]Crystal Bay Gen. Improvement Dist. v. Aetna Cas. & Sur. Co., 713 F. Supp. 1371 (D. Nev. 1989) (whether occurrence was a result of negligent construction and disposal practices or as a result of sudden and accidental spillage is a genuine issue of material fact making summary judgment inappropriate).

[249]New Jersey was the first state to construe the sudden and accidental language in Lansco, Inc. v. Dept. of Environmental Protection, 350 A.2d 520 (N.J. Ch. Div. 1975), and Broadwell Realty Serv., Inc., v. Fidelity & Cas. Co., 528 A.2d 76 (App. Div. 1987). In CPC Int'l, 962 F.2d 77 (1st Cir. 1992), the Court of Appeals, applying New Jersey Law, predicting on basis of *New Castle*, 833 F.2d 1162, that the New Jersey Supreme Court would construe pollution-exclusion clause to be ambiguous and would follow holding in *Broadwell*, and remanding to district court to determine whether property damage for which indemnity was sought had been intended or expected from standpoint of insured. However, on July 21, 1993, the New Jersey Supreme Court spoke on the meaning of "sudden and accidental" in Morton Int'l., Inc., v. General Accident Ins., Co. of Am., 629 A.2d 831 (N.J. 1993) *cert. denied*, — U.S. —. 114 S.Ct. 2764 (1994) finding the term to suggest quick or abrupt, but finding coverage to exist based on the equitable construction of clause given the insurance industries representations to regulators at the time of its approval.

[250]Avondale Indus., Inc. v. Travelers Indem. Co.,, 887 F.2d 1200, 1204-06 (2d Cir. 1989) (applying New York law, holding that insurer has duty to defend insured in shipbuilding and repairing enterprise that had sold chemical compounds and salvage oil to operator of twenty-year-old Louisiana dump site against litigation by private plaintiffs and State of Louisiana seeking damages from insured as "generator" of waste at dump site; duty to defend exists absent proof that discharges of pollutants at dump site were not sudden and accidental), *cert. denied*, 496 U.S. 906, (1990); National Grange Mut. Ins. Co. v. Continental Casualty Co., 650 F. Supp. 1404, 1409-12 (S.D.N.Y. 1986) (applying New York law, finding pollution-exclusion clause to be ambiguous, "sudden" not limited to instantaneous happening and construing "sudden and accidental" to mean unexpected and unintended; denying insurer's summary judgment motions based on pollution-exclusion clause to preclude coverage of insured for property damage caused by discharges of ash in operation of scrap-metal business in view of factual issue concerning insured's knowledge that ash constituted hazardous substance); Colonie Motors, Inc. v. Hartford Accident & Indem. Co., 538 N.Y.S.2d 630, 631-32 (App. Div. 1989) (concluding that phrase "sudden and accidental" should be construed not in abstract but in context of relevant facts, and holding property damage caused by crack in underground pipe of containment unit installed to prevent oil leakage and resulting in undetected and continuing discharge of waste oil that had contaminated groundwater eligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); Niagara County v. Utica Mut. Ins. Co., 439 N.Y.S.2d at 540-42 (construing pollution-

dental exception to the pollution exclusion clause provides or precludes coverage on alternative grounds that do not include whether the discharge was "sudden" in the temporal sense and allow recovery for gradual, but unintentional discharges subject to certain limitations.[253]

Most importantly the courts of nine states, Hawaii, Idaho,[254] Iowa,[255] Mississippi,[256] Nebraska,[257] New Mexico,[258] North Dakota, Oklahoma,[259] Rhode Is-

---

exclusion clause to apply only to "actual polluters," and holding that pollution-exclusion clause did not bar County's right to defense from CGL carrier in underlying "Love Canal" litigation alleging that County had failed to warn and safeguard citizens from dangers of toxic-waste discharges); Farm Family Mut. Ins. Co. v. Bagley, 409 N.Y.S.2d 294, 295-96 (App. Div. 1978) (finding pollution-exclusion clause ambiguous, and holding that factual issue presented on whether property damage to crops caused by intentional spraying of chemicals on insured's fields that accidentally had been dispersed to adjacent farmland eligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); Allstate Ins. Co. v. Klock Oil Co., 426 N.Y.S.2d 603, 604-05 (App. Div. 1980) (construing "sudden" non-temporally, and holding that property damage allegedly caused by undetected leak from insured's gasoline storage tank eligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); Technicon Elecs. Corp. v. American Home Assurance Co., 542 N.E.2d 1048, 1050-51 (N.Y. 1989) (holding property damage caused by intentional discharges of toxic wastes into waterway ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); Ogden Corp. v. Travelers Indem. Co., 924 F.2d 39, 42-43 (2d Cir. 1991) (applying New York law, construing "sudden" to describe discharges occurring over short period of time, and holding pollution-exclusion clause bars carrier's obligation to defend or indemnify insured in underlying litigation alleging that insured had engaged in continuous discharge of pollutants over period of thirty-three years); EAD Metallurgical, Inc. v. Aetna Casualty & Sur. Co., 905 F.2d 8, 10-11 (2d Cir. 1990) (holding that pollution-exclusion clause barred insurer's duty to provide coverage in underlying litigation that alleged insured willfully had discharged radioactive substances into environment over six-year period); State of New York v. Amro Realty Corp., 697 F. Supp. 99, 110 (N.D.N.Y. 1988) (applying New York law as defining "sudden" to mean happening without previous notice or on very brief notice, unforeseen, unexpected, unprepared for, and holding that property damage caused by intentional discharges of chemical solvents into drains and septic systems by insured's lessee over twenty-year period ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause), *aff'd in part, rev'd in part,* 936 F.2d 1420 (2d Cir. 1991).

[251] American Universal Ins. Co. v. Whitewood Custom Treaters, Inc., 707 F. Supp. 1140 (D.S.D. 1989) (damage caused by frozen pipes breaking is both sudden and accidental because insured did not knowingly create or permit the harm to exist); Benedictine Sisters of St. Mary's Hosp. v. St. Paul Fire & Marine Ins. Co., 815 F.2d 1209 (8th Cir. 1987) (discharge of soot from malfunctioning boiler system sudden and accidental, and covered by insurance policy); *Cf.* Headley v. St. Paul Fire & Marine Ins. Co., 712 F. Supp. 745 (D.S.D. 1989) (damage from waste deposited in NoDak dam system was not sudden and accidental to the extent that the insured reasonably knew that the dam might fail).

[252] E.B. & A.C. Whiting Co. v. Hartford Ins. Co., 838 F. Supp. 863 (D. Vt. 1993) (sudden and accidental pollution exclusion clause invalid and unenforceable by insurer under Vermont law); *See also* Gerrish Corp. v. Universal Underwriters Ins. Co., 947 F.2d 1023 (2nd Cir. 1991) (Vermont's insurance commission's ban on exclusion clause lawful).

[253] *See infra* notes 340-68.

[254] Hill v. Sullivan Mining Co., 201 P.2d 93 (Ida. 1948) (in workmen's compensation case, employee's ten year progression of tuberculosis was not "sudden," as in "suddenness of the onslaught," to justify compensation).

[255] Weber v. IMT Ins. Co., 462 N.W.2d 283 (Iowa 1990) (without reaching meaning of "sudden" court holds odor from hog manure placed in road tainting neighbor's sweet corn crop not covered as "accidental" because "accidents" do not include intentional act of discharging hog manure).

[256] First United Bank of Poplarville v. Reid, 612 So. 2d 1131 (Miss. 1992) ("sudden death" in life insurance contract means abrupt and unexpected).

[257] John Craft Chevrolet, Inc. v. Hawkeye-Security Ins. Co., 1993 Neb. App. LEXIS 396, No. A92-237 (Neb. Ct. App. Oct. 5, 1993) (interpretation of ambiguity in term or provision in an insurance policy presents a question of law).

[258] Espander v. City of Albuquerque, 849 P.2d 384 (N.M. Ct. App. 1993) (city immunity based on pollution exclusion language in statute does not save city from liability for water and sewer

land[260] have not spoken directly on the meaning of the "sudden and accidental" exception in the pre-1986 pollution exclusion clause, and the construction of the clause under the law of these states by both state and federal courts is uncertain.

This uncertainty is compounded by several jurisdictions that have changed their approach to the meaning of the "sudden and accidental" exception to the pollution exclusion clause. For example, since 1993 the supreme courts of Florida[261] and Minnesota[262] have changed their position and now interpret sudden to have a strict temporal meaning.

In 1993 the Supreme Court of New Jersey[263] abandoned the temporal distinction, and in 1991, the Supreme Court of Kentucky abandoned a temporal construction of the term "sudden" and now provides coverage for gradual and even expected discharges.[264]

The meaning of the "sudden and accidental" exception to the pollution exclusion clause has finally made its way before the Pennsylvania Supreme Court. On May 16, 1994, the Supreme Court of Pennsylvania granted petition for allowance of appeal in *Central Dauphin School Dist. v. Pennsylvania Mfgs. Assoc. Ins. Co.*, to decide whether insurers should be permitted to enforce policy exclusions in a manner inconsistent with the representations of insurers to gain approval for exclusion's use, and whether the terms "sudden and accidental" are ambiguous.[265]

Conversely under Florida law, prior to *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*,[266] "sudden and accidental" meant unexpected and unintended, and covered damages from intentional discharges where the result was unexpected or unintended.[267] However, in 1993, the Florida Supreme

---

run-off onto plaintiffs' property (quoting New Castle County v. Hartford Accident & Indem. Co., 970 F.2d 1267 (3d Cir. 1993)).

[259]*See* Continental Oil Co. v. National Fire Ins. Co., 541 P.2d 1315 (Okla. 1975) ("sudden and accidental" in boiler and machinery policy means unintended and unexpected); *See also* Waggoner v. Town & Country Mobile Homes, Inc., 808 P.2d 649, 660 (Okla. 1990) (construing "sudden and calamitous" in products liability action) (Wilson, J. dissenting).

[260]St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195 (1st Cir. 1994) (under both Rhode Island and New Jersey law "sudden and accidental" at the very least mean unintended and unexpected).

[261]*See infra* notes 264-69 and accompanying text.

[262]*See infra* notes 270-72 and accompanying text.

[263]Morton Int'l., Inc., v. General Accident Ins., Co. of Am., 629 A.2d 831 (N.J. 1993) (finding the term to suggest quick or abrupt, but finding coverage to exist based on equitable construction of clause given insurance industries representations to regulators at the time of its approval) *cert. denied,* — U.S. —, 114 S. Ct. 2764 (1994). *Morton* involved the contamination of Berry's Creek in New Jersey. Beneath its surface, the tract is saturated by an estimated 268 tons of toxic waste, primarily mercury. For a stretch of several thousand feet, the concentration of mercury in Berry's Creek is the highest found in fresh water sediments in the world. *Id.* at 834.

[264]James Graham Brown Found. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273 (Ky. 1991) (waste water discharges at wood treatment plants covered because "intended and unexpected" language ambiguous and requires proof that insured expect or intended the damage).

[265]No. 552, 1994 Pa. LEXIS 155 (Pa. May 16, 1994).

[266]No. 78293, 1993 Fla. LEXIS 1128 at *1 n.1 (Fla. July 1, 1993).

[267]*See* Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co., 668 F. Supp. 1541 (S.D. Fla. 1987) (holding that claims for damages based on contamination of aquifer resulting from intentional discharges of transformer oil that, unknown to insured, contained PCBs was eligible for coverage under CGL policy within as "sudden and accidental" exception to pollution-exclusion clause), *partial summ. judgment granted*, Uinited States v. Pepper's Stel & Alloys, Inc.,

Court announced in *Dimmitt Chevrolet* that the terms "sudden and accidental" are unambiguous and include the sense of immediacy or abruptness.[268] In *Dimmitt Chevrolet*, the Court held that the pollution-exclusion clause barred coverage for damages caused by discharges of oil at the insured's plant site in the regular course of the insured's business of selling used crankcase oil.[269] Although this concept of barring coverage for intentional discharges was not new in Florida, and was the prevailing law at least in federal court,[270] the Florida Supreme Court has now joined the ranks of nineteen other states in precluding coverage for all gradual discharges whether unexpected or unintended.[271]

Similarly, in 1994, Minnesota courts joined with those of Florida when its Supreme Court announced in *Board of Regents of the Univ. of Minn. v. Royal Ins. Co. of Am.*[272] that sudden means opposite of gradual and does not include unexpected release of asbestos fibers over 20 year period.[273]

As more and more state courts begin to speak out, or change their position on the meaning of the "sudden and accidental" pollution exclusion clause, not only do choice of law consideration take on added significance, but also the outcome of federal courts interpreting state law becomes more complicated and befuddled.

For example, federal courts construing Ohio law have found "sudden and accidental" to have a temporal element.[274] However the Ohio state courts have not required "sudden and accidental" to have a strict temporal meaning.[275]

---

823 F. Suypp. 1574 (S.D. Fla. 1993); Payne v. United States Fidelity & Guar. Co., 625 F. Supp. 1189, 1191-93 (S.D. Fla. 1985) (applying Florida law, construing "sudden and accidental" as meaning unexpected and unintended and holding that property damage allegedly caused by insured's refusal to grant EPA contractors access to site and failure to contain spread of PCBs discharged by metal-recovery business on adjacent property eligible for coverage under "sudden and accidental" exception to CGL policy pollution-exclusion clause).

[268]No. 789293, 1993 Fla. LEXIS 1128 at *3 (Fla. July 1, 1993).

[269]*Id.* at *2.

[270]Hayes v. Maryland Casualty Co., 688 F. Supp. 1513, 1515 (N.D. Fla. 1988) (applying Florida law to construe pollution exclusion clause to bar coverage for property damage caused by pollution extending over substantial period of time and holding property damage caused by intentional deposits on insured's property of filtration material from dry-cleaning fluid over extended period ineligible for coverage under pollution-exclusion clause whether or not insured had expected or intended damage to occur).

[271]No. 78293, 1993 Fla. LEXIS 1128 (Fla. July 1, 1993).

[272]517 N.W.2d 888 (Minn. 1994).

[273]Board of Regents of the Univ. of Minn. v. Royal Ins. Co., 517 N.W.2d 898, 891 (Minn. 1994); *Cf.* Grinnell Mut. Reins. Co. v. Wasmuth, 432 N.W.2d 495, 497-500 (Minn. Ct. App. 1988) (construing "sudden" to mean unexpected, and holding that property damage resulting from improper installation of insulation causing gradual emission of formaldehyde in residential premises eligible for coverage under "sudden and accidental" exception to pollution-exclusion clause).

[274]Borden, Inc. v. Affiliated FM Ins. Co., 682 F. Supp. 927, 930 (S.D. Ohio 1987) (applying Ohio law as defining "sudden" to mean "happening without previous notice or with very brief notice" and holding property damage resulting from regular and intentional deposits of radioactive and hazardous wastes over six years, creating thirty-five-foot pile covering thirty-five to forty acres, ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause), *aff'd*, 865 F.2d 1267 (6th Cir.), *cert. denied*, 493 U.S. 817 (1989).

[275]Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co., 477 N.E.2d 1227, 1233-35 (Ohio Ct. App. 1984) (finding pollution-exclusion clause ambiguous, construing "sudden" non-temporally to mean unexpected, and holding that property damage caused by continuing course of irresponsible waste-disposal practices by operator of hazardous-waste facility hired by insured

Recently, in *Morton Int'l., Inc. v. Continental Ins. Co.*,[276] the Ohio State Court of Appeals found the "sudden and accidental" language to be a virtual restatement of the policy definition of occurrence in that coverage is provided so long as the damage was unexpected and unintended by the insured.[277]

However, under the law set out in *Erie R. R. Co. v. Tompkins*,[278] since the Ohio State Supreme Court has failed to address this issue, the federal courts will still have the discretion to predict how the Ohio Supreme Court would rule on substantive issues of Ohio law. Under these circumstances, federal courts can decline jurisdiction and certify this issue to the respective state supreme courts for disposition.[279] For example, in 1995, the United States Circuit Court of Appeals for the First Circuit certified the issue of the meaning of the language in the clause to the Rhode Island Supreme Court.[280]

PART III

The Environmental Insurance Resolution Fund: An Overview

Due in part to the increasingly divergent holdings in both state and federal courts on the meaning of the "sudden and accidental" exception to the pollution exclusion clause,[281] not to mention the 300 million dollars annually spent on environmental insurance litigation,[282] Congress has declared that the Superfund program is in "deep trouble . . . [I]t is a harsh, punitive and unfair system that has set off a chain reaction of lawsuits leading to the meltdown of the entire cleanup program."[283]

While the goal of CERCLA is to expeditiously clean up the more than 1,211 Superfund sites in the country,[284] more than one third of the resources expended under Superfund have been used for administrative expenses and liti-

---

and others to dispose of hazardous waste subject to insurer's duty to defend under "sudden and accidental" exception to pollution-exclusion clause); Kipin Indus., Inc. v. American Universal Ins., Co., 535 N.E.2d 334, 338 (Ohio Ct. App. 1987) (finding pollution-exclusion clause ambiguous, relying on 1970 IRB submission to state regulators construing clause to bar coverage only when damage was intended or expected, and holding that claims for property damage resulting from continuous discharges of toxic chemicals by firm hired by insured's affiliate properly to dispose of hazardous waste subject to duty to defend under "sudden and accidental" exception to pollution-exclusion clause).

[276]No. C-930613, 1995 Ohio App. LEXIS 182 at *1 (Ohio Ct. App. Jan. 25, 1995).

[277]*Id.*

[278]304 U.S. 64 (1938).

[279]*See* 28 U.S.C. § 1367 (c). The district court may decline to exercise supplemental jurisdiction over a claim if — (1) the claim raises a novel or complex issue of State law. *Id.*

[280]CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co., No. 94-1276, 1995 U.S. App. LEXIS 1389 (1st Cir. Jan. 25, 1995) (the first circuit certified the issue of when an "occurrence" takes place under Rhode Island law when a undetected spill migrates for five years before discovery).

[281]*See supra* notes 213-62 and accompanying text for discussion.

[282]*Proposals to Reauthorize the Superfund Program: Hearings on H.R. 3800 Before House Subcommittee on Energy and Commerce*, 103rd Cong., 1 st Sess. (February 3, 1994) (testimony of Carol M. Browner, Administrator United States Environmental Protection Agency).

[283]*Issues Relevant to Superfund Liability: Hearings Before the Subcommittee on Environmental Energy, and National Resources Committee of the House Committee on Government Operations*, 102nd Cong., 2d Sess. (1993) [hereinafter *McCory*] (testimony of Martin A. McCrory, Senior Attorney to the National Resources Defense Council).

[284]56 Fed. Reg. 35,840 (1991).

gation costs to determine the liability of PRPs rather than the actual clean up of these sites.[285]

In 1994, based on the recommendations of the insurance industry, United States Environmental Protection Agency Administrator, Carol M. Browner, advocated the establishment of a new Environmental Insurance Resolultion Fund ("EIRF")[286] to ensure resolution of insurance claims related to Superfund liability for pre-1986 disposal of waste to ensur[e] interstate equity in such resolutions.[287]

On February 3, 1994, House Bill 3800[288] was submitted to Congress to amend CERCLA.[289] This Act attempts to establish the Environmental Insurance Resolution Fund ("EIRF").[290] The stated goal of EIRF is to offer a comprehensive resolution of disputes between insureds and insurers concerning liability for remediation costs[291] under CERCLA.[292] Upon passage, the Bill will automatically stay all litigation between GCL insurers and their insureds concerning coverage for environmental clean-up costs.[293] Those insureds that

---

[285]E. Donald Elliot, *Superfund: EPA Success, National Debacle?*, 6 NAT. RESOURCE & ENVT. 11 (Winter 1992).

[286]*See* H.R. 3800, 103rd Cong., 1st Sess. (1994), Title VIII-Environmental Insurance Resolution Fund, § 801. SHORT TITLE. This title may be cited as the "Environmental Insurance Resolution and Equity Act of 1994."

[287]*Id.* at § 801.

[288]H.R. 3800, 103rd Cong., 1st Sess. (1994).

[289]42 U.S.C. § 9601 (1980).

[290]TITLE VIII § 802. ENVIRONMENTAL INSURANCE RESOLUTION FUND. (a) ENVIRONMENTAL INSURANCE RESOLUTION FUND ESTABLISHED. There is hereby established the Environmental Insurance Resolution Fund (hereinafter referred to as the "Resolution Fund"). (b) OFFICES.-The principal office of the Resolution Fund shall be in the District of Columbia or at such other place as the Resolution Fund may from time to time prescribe. (c) STATUS OF RESOLUTION FUND.-Except as expressly provided in this title, the Resolution Fund shall not be considered an agency or establishment of the United States. The members of the Board of Trustees shall not, by reason of such membership, be deemed to be officers or employees of the United States.

[291]"Remedy" or "Remedial Action" as defined in 42 U.S.C. § 9601 (24) means: [T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare of the environment. This term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protections using dykes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation, of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, on-site treatment or incineration, provision of alternative water supplies, any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the cost of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may be otherwise necessary to protect the public health or welfare; the term includes off-site transport and off-site storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials. *Id.* (25) The terms "respond" or "response" means remove, removal, remedy, and remedial action, "all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto under CERCLA." 42 U.S.C. § 9601 (25).

[292]H.R. No. 3800. 103rd Cong., 1st Sess. § 802(g).

[293]TITLE VIII § 804. STAY OF PENDING LITIGATION. (a) IN GENERAL.- (1) Except as provided in this section, enactment of this title operates as a stay, applicable to all person other than the United States, of the commencement or continuation, including the issuance or employ-

have been named as potentially responsible parties ("PRPs") in connection with the disposal of hazardous waste prior to December 31, 1985 will be eligible[294] to recover a portion[295] of certain, eligible costs[296] provided that they can demonstrate coverage under a General Comprehensive Liability ("GCL") insurance policy for seven years within any consecutive fourteen year period prior to 1986.[297] The EIRF will only reimburse that portion of CERCLA costs that are less that the policyholder's coverage and cannot exceed $15,000,000.[298] If the policyholder cannot demonstrate coverage for the entire seven year period, it may recover an amount[299] no greater than one-seventh of $15,000,000

---

ment of process or service of any pleading, motion, or notice, of any judicial, administrative, or other action with respect to claims for indemnity or other claims arising from a contract for insurance described in section 802(g)(2)(A)(ii) concerning insurance coverage for eligible costs as defined in section 802(g)(2)(B)(i).

[294]TITLE VIII § 802(g)(2)(A)(i) STATUS AS POTENTIALLY RESPONSIBLE PARTY. - An eligible person-(I) shall have been named at any time as a potentially responsible party pursuant to the Comprehensive Environmental Response, Compensation and Liability Act with respect to an eligible site on the National Priority List in connection with a hazardous substance that was disposed of on or before December 31, 1985; or (II) is or was liable, or alleged to be liable, at any time for removal (as defined in section 101(23) of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601(23)) at any eligible site in connection with a hazardous substance that was disposed of on or before December 31, 1985.

[295]*See supra* note 24.

[296]TITLE VIII § 803(g)(2)(B) ELIGIBLE COSTS. (i) IN GENERAL.
For purposes of this subsection, the term "eligible costs" means costs described in clause (ii) or (iii) incurred with respect to a hazardous substance that was disposed of on or before December 31, 1958- (I) for which an eligible person has not been reimbursed; or (II) for which an eligible person has been reimbursed and that are the subject of a dispute between the eligible person and an insurer.

(ii) NPL SITES.-With respect to an eligible site described in subparagraph (C)(i), eligible costs means costs described in clause (i)-

(I) of response (as defined in section 101(25) of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601(25));

(II) for natural resources damages; or

(III) to defend potential liability (including, but not limited to, attorney's fees, costs of suit, consultant and expert fees and costs, and expenses for testing and monitoring).

(iii) NON-NPL SITES.-With respect to an eligible site described in paragraph (C)(ii), eligible costs means costs described in clause (i)- (I) of removal (as defined in section 101(23) of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601(23)); or (II) to defend potential liability (including, but not limited to, attorney's fees, costs of suit, consultant and expert fees and costs, and expenses for testing and monitoring).

[297]TITLE VIII § 802(g)(2)(A)(ii) INSURANCE COVERAGE.
An eligible person shall have demonstrated, to the satisfaction of the Resolution Fund, that such person had entered into a valid contract for comprehensive general liability (including broad form liability, general liability, commercial general liability, and excess or umbrella coverage) or commercial multi-peril (including broad form property, commercial package, special multi-peril, and excess or umbrella coverage) insurance coverage- (I) for any seven years in any consecutive 14 year period prior to January 1, 1986; or (II) in the case of a person that has been in existence for less than 14 years prior to January 1, 1986, for at least one-half of such years of existence. For purposes of this clause, a valid contract for insurance shall not include any contract for insurance with respect to which a person has entered into a settlement with an insurer providing, or where a judgment has provided, that the contract has been satisfied and that such person has no right to make any further claims under such contract.

[298]TITLE VIII § 802(g)(2)(B)(iv) LIMIT ON ELIGIBLE COSTS. (I) Except as provided in subclause (II), the eligible costs of an eligible person may not exceed- (aa) $15,000,000 in the case of an eligible person that has demonstrated insurance coverage pursuant to subparagraph (A)(ii)(I); or (bb) an amount equal to one-seventh of $15,000,000 for each year of insurance coverage, in the case of an eligible person that has demonstrated insurance coverage pursuant that has demonstrated insurance coverage pursuant to subparagraph (A)(ii)(II).

[299]*See infra* note 303.

for each year that it can demonstrate insurance,[300] and this amount is offset by any settlements made under an insurance contract.[301]

However, the EIRF will only make a resolution offer[302] to reimburse a portion[303] of CERCLA costs based on the relative favorability[304] of State insurance law where the site is located or the litigation is venued.[305] If the EIRF

---

[300]*See supra* note 294.

[301]TITLE VIII § 802(g)(2)(B)(iv)(II). The limitation provided in subclause (I) shall not apply to an eligible person that, when filing a request for a resolution offer with the Resolution Fund, presents evidence to the satisfaction of the Resolution Fund that the limits on valid contracts of insurance (including per occurrence, aggregate, primary, excess or other limits) of such eligible person prior to January 1, 1986, cumulatively exceed the amount determined pursuant to subclause (I) without reference to any time period. For purposes of this clause, a valid contract for insurance shall not include any contract for insurance with respect to which an eligible person has entered into a settlement with an insurer providing, or where a judgment has provided, that the contract has been satisfied and that such eligible person has no right to make any further claims under such contract.

[302]TITLE VIII § 802(g)(3) RESOLUTION OFFERS. (A) IN GENERAL.-The Resolution Fund shall offer one comprehensive resolution to each eligible person. The offer shall- (i) be for a percentage of all the eligible costs of such eligible person incurred in connection with all eligible sites, determined pursuant to paragraph (4); and (ii) state the limitation on eligible costs, if any, applicable to the eligible person pursuant to paragraph (2)(B)(ii). (B) REQUESTS FOR RESOLUTION OFFERS.-An eligible person shall file a request for resolution from the Resolution Fund in such form and manner as the Resolution Fund shall prescribe. No such request shall be deemed received by the Resolution Fund before the date final regulations concerning State percentage categories are published in the Federal Register pursuant to paragraph 4(B)(iii). The Resolution Fund shall make an offer of resolution, determined pursuant to paragraph (4), to each eligible person that has filed a request for an offer of resolution not later than 180 days after the receipt of a complete request as determined by the Resolution Fund.

[303]*See infra* note 307.

[304]TITLE VIII § 802(g)(2)(C)(4)(B)(i) IN GENERAL. The Congress finds that as of January 1, 1994, State law generally is more favorable to eligible persons that pursue claims concerning eligible costs against insurers in some States, that State law generally is more favorable to insurers with respect to such claims in some States, and that in some States the law generally favors neither insurers nor eligible persons with respect to such claims or that there is insufficient information to determine whether such law generally favors insurers or eligible persons with respect to such claims. The Congress further finds that considerations of equity and fairness require that resolution offers made by the Resolution Fund must vary to reflect the relative state of the law among the several States.

[305]TITLE VIII § 802(g)(4) DETERMINATION OF RESOLUTION OFFERS. (A) IN GENERAL.-The Resolution Fund shall determine a resolution offer-

(i) in the case of an eligible person that has established only one State litigation venue pursuant to subparagraph (C), by applying the State percentage determined pursuant to subparagraph (B)(iii) to the established State litigation venue;

(ii) in the case of an eligible person that has established two or more State litigation venues pursuant to subparagraph (C), each site with respect to which a State litigation venue has been established shall be accorded equal value and the applicable percentage shall be the weighted average of all established State litigation venues; or

(iii) in the case of an eligible person that has not established any State litigation venue pursuant to subparagraph (C)-

(I) if the eligible person has potential liability in connection with only one hazardous waste site, by applying the State percentage determined pursuant to subparagraph (B)(iii) to the State in which the site is located; or

(II) if the eligible person has potential liability in connection with more than one hazardous waste site, each site shall be accorded equal value and the applicable percentage shall be the weighted average of all States in which the sites are located. . . (C) LITIGATION VENUE.-For purposes of this subsection, litigation venue is considered established with respect to an eligible person if- (i) on or before December 31, 1993, the eligible person had pending in a court of competent jurisdiction a complaint or cross complaint against an insurer with respect to eligible costs at an eligible site; and (ii) no motion to change venue with respect to such complaint was pending on or before January 31, 1994.

determines[306] that State insurance law is relatively more favorable to insureds, policyholders will be offered 60% of eligible costs.[307] If State insurance law is less favorable, only 20% of eligible costs will be covered.[308] In all other States, 40% of eligible costs will be covered.[309] No resolution offer made by the EIRF is will be subject to review by any court.[310] In addition, all resolution offers will be reduced by the pre-settlement litigation costs incurred by insurer, and the EIRF will reimburse the insurer for these amounts.[311]

If a policyholder accepts a resolution offer from the EIRF, it must agree to waive any existing or future claims against an insured for CERCLA costs, and agree to dismiss all pending claims against its GCL insurers.[312] Upon acceptance by the EIRF, a portion[313] of the previously incurred, eligible, CERCLA costs will be paid over an eight year period.[314] If an insured rejects a resolution offer, litigates its claim, and recovers a less favorable judgment, the insurer shall be required to reimburse the insurer for 20% of the insurer's litigation costs.[315] In the event the insured recovers a judgment that is more favorable

---

[306]TITLE VIII § 802 (g)(4)(B)(ii) PROPOSED REGULATIONS. The Resolution Fund shall examine the law in each State as of January 1, 1994. Not later than 120 days after the date of enactment of this title, the Resolution Fund shall publish in the Federal Register a notice of proposed rulemaking soliciting public comment for 60 days and classifying States into [categories]. . .

[307]TITLE VIII § 802(g)(4)(B)(ii)(B) STATE PERCENTAGE. (I) 20 percent, in the case of the ten States in which the Resolution Fund determines that State law generally is most favorable to insurers relative to the other States. (II) 60 percent, in the case of the ten States in which the Resolution Fund determines that State law generally is most favorable to eligible persons relative to the other States. (III) 40 percent, in the case of all other States.

[308]*Id.*

[309]*Id.*

[310]TITLE VII § 802(g)(3)(C) REVIEW OF RESOLUTION OFFERS. No resolution offer made by the Resolution Fund shall be subject to review by any court.

[311]TITLE VIII § 802(g)(5)(B)(IV) ADJUSTMENT FOR CERTAIN DUTY-TO-DEFEND COSTS. If an insurer has incurred and paid costs pursuant to a duty-to-defend clause contained in a contract for insurance described in paragraph (2)(B), and such costs are the subject of a dispute between the eligible person and an insurer, the payment of a resolution to an eligible person shall be reduced by such amount, and the Resolution Fund shall pay such amount to the insurer. If such costs were paid by the insurer on or before the date the eligible person accepted a resolution offer made by the Resolution Fund, payment to an insurer under this subclause shall be made in equal annual installments over a period of eight years, and interest shall not accrue with respect to such costs. The Resolution Fund may, in its sole discretion, make such payments over a shorter period if the aggregate costs do not exceed $50,000.

[312]TITLE VIII § 802(g)(5)(B)(i) WAIVER OF INSURANCE CLAIMS.
The Resolution Fund shall not make payments to an eligible person unless the eligible person agrees in writing, subject to reinstatement described in clause (ii)- (I) to waive any existing and future claims against any insurer for eligible costs; and (II) to stay or dismiss each claim pending against an insurer for eligible costs.

[313]*See supra* note 303.

[314]TITLE VIII § 802(g)(5)(B)(iii) PAYMENT OF RESOLUTION OFFERS.-(I) PRE-RESOLUTION COSTS. The Resolution Fund shall make equal annual payments over a period of eight years for eligible costs incurred by an eligible person on or before the date such person accepts a resolution offer pursuant to subparagraph (A) (i) or (ii), and interest shall not accrue with respect to such eligible costs. The Resolution Fund may, in its sole discretion, make such payments over a shorter period if the aggregate eligible costs do not exceed $50,000. An eligible person shall submit to the Resolution Fund documentation of such costs as the Resolution Fund may require. The initial payment to an eligible person under this subclause shall be made not later than 60 days after the receipt of documentation satisfactory to the Resolution Fund.

[315]TITLE VIII § 803(g)(5)(C)(ii) INSURER ACTION AGAINST ELIGIBLE PERSON.
Any eligible person that rejects a resolution offer, litigates a claim with respect to eligible costs against an insurer, and obtains a final judgment that is less favorable than the resolution offered

than the EIRF's resolution offer, the insurer will be entitled to be reimbursed for the amount of the resolution offer.[316]

As stated above, on January 4, 1995, an identical version of H.R. 3800, H.R. 228, the Superfund Reform Act Of 1995 was referred to the House Commerce Committee without co-sponsorship where it is likely to remain.[317]

Most importantly, the proposed EIRF would have not likely reduced environmental insurance litigation because it fails to address several critical issues left unanswered in the debate over liability. First, as of this writing, nine state courts have not addressed the issue of the "sudden and accidental" pollution exclusion clause, and hence, cannot be categorized under EIRF as being favorable, or not favorable to insureds to determine whether the insured will be able to obtain 20% or 60% of the insured's environmental remediation costs.[318] EIRF's proposal to lump these jurisdictions into the "all other" category and provide coverage of up to 40% is unacceptable, and is not likely to reduce litigation in these jurisdictions.

Second, as shown above, in 1994 alone, four states have changed their position on the interpretation of the "sudden and accidental" language as necessarily implying a temporal meaning, making the administration of EIRF, and the determination of state favorableness, a slippery, and re-occurring problem that is highly unlikely to reduce litigation.[319]

Third, in those jurisdictions where the courts have found or refused coverage on different or alternative grounds as in Nevada, New Jersey, New York, South Dakota, Vermont, it would be inappropriate to lump these jurisdictions into the "all other" category. In these jurisdictions, favorability becomes hard to quantify, and devolves into a fact specific inquiry into the status of the insured and the nature of the discharge.[320] Accordingly, application of EIRF in these jurisdictions becomes unmanageable, and is not likely to reduce litigation.

Fourth, and most importantly, since EIRF provides that the substantive law of the state where the site is located or where jurisdiction is venued shall apply

---

by the Resolution Fund, shall be liable to such insurer for 20 percent of the reasonable costs and legal fees incurred by the insurer in connection with such litigation after the resolution was offered to the eligible person. The district courts of the United States shall have original jurisdiction of all such actions, without regard to amount or value. The court shall reduce any award to an insurer in any such action by the amount, if any, of such costs and legal fees recovered by the insurer pursuant to State law or court rule. Nothing in this clause shall be construed to limit or affect in any way the application of State law, or the rule of any court, to such costs or legal fees.

[316]TITLE VIII § 802(g)(5)(C)(iii) REIMBURSEMENT TO INSURER.

In the case of an eligible person that rejects a resolution offer, litigates a claim with respect to eligible costs against one or more insurers, and obtains a final judgment against any such insurer, the Resolution Fund- (I) shall reimburse to such insurer or insurers the lesser of the amount of the resolution offer made to the eligible person or the final judgment; and (II) may, if the resolution offer exceeded the final judgment, reimburse the insurer or insurers for unrecovered reasonable costs and legal fees, except that the total reimbursement under this subclause may not exceed the amount of the resolution offer to the eligible person. Reimbursements pursuant to this clause shall be subject to such documentation as the Resolution Fund may require and shall be made by the Resolution Fund not later than 60 days after receipt by the Resolution Fund of a complete request for reimbursement as determined by the Resolution Fund.

[317]1995 Bill Tracking H.R. 228; 104 Bill Tracking H.R. 228.

[318]*See supra* note 307 and accompanying text for discussion.

[319]*See supra* notes 267-81 and accompanying text for discussion.

[320]*See supra* notes 245-50 and accompanying text for discussion.

to determine favorability,[321] EIRF would serve no useful purpose in reducing litigation but instead would exacerbate, or even help create a satellite industry in choice of law litigation concerning the separate choice of law approaches as described in Part I of this Article.[322]

PART IV

A Clear and Workable Framework

As stated above in Part II of this Article, most jurisdictions that find the term "sudden and accidental" to be unambiguous almost uniformly ascribe a temporal meaning to the term "sudden" and eliminate coverage for gradual, but often unintentional discharges.[323] Conversely, most jurisdictions that fund the term "sudden" to be ambiguous, almost uniformly find that "sudden" does not necessarily imply a temporal meaning, and provide coverage for gradual, and sometimes intentional, discharges.[324]

These cases cannot reasonably be reconciled, and a search for a clear, workable framework must include those jurisdictions that do not bottom their determination of coverage on the ambiguity of the term "sudden" or whether sudden necessarily implies a temporal requirement.[325]

For example, the New Jersey Supreme Court has taken a unique approach to the meaning of the "sudden and accidental" pollution exclusion clause.[326] New Jersey has found the term "sudden and accidental" to be clear and unambiguous, but nevertheless found liability for the insurer.[327] Instead, the New Jersey Supreme Court refused to construe the terms "sudden and accidental" against the insured, and deny liability, based on the contemporaneous representation to insurance regulators at the time of the clauses submission for approval.[328]

Indeed, this notion that the representations made to the state insurance regulatory agencies at the time of the clause's submission for approval is not a new concept. For example in *Claussen v. Aetna Casualty & Surety Co.*,[329] the plaintiff operated a landfill and sought indemnification for cleanup costs ordered by the EPA. Despite that migration had occurred over a twenty five year period, in interpreting policy to favor the insured, the court dwelled on

---

[321] *See supra* note 307 and accompanying text for discussion.

[322] *See supra* notes 79-94 and accompanying text for discussion.

[323] *See supra* notes 208-28 and accompanying text for discussion.

[324] *See supra* notes 233-48 and accompanying text for discussion.

[325] *See supra* notes 245-50 and accompanying text for discussion.

[326] Morton International Inc. v. General Accident Insurance Co. of America, 629 A.2d 831 (1993), *cert. denied*, — U.S. —, 114 S. Ct. 2764 (1994). *Morton* involved the contamination of Berry's Creek in New Jersey. Beneath its surface, the tract is saturated by an estimated 268 tons of toxic waste, primarily mercury. For a stretch of several thousand feet, the concentration of mercury in Berry's Creek is the highest found in fresh water sediments in the world. *Id.* at 834.

[327] *Id.*

[328] *Id.* For a further discussion of the regulatory history of the "sudden and accidental" pollution exclusion clause, and the contemporaneous representations to state insurance regulators, *see supra* notes 143-59 and accompanying text for discussion.

[329] Claussen v. Aetna Casualty & Surety Co., 380 S.E.2d 686 (Ga. 1989).

the representations made to state regulators in construing the terms "sudden and accidental"[330] and found that coverage existed.

However, this reasoning is flawed, and even the *Claussen* court was aware of the very limited prospective value of its holding. The court remarked: "insurance companies have become wary of insuring against environmental risk and have dropped out of the field or are charging higher premiums. In short, the situation has changed so that our decision is not likely to have any serious impact on prospective behavior."[331]

Just as the reasoning in *Claussen* is flawed —in that it rests on the representations to insurance regulators to determine application of the "sudden and accidental" clause— so too is the reasoning behind *Morton* flawed. Both cases provide for liability of the insurer based upon the policyholder's long-term, intentional discharge of known contaminants which under any rational policy structure should not be covered.

The policies underlying the construction of the "sudden and accidental" pollution exclusion are clear, and were best summarized in *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*[332] In *Waste Management,* the court denied coverage to plaintiff for cleanup of landfill leachate under RCRA. The court found the events to fit squarely within the language of the pollution exclusion clause, and reasoned that "the policy reasons for the pollution exclusion clause were obvious: if an insured knows that liability incurred by all manner of negligent or careless spills and releases is covered by his liability policy, he is tempted to diminish his precautions and relax his vigilance. Relaxed vigilance is even more likely where the insured knows that the intentional deposit of toxic material in his dumpsters, so long as it is unexpected, affords him coverage. In this case, it pays the insured to keep his head in the sand."[333]

Limiting coverage to "sudden" pollution albeit accidental, increases the likelihood that such conduct was unintentional because it increases the likelihood that the insured will turn a blind eye toward negligent waste practices, that over time, poison the environment.[334]

This same policy reasoning was apparent in *Techalloy Co. v. Reliance Insurance Co.*[335] In *Techalloy,* the court denied coverage, and stated that at best Techalloy could show that the discharge was accidental but not sudden, in the temporal sense, since the discharge had taken place sporadically over a twenty five year period.[336]

Among those states that provide or refuse coverage on alternative grounds, other than whether the term "sudden" necessarily implies a temporal meaning, New York Courts have interpreted the clause in the manner most consistent

---

[330]For a further discussion of the courts statements in *Claussen, see supra* notes 155-57 and accompanying text.

[331]*Claussen,* 380 S.E.2d at 690.

[332]340 S.E.2d 374 (N.C. 1986).

[333]*Id.* at 381.

[334]TNT Bestway Transp., Inc. v. Truck Ins. Exch., No. CA-CV 92-0128, 1994 Ariz. App. LEXIS 186 at *7 (Ariz. Ct. App. Aug. 30, 1994).

[335]487 A.2d 820 (Pa. Super. 1984).

[336]*Id.* at 826.

with the policies underlying the "sudden and accidental" language. In *Niagara County v. Utica Mut. Ins. Co.*,[337] the infamous "Love Canal" case, the New York Court first construed pollution exclusion clause to apply only to "actual polluters," and held that pollution exclusion clause did not bar County's claim because the county was not an "actual polluter."[338]

As a result of this reasoning, New York Courts generally will provide coverage for gradual discharges provided the discharge itself is neither expected nor intended from the standpoint of the insured, and the insured is not an "active polluter." For example, in *Allstate Ins. Co. v. Klock Oil Co.*,[339] the court held that property damaged by an undetected leak from the insured's gasoline storage tank was eligible for coverage under the "sudden and accidental" exception to the pollution-exclusion clause because it was unexpected and unintended.[340]

Similarly, in *Colonie Motors, Inc. v. Hartford Accident & Indemnity*,[341] the court concluded that the phrase "sudden and accidental" should be construed not in abstract but in the context of relevant facts. The Court held that the property damage caused by a crack in an underground pipe installed to prevent oil leakage resulted in undetected and continuing discharge of waste oil that had contaminated groundwater eligible for coverage under the "sudden and accidental" exception to the pollution exclusion clause.[342]

However, as noted above, New York Courts will not provide coverage where the discharge was intentional,[343] or when the discharge is part of the insured's "regular business activity."[344] For example, in *State of New York v. Amro Realty Corp.*,[345] a federal court applying New York law held that property damage caused by intentional discharges of chemical solvents into drains and septic systems by insured's lessee over a twenty year period was ineligible for coverage under the "sudden and accidental" exception to the pollution-exclusion clause.[346]

---

[337] 439 N.Y.S.2d at 540-42.

[338] *Id.*

[339] 426 N.Y.S.2d 603, 604-05 (App. Div. 1980).

[340] *Id.*

[341] 538 N.Y.S.2d 630, 631-32 (App. Div. 1989).

[342] *Id.*

[343] Farm Family Mut. Ins. Co. v. Bagley, 409 N.Y.S.2d 294, 295-96 (App. Div. 1978) (finding pollution-exclusion clause ambiguous, and holding that factual issue presented on whether property damage to crops caused by intentional spraying of chemicals on insured's fields that accidentally had been dispersed to adjacent farmland eligible for coverage under "sudden and accidental" exception to pollution-exclusion clause); Technicon Electronics Corp. v. American Home Assurance Co., 542 N.E.2d 1048, 1050-51 (N.Y. 1989) (holding property damage caused by intentional discharges of toxic wastes into waterway ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause).

[344] EAD Metallurgical, Inc. v. Aetna Casualty & Sur. Co., 905 F.2d 8, 10-11 (2d Cir. 1990) (holding that pollution-exclusion clause barred insurer's duty to provide coverage in underlying litigation that alleged insured willfully had discharged radioactive substances into environment over six-year period).

[345] 697 F. Supp. 99, 110 (N.D.N.Y. 1988) *aff'd. in part, rev'd. in part,* 936 F.2d 1420 (2d Cir. 1991).

[346] *See also* Ogden Corp. v. Travelers Indem. Co., 924 F.2d 39, 42-43 (2d Cir. 1991) (applying New York law, construing "sudden" to describe discharges occurring over short period of time, and holding pollution-exclusion clause bars carrier's obligation to defend or indemnify insured in

However, this "active polluter" distinction is not unique to New York, and implicitly has been successfully applied in other jurisdictions.[347] For example, in *Great Lakes Containers, Corp. v. National Union Fire Ins. Co.*,[348] the court denied coverage for contamination to groundwater as a result of plaintiff's barrel cleaning and reconditioning business. The court reasoned that Great Lakes could not recover damages for the contamination of the soil, surface, and subsurface waters which took place as a concomitant of its regular business activity, and hence, that the property damage resulting from such activity falls squarely within the language of the pollution exclusion clause.[349]

Recently, the Florida Supreme Court adopted this approach in *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*,[350]and held that the pollution exclusion clause barred coverage for property damage caused by placement of waste oil sludge into unlined earthen pit in insured's "regular course of business," generating crankcase oil.[351]

Similarly, the District Court of Delaware interpreting Connecticut law came to the same conclusion in *Remington Arms Co. v. Liberty Mutual Ins. Co.*,[352] and held that the intentional, and routine practice of incinerating off-specification shells, cartridges, and primers at the Remington plant were deliberate, expected, and routine, as was lead shot from skeet shooting, from 1971 to 1980 as to bar coverage.

Oregon has taken the "regular course of business" approach in *Transamerica Ins. Co. v. Sunnes*,[353] and has held that property damage caused by intentional discharges in regular course of business of acid and caustic wastes into city sewer line ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause even if damage had been unintended. Massachusetts, also, has bottomed the denial of coverage under the "sudden and accidental" exception for pollution resulting from the insured's "routine business activity."[354]

In addition to denying coverage for "active polluters" in the "regular course of business" a policy of denying coverage of intentional discharges presents a workable framework that is consistent with the policy goals underlying the interpretation of the "sudden and accidental" clause.[355]

However, providing that all but intentional discharges should be denied coverage does not end the inquiry. Typically, before a court can find intent it often

---

underlying litigation alleging that insured had engaged in continuous discharge of pollutants over period of thirty-three years).

[347]*See infra* notes 349-55.

[348]727 F.2d 30 (1st Cir. 1984).

[349]*Id.* at 33.

[350]No. 78293, 1993 Fla. LEXIS 1128 at *5 (Fla. July 1, 1993).

[351]*Id.*

[352]801 F. Supp. 1406 (D. Del. 1992).

[353]711 P.2d 212, 214 (Or. Ct. App. 1985), *cert. denied*, 717 P.2d 631 (Or. 1986).

[354]Liberty Mut. Ins. Co. v. SCA Servs., Inc., 412 Mass. 330, 588 N.E.2d 1346, 1349-50 (Mass. 1992) (holding that property damage resulting from routine business activity over several months during which barrels containing hazardous waste had been emptied into open trenches or dumped into trenches and flattened with bulldozer ineligible for coverage under "sudden and accidental" exception to pollution-exclusion clause).

[355]*See, e.g.*, Hicks v. American Resources Ins. Co., 544 So. 2d 952 (Ala. 1989) (pollution exclusion clause eliminates coverage for intentional spills or discharges).

has to resolve the issue of knowledge of the insured.[356] In construing intent, some courts refuse to require every element of the clause to carry an implied scienter element because the "drafter chose to write the policy in plain English rather than qualify every term *ad infinitum*."[357]

Knowledge is a slippery issue. To determine liability, some courts focus on whether the insured knowingly dispersed a hazardous material rather than whether the discharge itself was intentional.[358] For example, in *EAD Metallurgical, Inc. v. Aetna Casualty & Surety Co.*,[359] the court held that the continuous deposit of radioactive waste in sewer lines was purposeful and could not be considered accidental notwithstanding that the insured did not know the substance was radioactive.[360] On the other hand, some courts including New York, have found that knowledge on the part of the insured that the discharged substances are hazardous is required to prove intent.[361]

However, knowledge on the part of the insured should be irrelevant to determine coverage. Releases may be unexpected and unintended without being sudden and accidental.[362] For example, in *Hartford Accident & Indemnity Co. v. United States Fidelity & Guaranty*,[363] the insured intentionally discharged condensed liquid wastes containing Polychlorinated Biphenyls (PCBs) into an unlined earthen pit from 1959 to 1974. The court properly refused coverage, irrespective of the knowledge of the insured, because the discharge was intentional.[364]

In *New Castle County v. Hartford Accident & Indemnity Co.*,[365] the Third Circuit held that knowledge of the contaminating quality of the substance discharged is irrelevant and construing pollution-exclusion clause as imposing on

---

[356]Diamond Shamrock Chem. Co. v. Aetna Casualty & Sur. Co., 554 A.2d 1342 (N.J Super. 1989). In other jurisdictions, mere foreseeability does not bar coverage, City of Johnstown, New York v. Bankers Standard Ins. Co., 877 F.2d 1146 (2d Cir. 1989). Other jurisdictions hold that there must be a showing that the policyholder actually knew and intended the damage to occur to preclude coverage. *See, e.g.*, Broderick Investment Co. v. Hartford Accident & Indemnity Co., 954 F.2d 601 (10th Cir. 1992).

[357]New Castle County v. Hartford Accident & Indemnity Co., 970 F.2d 1267, 1271 (3rd Cir. 1992).

[358]*See infra* notes 360-69.

[359]905 F.2d 8 (2nd Cir. 1990).

[360]*Id.* at 9.

[361]*See* National Grange Mut. Ins. Co. v. Continental Casualty Co., 650 F. Supp. 1404, 1409-12 (S.D.N.Y. 1986) (applying New York law, finding pollution-exclusion clause to be ambiguous, "sudden" not limited to instantaneous happening and construing "sudden and accidental" to mean unexpected and unintended; denying insurer's summary-judgment motions based on pollution-exclusion clause to preclude coverage of insured for property damage caused by discharges of ash in operation of scrap-metal business in view of factual issue concerning insured's knowledge that ash constituted hazardous substance); *See also,* Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1217-22 (Ill. 1992) (construing "sudden" to mean unexpected or unintended, and holding that claims for remediation of property damage involving contamination of Waukegan Harbor and Lake Michigan resulting from discharges over several years of hydraulic oil in ordinary course of insured's outboard-motor-manufacturing business, such oil having contained PCBs allegedly without insured's knowledge, subjected insurers to duty to defend under "sudden and accidental" exception to pollution-exclusion-clause; resolution of insurer's duty to indemnify held subject to factual determinations after trial).

[362]Travelers Indemnity v. Dingwell, 414 A.2d 220 (Me. 1980).

[363]962 F.2d 1484 (10th Cir. 1992).

[364]*Id.*

[365]970 F.2d 1267 (3rd Cir. 1992).

insured risk of discharge of known contaminants.[366] However, as the Court in *New Castle* commented: "Moral culpability is irrelevant in the economic scheme of things, should the holy water turn out to be witches brew . . . ."[367] Irrespective of the Court's ultimate holding in *New Castle,* this language supports the proposition that once the court determines that the discharge was intentional, the inquiry should end as to whether the insured knew, or should have known, the hazardous nature of the substances discharged. Contrary to the court's holding in *New Castle*,[368] the risk of damage from the innocent but intentional act of pollution is significant, and the allocation of risk is better understood when we consider who is in the best position to curtail, control or minimize certain risks. The purpose of the pollution exclusion clause is specifically to shift the risk of loss to the insured when it intentionally discharges contaminants. Accordingly, to fulfill this purpose instances of intentional discharges should never be afforded coverage.

CONCLUSION

CERCLA was enacted with two purposes in mind. First, Congress intended to provide the federal government with the means to effectively control the spread of hazardous materials from inactive and abandoned waste disposal sites. Second, it intended to affix the ultimate cost of cleaning up these disposal sites to the parties responsible for their contamination.[369] Moreover, Congress was aware that hazardous waste spreads once introduced into the environment.[370]

The "sudden and accidental" exception to the pollution exclusion clause in pre-1986 GCL policies, by definition, involves hazardous substances that were introduced into the environment prior to 1986. The goal of any rational policy should have as its first priority the expeditious remediation of these hazardous waste sites.

Instead, over the last several years more than one third of the total cost expended under Superfund costs, have been litigation costs, and private parties spend approximately 100 million dollars per year in environmental litigation. Much of this controversy surrounds the interpretation of the "sudden and accidental" pollution exclusion clause.

There is no discernable trend in interpreting the meaning of the "sudden and accidental" language, and whether "sudden" necessarily implies a temporal element. State courts, federal district courts, and federal circuit courts are split as to the meaning of the "sudden and accidental" language in various jurisdictions, and the controversy continues as more state supreme courts address the issue, or renounce earlier interpretations of the clause's intended meaning.

---

[366] *Id.* at 1271.

[367] *Id.* at 1272.

[368] *Id.*

[369] H.R. Rep. No. 1016, 96th Cong., 2d Sess. 33 (1980); 3550 Stevens Creek Assoc. v. Barclay's Bank of Cal., 915 F.2d 1355, 1363 (9th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991), *quoted in*, Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1340 (9th Cir. 1992).

[370] H.R. Rep. No. 1016, 96th Cong., 2nd Sess. 33, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.

Insurance companies, which have lost about half these cases, are resorting to Congress to change the law, and establish an Environmental Insurance Fund. The EIRF is destined for failure. It has been sent to conference from where it is most likely never to emerge, and it fails to address key issues implicated in the "sudden and accidental" debate.

However, an analysis of the policy underlying the "sudden and accidental" exception, as construed by a significant number of jurisdictions, leads to a clear workable framework for refusing or providing coverage on the basis of the insured's status as an "active polluter," the nature of the insured's "regular course of business," and whether the initial discharge was intentional irrespective of the insured's knowledge that the discharged substances were hazardous.

Accordingly, consistent with the goal of expeditiously cleaning up the environment, and curtailing the plethora of litigation surrounding the interpretation of the "sudden and accidental" language, the foregoing approach presents a clear, workable framework, that promotes certainty, and that hopefully will lead to a better understanding and resolution of this issue.

Nicholas J. Guiliano