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The "Sudden and Accidental" Exception to the Pollution Exclusion Clause in Comprehensive General Liability Insurance Policies: The Gordian Knot of Environmental Liability

Sharon M. Murphy

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The “Sudden and Accidental” Exception to the Pollution Exclusion Clause in Comprehensive General Liability Insurance Policies: The Gordian Knot of Environmental Liability

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I. INTRODUCTION

From 1973 to 1985, comprehensive general liability (CGL) insurance policies contained a pollution exclusion clause.¹ The plethora of litigation² spawned by this clause, however, has done little to clarify either its meaning or its relationship to the policy as a whole.³ Uncer-

1. See generally Nancer Ballard & Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610 (1990).

2. A partial list of cases construing the CGL pollution exclusion clause includes: *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146 (2d Cir. 1989); *United States Fidelity & Guar. Co. v. Star Fire Coals, Inc.*, 856 F.2d 31 (6th Cir. 1988); *Benedictine Sisters v. St. Paul Fire & Marine Ins. Co.*, 815 F.2d 1209 (8th Cir. 1987); *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987); *Fischer & Porter Co. v. Liberty Mut. Ins. Co.*, 656 F. Supp. 132 (E.D. Pa. 1986); *National Grange Mut. Ins. Co. v. Continental Casualty Ins. Co.*, 650 F. Supp. 1404 (S.D.N.Y. 1986); *City of Northglenn v. Chevron U.S.A., Inc.*, 634 F. Supp. 217 (D. Colo. 1986); *Payne v. United States Fidelity & Guar. Co.*, 625 F. Supp. 1189 (S.D. Fla. 1985); *United States Fidelity & Guar. Co. v. Specialty Coatings Co.*, 535 N.E.2d 1071 (Ill. App. Ct. 1989); *Autotronic Sys., Inc. v. Aetna Life & Casualty*, 456 N.Y.S.2d 504 (N.Y. App. Div. 1982); *Niagara County v. Utica Mut. Ins. Co.*, 439 N.Y.S.2d 538 (N.Y. App. Div.), *appeal dismissed*, 427 N.E.2d 1191 (N.Y. 1981); *Evans v. Aetna Casualty & Sur. Co.*, 435 N.Y.S.2d 933 (N.Y. Sup. Ct. 1981); *New Jersey Dep't of Env'tl. Protection v. Signo Trading Int'l, Inc.*, 562 A.2d 251 (N.J. Super. Ct. App. Div. 1989); *Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co.*, 528 A.2d 76 (N.J. Super. Ct. App. Div. 1987); *Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co.*, 451 A.2d 990 (N.J. Super. Ct. Law Div. 1982); *Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co.*, 477 N.E.2d 1227 (Ohio Ct. App. 1984); *Transamerica Ins. Co. v. Sunnes*, 711 P.2d 212 (Or. Ct. App. 1985), *rev. denied*, 717 P.2d 631 (Or. 1986); *Lower Paxton Township v. United States Fidelity & Guar. Co.*, 557 A.2d 393 (Pa. Super. Ct. 1989); *Techalloy Co. v. Reliance Ins. Co.*, 487 A.2d 820 (Pa. Super. Ct. 1984); *City of Milwaukee v. Allied Smelting Corp.*, 344 N.W.2d 523 (Wis. Ct. App. 1983).

3. See *Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co.*, 668 F. Supp. 1541, 1549-50 (S.D. Fla. 1987).

A large number of law review articles have been written on this topic. These articles generally document the variety of pollution exclusion clause interpretations in the federal courts, and then propose suggestions to alleviate the interpretive conflicts. See *infra* part V. See also Brooke Jackson, *Liability Insurance for Pollution Claims: Avoiding a Litigation Wasteland*, 26 TULSA L.J. 209 (1990); Seth A. Ribner, *Modern Environmental Insurance Law: "Sudden and Accidental,"* 63 ST. JOHN'S L. REV. 755 (1989); Robert M. Tyler, Jr. & Todd J. Wilcox, *Pollution Exclusion Clauses: Problems in Interpretation and Application Under the Comprehensive General Liability Policy*, 17 INAHO L. REV. 497 (1981); S. Hollis M. Greenlaw, Note, *The CGL Policy and the Pollution Exclusion Clause: Using the Drafting History to Raise the Interpretation Out of the Quagmire*, 23 COLUM. J. L. & SOC. PROBS. 233 (1990). For a discussion comparing the old and the new language of pollution exclusions, see generally Michael J. Geiger, *Interpretations of the Pollution Exclusions Clause: The Insurance Industry's Past, Present and Future Vehicle to Limit Liability*, FED. INS. & CORP. COUNSEL Q. 159 (1990); R. Stephen Burke, Comment, *Pollution Exclusion Clauses:*

tainty regarding the scope of liability coverage under this clause drives many of the hazardous waste and toxic tort lawsuits filed.⁴ Courts have interpreted the pollution exclusion clause variously, often admitting that the law in this area is a confusing array of policy arguments and conflicting drafting histories.⁵ Part II of this Note sets forth the historical framework of the CGL policies and environmental litigation, including the role of recent congressional action in intensifying the controversy. Part III examines the state supreme court decisions that have interpreted the exclusion's "sudden and accidental" language. Finally, Part IV examines the solutions suggested by commentators in the field and proposes an alternate resolution to this vexatious problem of interpretation.

II. GENERAL BACKGROUND

A. *Comprehensive General Liability (CGL) Insurance Policies*

Comprehensive general liability insurance protects businesses against liability for damages to third parties.⁶ CGL policies are meant to protect against most liabilities associated with business operations including damages incurred through specified business activities.⁷ CGL coverage generally requires that an insurer both defend the insured in any litigation arising from the loss and indemnify the insured for any payment made as a result of the loss.⁸ These standard policies offer lia-

The Agony, the Ecstasy, and the Irony for Insurance Companies, 17 N. KY. L. REV. 443 (1990); Jonathan C. Averback, Note, *Comparing the Old and the New Pollution Exclusion Clauses in General Liability Insurance Policies: New Language—Same Results?*, 14 B.C. ENV'TL AFF. L. REV. 601 (1987). For a broad discussion of environmental liability insurance, see generally Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942 (1988). This Note, however, will focus on state supreme court decisions interpreting the "sudden and accidental" language in the pollution exclusion clause. Moreover, this Note will demonstrate why insurers and insureds must cooperate to settle claims brought under the pollution exclusion.

4. Averback, Note, *supra* note 3, at 625-26.

5. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374, 380 n.4 (N.C. 1986); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 577-78 (Wis. 1990). For a more comprehensive list of cases illustrating the various methods of interpreting the pollution exclusion clause, see *International Minerals & Chemical Corp. v. Liberty Mutual Insurance Co.*, 522 N.E.2d 758 (Ill. App. Ct. 1988).

6. See, e.g., Comment, *supra* note 3, at 447.

7. Ballard & Manus, *supra* note 1, at 620.

A typical CGL policy promises "to pay on behalf of the insured all sums . . . [it is] legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies caused by an occurrence. . . ." Geiger, *supra* note 3, at 161 n.10. However, the policy can and often does contain exclusionary clauses. The clauses exclude from coverage certain types of liability that either the insured does not wish to purchase or the insurer does not want to provide. The pollution exclusion clause discussed in this Note is one such exclusion. See Greenlaw, *supra* note 3, at 233 n.4; see also Comment, *supra* note 3.

8. Geiger, *supra* note 3, at 161.

bility protection for nearly all types of commercial ventures.⁹

Standardized insurance policies, such as the CGL, are attractive to insurance companies because theoretically they are easy to interpret.¹⁰ Standardized policies are more efficient for industry use since they are drafted only once. Besides saving manpower, standardized language is also more efficient because once a court interprets the policy language and establishes certain coverage, insurers can rely on that precedent in estimating future risks.¹¹

Judicial interpretation of policy language has a direct effect on an insurer's risk of liability. If judicial construction of policy language is narrow, losses that must be covered by the insurer are more infrequent. If interpretation is broad and far-reaching, the insurer's risk grows commensurately.

The larger concern relating to judicial interpretation of standardized policy language is that by its very nature and usage, the language in a standardized policy must be relatively broad and general.¹² In order to apply the terms of a standardized policy to a wide spectrum of business enterprises, the language used cannot be too specific or confining.¹³ Unfortunately, such general language leaves room for interpretations that were unintended by the insurers who drafted the CGL policy.¹⁴ Moreover, most courts consider form policies to be contracts of adhesion.¹⁵ Where policy language is deemed to be ambiguous, courts will construe the meaning against the insurer.¹⁶

Ironically, while the CGL policy and its pollution exclusion were meant to provide greater predictability and stability to underwriting risk for pollution liability, the divergent interpretations of the exclusion have added uncertainty. Recognizing the vagaries of judicial interpretation, the CGL drafters¹⁷ revised the policy several times to reflect both

9. See, e.g., *id.*; Tyler & Wilcox, *supra* note 3, at 498.

10. Averback, Note, *supra* note 3, at 604. A standardized policy is a form policy. It is drafted by the insurance industry for general use by a variety of companies, businesses, and industries. A form policy differs from a manuscript policy in which each term is bargained for and predicated upon an insured's individualized insurance needs.

11. *Id.* at 604-05. Because after such a case the insurance industry knows how courts will construe specific terms common to all CGL policies, insurers can estimate the likelihood of liability under those established definitions. Predictability is thus served.

12. *Id.* at 605.

13. *Id.*

14. *Id.*

15. See 2 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 10A.03[2] (1990). Regardless of an insured's knowledge, expertise, or ability to bargain for expansion of coverage, many courts apply the doctrine of *contra preferentem* to insurers freely. *Id.*

16. Averback, Note, *supra* note 3, at 605 n.28.

17. The Insurance Services Office (ISO) is responsible for drafting CGL form policies. The ISO is an insurance trade organization in which more than 1400 companies participate. One of the main tasks of the organization is to draft form policies and language and to secure approval for the

the changing needs of the insurance industry and the coverage concerns of businesses.¹⁸

B. Redrafting the CGL Policy to Address Interpretive Uncertainty

1. The Change from Accident-Based to Occurrence-Based Liability

Prior to 1966, CGL policies based liability on "accidents," not "occurrences."¹⁹ Over time, the interpretation of the term "accident" became a source of controversy.²⁰ Courts construed the term broadly, while businesses clamored for wider coverage that was not limited by the notion of a fortuitous happening.²¹ The Insurance Services Office (ISO) switched from accident-based to occurrence-based liability in 1966 to address these concerns.²²

The revised CGL policy defined occurrence as an accident resulting in damages neither expected nor intended by the insured.²³ While the definition of the term "occurrence" included continuous or repeated exposure to injurious conditions, it is unclear whether the term was meant to include gradual environmental pollution.²⁴ Insurers wanted to focus coverage only on unforeseeable damage, thereby emphasizing the responsibility of industry to oversee the safe disposal of hazardous waste.²⁵

use of such policies from the pertinent state regulatory bodies. Most major American insurers who issue comprehensive general liability insurance follow ISO wording. Ballard & Manus, *supra* note 1, 621 & n.41.

18. See James A. Hourihan, *Insurance Coverage for Environmental Damage Claims*, 15 FORUM 551, 552-53 (1980).

19. See LONG, *supra* note 15, § 10A.04[1][a]; Tyler & Wilcox, *supra* note 3, at 499; Averbach, Note, *supra* note 3, at 607.

20. LONG, *supra* note 15, § 10A.04[1][a].

21. Tyler & Wilcox, *supra* note 3, at 499. Consumers were demanding liability protection unlimited by notions of "accidents," while at the same time courts were reading the "accident" term quite broadly. *Id.* Faced with both consumer and judicial hostility to the narrowness of "accident," insurers adopted the "occurrence" language.

22. See generally *supra* note 19.

23. Tyler & Wilcox, *supra* note 3, at 499 (stating that "the term *occurrence* is defined as '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'" (quoting William R. Fish, *An Overview of the 1973 Comprehensive General Liability Insurance Policy and Products Liability Coverage*, 34 J. Mo. B. 257, 258 (1978))); see also LONG, *supra* note 15, § 10A.04[1][b].

24. LONG, *supra* note 15, §§ 10a.04[1][b], 10A.04[2]. Long suggests that this is a point of contention between the insurance industry and policyholders. Insurers have long held the belief that CGL policies were meant to insure against fortuitous happenings. To be fortuitous, these events must contain an element of suddenness or surprise. Policyholders, however, have claimed that the very drafting of an exclusion shows that insurers considered gradual events to be covered under the general language of the policy. *Id.* § 10A.04[2]. See also Averbach, Note, *supra* note 3, at 607.

25. See Hourihan, *supra* note 18, at 553.

The initial fundamental coverage of the CGL policy promises to pay the legal obligations of the insured resulting from an "occurrence."²⁶ With such encompassing language, the insurer must begin by assuming coverage.²⁷ This basic liability language, however, does contain a caveat: coverage is conditioned upon damages resulting from an *occurrence*.²⁸ Thus, the tension between the meaning of the "occurrence" language and liability for losses caused by pollution became obvious to the insurance industry.²⁹

While the switch to occurrence-based liability was not meant to provide coverage for insureds who knowingly discharged pollutants as part of their everyday business,³⁰ the definition of the term "occurrence" was too broad to avoid this liability. Courts continued to find coverage for intentional pollution damage even after the policy change.³¹

*Grand River Lime Co. v. Ohio Casualty Insurance Co.*³² is an example of the unwillingness of courts to hold businesses liable for manufacturing processes that regularly contaminate the environment. The insured in *Grand River* sought coverage for allegations of bodily injury and property damage arising from a seven-year period of toxic emissions caused by quarrying operations.³³ Ohio Casualty, the insurer, argued that the insured had to expect damages after seven years of emissions.³⁴ The court disagreed, drawing a distinction between intending to emit and expecting damage caused by the emitting activity.³⁵

While it granted that the policy definition of the term "occurrence" consists in part of the notion of "accident," the court refused to give "occurrence" any of the temporal meaning supposedly embodied in the term "accident."³⁶ Instead, the court construed "occurrence" as being

26. See generally Geiger, *supra* note 3, at 161 n.10 (stating that the CGL policy will "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies caused by an occurrence").

27. Tyler & Wilcox, *supra* note 3, at 498.

28. See *id.* at 499; LONG, *supra* note 15, § 10A.04[1][b]; Tyler & Wilcox, *supra* note 3, at 499.

29. Tyler & Wilcox, *supra* note 3, at 501.

30. *Id.* at 499-500.

31. See, e.g., Steyer v. Westvaco Corp., 450 F. Supp. 384 (D. Md. 1978) (stating that the term "occurrence" covered a four-year period of pollution discharge from a pulp paper plant); *Grand River Lime Co. v. Ohio Casualty Ins. Co.*, 289 N.E.2d 360 (Ohio Ct. App. 1972) (holding that a seven-year period of air pollution constituted an "occurrence").

32. 289 N.E.2d 360 (Ohio Ct. App. 1972). For a more complete explication of the ramifications of *Grand River*, see Tyler & Wilcox, *supra* note 3, at 501-04.

33. *Grand River*, 289 N.E.2d at 362.

34. *Id.* at 365.

35. *Id.*

36. The court noted, "[W]e think it better not to interpret the word 'occurrence' in a sudden or momentary sense, but permit such term to encompass a period of time." *Id.*

broader than "accident" for coverage purposes.³⁷ Thus, the *Grand River* court renounced the idea that the occurrence language restricted an insurer's liability only to events sudden in time.

The court required more than a demonstration of a long history of pollution in order to exclude coverage. It required a showing that the specific damage caused was expected or intended.³⁸ Damage resulting from ongoing actions, such as ordinary business operations, would not lead necessarily to a ruling that the damage was expected because the court deemed the foreseeability of such damage insufficient to exempt the insurer from liability.³⁹ The court's differentiation between intended acts and intended damage signalled an unwillingness to restrict pollution coverage with a limiting definition of "occurrence."

Spurred by far-reaching decisions similar to *Grand River*, the insurance industry foresaw the potential for large liability awards. Once again the ISO bowed to broad judicial interpretation and began to re-draft the CGL policy.⁴⁰ By 1970, CGL policies included the pollution exclusion as a mandatory endorsement.⁴¹ Finally, in 1973, the pollution exclusion was inserted into the body of the policy.⁴²

2. The Pollution Exclusion

The pollution exclusion clause exempts from coverage damages caused by certain kinds of pollution. The standard pollution exclusion in use from 1973 to 1985⁴³ stated:

This insurance does not apply . . . (f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*⁴⁴

Thus, pollution damage is exempted from coverage unless caused by a "sudden and accidental" event. The standard CGL policy leaves "sud-

37. *Id.*

38. *Id.*

39. *Id.*

40. LONG, *supra* note 15, § 10A.04[2].

41. Tyler & Wilcox, *supra* note 3, at 500 & n.24. While the pollution exclusion was not yet part of the body of the policy, the ISO saw a clear need for the exclusionary language and made it a required attachment to every issued CGL. *See also* Averback, Note, *supra* note 3, at 608.

42. Tyler & Wilcox, *supra* note 3, at 500 & n.24; Averback, Note, *supra* note 3, at 608.

43. By 1985 the insurance industry could no longer bear the immense cost of claims from pollution damage. Consequently, the ISO eradicated all coverage for pollution-related occurrences under the CGL policy. LONG, *supra* note 15, § 10A.04[3]. In theory, insureds may negotiate and purchase endorsements for pollution liability as additions to the form policy; in reality, however, the cost of such endorsements may be so high as to eliminate virtually all pollution coverage.

44. Ballard & Manus, *supra* note 1, at 613.

den and accidental" undefined.⁴⁵ By leaving such an important exception to the exclusion undefined, the drafters of the CGL created a gap in the policy, providing an impetus for litigation.

a. The Drafting History: Two Different Perspectives

To add more uncertainty to the interpretation of the exclusionary language, the drafting history of the pollution exclusion itself is contradictory and unclear. The clouded intentions of the ISO in adopting the "sudden and accidental" language also encourage litigation over coverage.⁴⁶ Not surprisingly, insurers and policyholders have sharply contrasting views as to the proper interpretation of the exclusion's drafting history.

(i). The Insurers' Perspective

Some commentators believe that the ISO drafted the pollution exclusion to guard against judicial interpretations of the CGL that broadened the definition of "occurrence" and led to increased liability for pollution-based damage.⁴⁷ Under this limitation view of the exclusion,

45. *Id.* at 613-14. Under the exclusionary language, insurers must provide coverage for pollution-related damage only when it can be characterized as "sudden and accidental." This provides an incentive for policyholders to use every argument and possible interpretation at their disposal in an attempt to fit pollution-related events into the "sudden and accidental" exception to the pollution exclusion.

46. With a variety of ISO intentions ascribed to the addition of the exclusion to the policy, a litigant simply may pick the rationale that best supports its own argument and hope that the court will find its reasoning persuasive. At least one commentator has criticized judicial reliance on this conflicting drafting history. Ribner, *supra* note 3, at 792-93. The insurance industry's reliance on these statements of intention may be misplaced unless it recognizes that the meaning of the terms "accident" and "occurrence" may change over time. *Id.*

47. See, e.g., LONG, *supra* note 15, § 10A.04[2]; Robert A. Zeavin & Eric J. Schindler, *Clearing the Air on CGL's Pollution Exclusion Clause*, 4 HAZARDOUS WASTE & TOXIC TORTS L. & STRATEGY, Oct. 1988, at 1, 1:

The exclusion was developed as an industry response to the exponential increase in the liability exposure of insurers amid expanding common law and statutory environmental liabilities, and the uncertainty and unpredictability that courts created in interpreting pre-1966 "accident" policies and post-1966 "occurrence" policies in hazardous waste/toxic tort coverage litigation.

Id. at 6; Tyler & Wilcox, *supra* note 3:

The insurer's concern arose from the burgeoning environmental lawsuits in combination with the clause in the definition of *occurrence* which reads "continuous or repeated exposure to conditions." The quoted language is suggestive of manufacturing and industrial processes which produce pollution over a substantial period of time. The pollution exclusion was the insurance companies' response to the fear of increased exposure in environmental litigation.

Id. at 506; *id.* at 508; E. Joshua Rosenkranz, Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237, 1251 (1986) (stating that "[t]he insurers' primary concern was that the occurrence-based policies, drafted before large scale industrial pollution attracted wide public attention, seemed tailor-made to extend coverage to most pollution situations. Consequently, they tacked onto the occurrence-based policies an exclusionary clause that applied specifi-

the drafters sought to restrict coverage by accepting liability only when a pollution occurrence is sudden and accidental. Under the main body of the exclusion, pollution-related damages are exempted from coverage. The "sudden and accidental" language reinstates a limited amount of coverage under the policy.

Thus, one drafting interpretation holds that in response to decisions such as *Grand River*, which was a harbinger of judicial interpretations sympathetic to compensation for hazardous waste cleanup, the insurance industry further restricted coverage for pollution damages. Under this interpretation, not only must the damage first satisfy the "occurrence" requirement, but the release or dispersal of the pollutants also must be "sudden and accidental" to trigger coverage for the event. The ISO may have intended the pollution exclusion clause to function as a filter, restricting further judicial broadening of "occurrence" to include gradual environmental pollution.

Additionally, the ISO saw the provision of coverage for gradual pollution damage as contrary to public policy.⁴⁸ Public focus was centering rapidly on the environmental ramifications of industrial processes. The publication of *Silent Spring* by Rachel Carson set off initial public alarm.⁴⁹ The Love Canal debacle in 1969 and the large Unocal oil spill at about the same time raised national consciousness of the scope and magnitude of America's hazardous waste problem.⁵⁰ In light of this increased public awareness, the drafters of the pollution exclusion may have intended it not only to limit the insurance industry's liability for damages from industrial business practices, but also to encourage policyholders to take greater precautionary measures when using processes that could result in environmental harm.⁵¹ The insurance industry hoped that restricted coverage would force businesses to clean up their

cally to pollution related claims" (footnote omitted)); Averback, Note, *supra* note 3, at 607-08 (stating that the pollution exclusion was designed to limit rapidly growing liability for pollution events); Geiger, *supra* note 3, at 163 (stating that "the object of the clause was to address the problem of potentially limitless claims by covering only those accidents distinct in time and place").

48. Note, *supra* note 47, at 1253 n.82.

49. LONG, *supra* note 15, § 10A.01[3]. *Silent Spring* was one of the first books to bring the topic of environmental pollution to the public forefront. The book dramatized the danger of pesticides, heightening public awareness of the fragility of the environment. *Silent Spring* set the stage for the "green" movements of the late 1960s.

50. *Id.* In the Love Canal contamination, hazardous chemicals had been dumped and later covered by fill to form the foundation for a subdivision in Niagara, New York. *Id.* The inhabitants of the area were found to have much higher incidences of cancer, miscarriage, and birth defects than the nation at large. *Id.* The Unocal oil spill was caused by oil leaks from a drilling platform directly off the coast of Santa Barbara, California. *Id.*

51. Note, *supra* note 47, at 1253 & n.82.

industrial waste by-products.⁵² Under this view, indemnification by the insurer would be contrary to public policy because it would encourage industry to maintain the status quo instead of providing an incentive to seek cleaner, safer methods of production.⁵³

By avoiding coverage for gradual pollution, the pollution exclusion clause also may limit the moral hazard of intentional pollution.⁵⁴ Insurance is not meant to provide coverage for the day to day expenses incurred in business activity; instead it is meant to cover unexpected and unintended losses. Gradual pollution may be less likely to result from a fortuitous incident.⁵⁵ Thus, damages resulting from gradual pollution should be includable in the normal cost of business enterprise. Otherwise, businesses would have little incentive to reduce the risk of pollution, and the insurer, rather than the business itself, would bear the costs of normal business operation.⁵⁶ Additionally, if pollution is part of a business's normal operations, it is likely that contamination or the release of pollutants is highly foreseeable to the insured so coverage should be excluded under the "occurrence" requirement.⁵⁷

Not only could the pollution exclusion protect insurers from judicial expansion of liability, but it could also force policyholders to recognize the harmful effects of some industrial processes. For this reason, the insurance industry has argued that the pollution exclusion exacts separate liability requirements and provides different incentives than the basic "occurrence" language in the main coverage portion of the CGL.⁵⁸ As a result, the exclusion makes coverage for pollution-related damage much more difficult for courts to find.

(ii). The Policyholders' Perspective

Contrary to the insurance industry's rationale for the exclusionary language, policyholders have argued that the exclusion was meant only as a reiteration of the "occurrence" requirement.⁵⁹ According to policyholders, the ISO itself has demonstrated this intention. One standard explanation disseminated by those ISO officials responsible for assisting state insurance commissioners was that since expected or intended pol-

52. *Id.*

53. *Id.* at 1253 n.82.

54. Abraham, *supra* note 3, at 953. One of the purposes of policy exclusions is to eliminate moral hazard. *Id.* at 952. Insurance is meant to protect a policyholder from fortuitous harm and not from harm intentionally created by the insured. *Id.* Intentionally caused harm—the collection of damages for the insured's own behavior—is the moral hazard. *Id.*

55. *Id.* at 953.

56. *Id.*

57. *Id.*

58. See generally *supra* note 47.

59. Long, *supra* note 15, § 10A.04[2].

lution-related damages were excluded by the occurrence language, the pollution exclusion clause was meant only to clarify and provide heightened notice of the uninsurability of this type of damage.⁶⁰ This clarification, however, was itself rather unclear.⁶¹ It seemed to ignore the fact that the occurrence requirement focuses on unintentional *damage* from pollution while the exclusion focuses on the actual *release* or *dispersal* of pollutants causing damage.⁶² Thus, there is at least one difference in coverage requirements between the language of the policy and that of the exclusion. Consequently, even the supposedly helpful memorandum from the ISO⁶³ is subject to interpretational difficulties.

One commentator suggests that the insurance industry adopted the exclusion to preclude both reckless and intentional polluters from coverage.⁶⁴ This interpretation too would make the exclusion a mere clarification or restatement of occurrence-based liability.⁶⁵ Comments from some insurance representatives made in an attempt to persuade state insurance commissioners to endorse the new exclusion in their respective states indicate that clarification was the sole purpose behind the additional language.⁶⁶

Since state insurance commissioners seemed concerned that the new language effected a limitation on liability,⁶⁷ the extent to which these remarks were industry posturing designed to facilitate the state commissioners' approval remains unknown. It is unclear whether the commissioners would have approved the language of the exclusion had it been presented to them as a limitation device and not as a reaffirma-

60. The memorandum itself stated somewhat ambiguously:

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.

Ballard & Manus, *supra* note 1, at 626 (quoting Insurance Rating Board, Submission to Ins. Comm'r of W. Va. (May 18, 1970)).

61. *Id.*

62. *Id.*

63. *See supra* note 60.

64. Greenlaw, Note, *supra* note 3, at 246. Greenlaw attempts to show that the drafting history supports the view that the scope of the pollution exclusion is coextensive with the definition of occurrence. The author believes the exclusion was meant only to clarify the policy and not to further limit liability to events that are strictly "sudden and accidental," in the narrowest sense.

65. *Id.* at 272.

66. Representatives from Travelers Indemnity Company pointed out during review by the West Virginia Insurance Commissioner that the "idea behind [the pollution exclusion clause] is that the insurance industry does not consider intentional pollution to be insurable, and the industry wishes to make its position clear to the insured." *Id.* at 249 (quoting Letter from Richard C. Reeves, Assistant Secretary, Government Affairs Division, The Travelers Indemnity Co., to the Honorable Samuel H. Weese, Insurance Commissioner, State of West Virginia (Aug. 30, 1970)).

67. Greenlaw, Note, *supra* note 3, at 248.

tion of noncoverage for intended or expected damage.⁶⁸

b. An Early Interpretation of the Exclusion: Lansco, Inc. v. Department of Environmental Protection

*Lansco, Inc. v. Department of Environmental Protection*⁶⁹ was the first in a string of early cases to find that the pollution exclusion was a reiteration of the definition of "occurrence" and not a further limitation on liability.⁷⁰ The court collapsed the pollution exclusion into the meaning of "occurrence," denying any difference in meaning between the two.⁷¹

In *Lansco* vandals opened valves on two oil storage tanks causing 14,000 gallons of oil to spill onto the company's property, flow into a drainage system, and eventually pollute a nearby river. *Lansco* sued its insurers for indemnification when they refused to cover the cost of environmental cleanup. The New Jersey Superior Court found coverage, holding that the "sudden and accidental" language of the exclusion merely restates the "unexpected and unintended" definition of "occurrence."⁷² Thus, the court rejected the view that the exclusion provides greater restrictions on coverage than the occurrence language does. By refusing to so hold, the court in effect was able to finance all cleanup operations through insurance dollars.

Some courts have followed the initial interpretation of *Lansco* and have refused to find stricter requirements for coverage inherent in the pollution exclusion.⁷³ Other courts, however, have acknowledged the difficulty in choosing which drafting history provides the more correct version of the exclusionary rationale and have been wary of entering the interpretational fray.⁷⁴

C. CERCLA Liability: The Taint of Detrimental Uncertainty

Since 1980 when Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁷⁵ the incen-

68. *Id.* at 252.

69. 350 A.2d 520 (N.J. Sup. Ct. Ch. Div. 1975), *aff'd*, 368 A.2d 363 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 372 A.2d 322 (N.J. 1977).

70. Zeavin & Schindler, *supra* note 47, at 6.

71. *Id.*

72. *Lansco*, 350 A.2d at 524.

73. See, e.g., Jackson Township Mun. Util. Auth. v. Hartford Accident & Indemnity Co., 451 A.2d 990 (N.J. Super. Ct. Law Div. 1982); Allstate Ins. Co. v. Klock Oil Co., 426 N.Y.S.2d 603 (N.Y. App. Div. 1980); Farm Family Mut. Ins. Co. v. Bagley, 409 N.Y.S.2d 294 (N.Y. App. Div. 1978).

74. Geiger, *supra* note 3, at 163. See, e.g., Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 573-75 (Wis. 1990) (discussing the drafting history).

75. Comprehensive Environmental Response, Compensation, and Liability Act of 1980

tive to find coverage under CGL policies for pollution-related damages has heightened. Congress intended CERCLA to put bite into the Environmental Protection Agency's (EPA) formerly ineffectual attempts to force private-sector industry to assume responsibility for hazardous waste releases into the environment.⁷⁶ CERCLA gives the EPA far-reaching powers to clean up polluted sites at the cost of the sites' past or present owners and operators.⁷⁷ For industry, this leaves very few ways to escape liability.⁷⁸ In effect, CERCLA functions as a strict liability statute.⁷⁹

CERCLA strikes fear in the hearts of corporations. Cleanup costs are so high that if businesses are forced to bear the cost of environmental remediation alone, their financial viability may be threatened. Faced with the potential for astronomical cleanup costs, polluters are seeking to shift their liability burdens onto their insurers.⁸⁰ Many businesses potentially are liable for pollution dating back to the early 1960s that since has contaminated groundwater and the surrounding soil.⁸¹ These businesses may have been unaware thirty years ago that their disposal methods would have huge future monetary repercussions. Cleanup of

(CERCLA), 42 U.S.C. §§ 9601-9675 (1988), amended by Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99-499, 100 Stat. 1613 (1986).

76.

The stated purposes of CERCLA are to empower the federal government and the states to take legal action against parties responsible for unauthorized releases of hazardous substances into the environment; to provide funds for government cleanup efforts where quick action is necessary or the responsible parties cannot be identified; to collect information about hazardous waste sites, particularly abandoned or inactive sites; and to assist cleanup efforts by requiring prompt notification by responsible parties of any release or substantial threat of release of hazardous substances into the environment.

LONG, *supra* note 15, § 10A.02[1][c].

77. 42 U.S.C. § 9607; see Brooke Jackson, *Environmental Cleanups and Insurance: Isn't there a Better Way?*, 21 ENV'T REP. (BNA), at 767 (Aug. 10, 1990).

78. 42 U.S.C. § 9601(35). CERCLA excuses an innocent landowner from liability if the owner undertook appropriate inquiry into the property before purchasing it and had no notice, either actual or constructive, of the potential for hazardous waste problems. *Id.* Also, an owner who acquires contaminated property through bequest or inheritance will not be held liable for its cleanup. *Id.* These conditions for nonliability are extremely difficult to establish as they hinge upon conceptions of notice, due investigation, and specific circumstances surrounding the disposal of the waste. Clearly, the EPA will push hard to denominate as many entities as possible as potentially responsible parties. This gives the EPA a greater likelihood of collecting enough money to finance a cleanup before resorting to expenditure of government funds.

79. A party that has previously or is currently associated "with hazardous substances, as a generator, transporter or disposer, may face liability under CERCLA should those substances be released into the environment, and cause the government to incur response costs." LONG, *supra* note 15, § 10A.02[1][c][i].

80. *Id.* § 10A.04. With such huge costs weighing upon American corporations, it has been suggested by at least one commentator that corporate directors may even have a fiduciary duty to the corporation and its shareholders to shift such liability onto its general insurers. *Id.*

81. LONG, *supra* note 15, at § 10A.04.

hazardous waste sites is extremely expensive⁸² and the number and scope of environmental contaminations in the United States as a whole are frightening. Currently, decontamination costs are estimated at over eight hundred billion dollars for the nation's known polluted sites.⁸³

Insurance works best when it is premised on discernible risk.⁸⁴ Insurers cannot set appropriate premium rates confidently with unknowable future risks.⁸⁵ The inability to predict losses within a delineated coverage area deprives insurers of both the ability to estimate their success rate in spreading losses by diversification and to set an appropriate price for coverage.⁸⁶ When environmental liability is uncertain, when insurers are unable to predict losses statistically, the insurance system no longer functions efficiently.

Unfortunately, the insurance industry did not anticipate the strict liability provisions of CERCLA.⁸⁷ Even during the 1970s when insurers were drafting the pollution exclusion and inserting it into policies, the industry did not foresee the enactment of CERCLA or the overarching congressional movement to force businesses to pay for pollution damages. Insurers argue that they did not intend for their policies to cover enormous liabilities like those imposed under CERCLA.⁸⁸

CERCLA is a harshly worded statute from the insurers' perspective because liability can be retroactive. Regardless of when hazardous material was deposited or transported, liability turns on the release or threatened release of contaminating pollutants.⁸⁹ Retroactive strict liability creates uncertainty that is very dangerous to the insurance industry. It entails culpability for damages that result from actions that were not subject to liability at the time of perpetration.⁹⁰

Both policyholders and insurers can anticipate ordinary strict liability, including it in cost calculations of regular business operation. Thus, financial resources can be allocated in anticipation of the imposition of such liability.⁹¹ Policyholders and insurers, however, generally

82. "No field of liability involves more far-reaching statutory civil liabilities than those imposed by the federal Superfund and similar state regimes." Abraham, *supra* note 3, at 956.

83. LONG, *supra* note 15, § 10A.03[1]. With these huge sums at stake, it is unlikely that litigation between corporate policyholders and their insurers will taper off in the immediate future. See *id.* § 10A.02[1][c][i].

84. Abraham, *supra* note 3, at 947.

85. LONG, *supra* note 15, § 10A.04.

86. See, e.g., Abraham, *supra* note 3, at 952 n.31.

87. LONG, *supra* note 15, § 10A.03[1].

88. *Id.* As one commentator has stated, "[P]rior to the enactment of many of the environmental statutes of the 1980's, neither the insured nor the insurer had the remotest idea that such laws would be passed by legislative bodies or upheld by the courts." *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

cannot anticipate findings of liability under a CERCLA strict liability scheme.⁹² No planning, financial or otherwise, can ameliorate the effect this kind of potential liability can have on the coffers of a polluting company and its insurers. Consequently, insurers doubt the prudence of providing coverage in a climate of such unpredictable "legal change."⁹³ The premiums paid before the enactment of CERCLA also did not reflect the possibility of higher future retroactive liability that the statute creates. CERCLA caught insurers unaware and unprepared for higher risks of liability imposed upon past behavior of the policyholder.⁹⁴

The inherent nature of CERCLA as a *strict* liability statute⁹⁵ presents insurers with additional uncertainty problems. The activities of policyholders that give rise to potential liability have become difficult risks to insure against because, under CERCLA, undiscoverable risks may be held actionable many years after the initial undertaking.⁹⁶ Regardless of whether an action was reasonable when it was taken, inestimable liability may attach at some future date. Thus, even had insurers foreseen the passage of CERCLA and its concomitant imposition of great liability risk, and even had insurers charged higher premiums to ward against these new actions, uncertainty would still cause unpredictable losses.⁹⁷ Confronted with a disproportionate ratio of risk to premium that may undermine their financial viability, insurers have an incentive to dispute coverage under the ill-defined pollution exclusion.⁹⁸

Moreover, the rush to shift CERCLA damages onto insurers abrogates the purpose of the statute.⁹⁹ Insurers argue that Congress passed CERCLA in part to make industry acknowledge and account for environmental externalities involved in manufacturing processes.¹⁰⁰ Con-

92. *Id.*

93. *Id.*

94. See Jackson, *supra* note 77, at 768:

Since the underwriters did not anticipate the enormous superfund and other environmental claims of today, they did not charge premiums commensurate with the risk. A contract is a contract, but the fact remains that many insurers face threats to their profitability, if not their survival, as ominous as those facing those who are insured.

95. Strict liability holds a defendant culpable for "the failure to reduce risks that could not have been discovered through the exercise of reasonable care." Abraham, *supra* note 3, at 957.

96. *Id.* at 958.

97. With the current state of technology, insurers cannot predict which chemicals or wastes may be harmful at some point in the distant future. Thus, under the strict liability format of CERCLA, risks are still unpredictable because the synergistic effects between various wastes and the environment are unknown.

98. Abraham, *supra* note 3, at 957.

99. See *supra* note 76 and accompanying text.

100. Comprehensive Environmental Resource, Conservation & Liability Act, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (statement of Sen. Albert Gore, Jr.).

Congress no longer wanted society to bear the costs of hazardous waste cleanup where generators, transporters, owners, and operators have profited from processes causing contamination. See

gress enacted CERCLA partially to provide an incentive for businesses to find cleaner methods of manufacturing and safer methods of disposal.¹⁰¹ Shifting losses directly onto insurers does not provide this incentive as envisioned by Congress.¹⁰²

The industrial community, however, might bankrupt itself in payment of CERCLA claims. Even worse, because of the high cost of cleanup, remediation projects still may remain underfunded and incomplete after the responsible parties under CERCLA have exhausted their resources in payment of the claims. Courts may become concerned that no entity will be legally or financially available to clean up contaminated land or water entirely and then may issue result-oriented decisions in the name of public policy. Courts may rule based on the notion that *someone* must clean up the contamination to protect society from further injury.¹⁰³

Judicial decisionmaking, therefore, is complicated by competing public policy concerns and the practical implications of potential liability under CERCLA. The risk of uncertainty under CERCLA, a synergistic by-product of the above-discussed factors, wreaks havoc on the insurance industry's ability to anticipate future losses and provide for such losses financially.¹⁰⁴ In the area of environmental risk, uncertainties have resulted in the underanticipation of losses. Policyholders may find themselves without adequate coverage for CERCLA liabilities and insurers may go bankrupt paying out cleanup dollars under policies that never contemplated the imposition of the strict liability scheme of CERCLA and its state statutory counterparts.

III. JUDICIAL INTERPRETATIONS OF THE POLLUTION EXCLUSION

Like the inestimable risks under CERCLA, judicial construction of policy language also may lead to unpredictable liability. Any expansive reading of coverage language for environmental damages has a great impact on insurers due to the large dollar amounts involved.¹⁰⁵ Judge-

United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) (stating that those responsible for pollution damages should bear the cost of rectifying them).

101. Comprehensive Environmental Resource, Conservation & Liability Act, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (statement of Sen. Albert Gore, Jr.).

102. See generally Abraham, *supra* note 3 (providing a detailed study of the effects of the "new" environmental liability upon the insurance industry and the concomitant availability of coverage).

103. As traditional "deep pocket" defendants, insurers may be placed in the position of becoming de facto guardians of the environment.

104. See Abraham, *supra* note 3, at 946-47 (noting that "[i]nsurance operates most comfortably with stochastic events, in which the probability of the frequency and magnitude of insured losses that will be suffered by a group of policyholders is highly predictable").

105. Abraham, *supra* note 3, at 960 n.52.

made insurance is not a new phenomenon. Judges have long interpreted policies to find coverage by manipulating policy language and courts often attempt to construe policies to provide protection to consumers.¹⁰⁶ This is part of the rationale behind *contra preferentem*.¹⁰⁷ To the extent these judicial constructions of policy language are unanticipated, they create uncertainty for future losses.¹⁰⁸

Judicial interpretations that ignore or manipulate apparent meanings in a policy create even greater market instability than do unanticipated statutory schemes.¹⁰⁹ While insurers can redraft policy language to avoid coverage under delineated statutes, this is much more difficult to do with judge-made insurance. The meaning imparted by a court is usually different than the apparent one and courts each may interpret the language differently.¹¹⁰ Insurers are left unable to rely on the language in their own policies. As a result, insurers must either draft new language, beginning again the whole interpretive process, or drop coverage for a particular risk from the policy entirely.¹¹¹

Because the arguments both for and against coverage turn on inter-

106. *Id.* at 960-61; *cf.* LONG, *supra* note 15:

It ignores reality to say that large, national corporations should be treated the same way as small individual purchasers of insurance when it comes to policy interpretation Virtually all American corporations of any size employ in-house risk managers who are experts in the business of insurance. . . . While the insurance industry may utilize policy language which some refer to as "standard," the insurance representatives of corporate America are well aware of precisely what each "standard" phrase means.

Id. § 10A.03[2].

107. *Contra preferentem* is a doctrine applied to contract interpretation. Basically, the doctrine requires any contractual ambiguities to be construed against the contract's drafter. For a discussion of *contra preferentem* as used and misused in the environmental context, see LONG, *supra* note 15, at § 10A.03[2]. Courts give the doctrine heavy weight when the contract at issue is a form contract. Courts are thus loath to interpret form policies against insureds since they often view insurance policies as contracts of adhesion. See *supra* note 15 and accompanying text. See also *New Castle County v. Hartford Accident & Indemnity Co.*, 673 F. Supp. 1359 (D. Del. 1987); *Government Employees Ins. Co. v. DeJames*, 261 A.2d 747 (Md. 1970). Thus, corporations arguably should not receive as much judicially wrought protection as should an individual insured. In the environmental area, some courts have gone beyond construing ambiguities in favor of the individual policyholder and have found coverage even when contrary language applies if the policyholder is a large business entity capable of retaining expert counsel, is a sophisticated negotiator, and has some amount of bargaining power. Abraham, *supra* note 3, at 960-61; LONG, *supra* note 15, at § 10A.03[2].

108. At least statutory liabilities creating uninsurable uncertainties can be mitigated by the addition of exclusions, coverage limitations, and larger deductibles to the policy. Abraham, *supra* note 3, at 961. This is not the case with unanticipated judicial interpretations, however. *Id.*

109. *Id.*

110. "[T]here is no completely reliable way to draft around the threat of judge-made insurance, because by definition this is coverage that ignores the apparent meaning of the policy language itself." *Id.*

111. This is exactly what happened with the pollution exclusion in the CGL. See note 7 and accompanying text; see generally Averback, Note, *supra* note 3.

pretations of insurance policy language, state law governs.¹¹² Because insurance doctrine traditionally has been an area of state governance, the United States Supreme Court will be loath to end the interpretive controversy by accepting a case involving such issues.¹¹³ Courts will continue to construe the pollution exclusion in various ways, often acting on their own social welfare agendas and the differing traditions of contract construction in each state. The danger is that the cost of litigating this kind of issue will rise dramatically as more environmental cleanups are needed and insurers and insureds fight to determine the most hospitable forums for their arguments.¹¹⁴

Because of the high cost of litigating environmental coverage claims and the possibility of setting an adverse precedent, few parties have an incentive to carry such litigation to its conclusion. Settlement is a more attractive option.¹¹⁵ While many environmental insurance coverage cases are filed, few have been tried to conclusion.¹¹⁶ This adds yet another wrinkle to the problem. With relatively few cases being tried and appealed, few state supreme courts have been able to rule on the issues concerned.

A. Common Analytical Frameworks

The definition of "sudden and accidental" is one of the most litigated issues in pollution exclusion disputes.¹¹⁷ While the range of inter-

112. See *infra* part III.B; Ribner, *supra* note 3.

113. Jackson, *supra* note 77, at 768.

114. Forum shopping has become extremely important as parties race to see who can file suit first in a jurisdiction with favorable case law. Judith S. Roth, *Dispute Over CGL Coverage Makes 1988 an Eventful Year*, 4 HAZARDOUS WASTE & TOXIC TORTS L. & STRATEGY, Dec. 1988, at 1, 1.

A Maryland district court has accused New Jersey of promulgating a body of law that is promulgated regarding environmental liability in an effort to attract industry. *Travelers Indem. Co. v. Allied-Signal, Inc.*, 718 F. Supp. 1252, 1257-58 (D. Md. 1989). The court warned:

It is entirely proper for the courts of New Jersey, subject to legislative strictures, to make rulings on questions of law against the background of what they perceive the underlying public policy of the state to be. However, a state's legitimate interest in attracting corporate business does not justify its encouragement of forum shopping to its own courts or its intrusion upon the sovereign power of its sister states to make their own decisions concerning matters directly affecting their interests within their borders.

Id. at 1258.

115. LONG, *supra* note 15, § 10A.03[2]; Geiger, *supra* note 3, at 163. *Cf.* Roth, *supra* note 114, at 6. The insurer may agree in settlement to buy back the environmental coverage for the years it was in effect with the policyholder. This allows the insurer to avoid any further claims on the part of the policyholder for similar damages.

116. LONG, *supra* note 15, § 10A.03[2].

117. It is not surprising that policyholders focus on the "sudden and accidental" language since the policies provide coverage for pollution events considered sudden and accidental. With "sudden," the main argument seems to be over whether the word contains a temporal element, *i.e.*, whether coverage is confined to instantaneous events. While "accidental" is also open to interpretation, the insurance industry has long used the notion of an "accident" for limitations on coverage

pretation is broad, some common judicial analyses have emerged during the past seventeen years of litigation. The various interpretations fall roughly into three categories. First, a court may decide that the clause is ambiguous.¹¹⁸ The typical CGL policy does not define "sudden and accidental," and these words could have several different meanings. If the policy is determined to be ambiguous, under insurance contract law most courts will resort to *contra preferentem* and hold that the policy covers the pollution damage.

If the phrase is not considered ambiguous, the court must define it. Many courts will interpret the phrase to mean "unexpected and unintended." The courts in this second category hold that the exclusion language reiterates the coverage limitations provided through the definition of occurrence.¹¹⁹ Thus, coverage for gradual pollution events often will be covered. Courts using this analysis may not recognize the distinction between the basic coverage language and that of the exclusion: a covered "occurrence" is one in which *damage* is unintended and unexpected, while the pollution exclusion reinstates coverage where the *release* of pollutants is sudden and accidental. Courts that recognize this distinction will usually reject the reiteration theory of the exclusion.

Finally, courts may view the "sudden and accidental" language as limiting coverage otherwise granted under the term "occurrence."¹²⁰ These courts often will perceive a temporal element in the word "sudden" and define "accidental" as something akin to "unintended."¹²¹ By

and thus the term may not be as difficult to interpret.

In addition to the meaning of "sudden and accidental," policyholders and insurers have litigated whether a particular contaminant falls within the subject matter of the exclusion. Averhack, Note, *supra* note 3, at 615; *see, e.g.*, Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So. 2d 95 (Ala. 1977); Autotronic Sys. Inc. v. Aetna Life & Casualty, 456 N.Y.S.2d 504 (1982); United Pac. Ins. Co. v. Van's Westlake Union, Inc., 664 P.2d 1262 (Wash. App. 1983). Insurers and insureds have also litigated the meaning of "damages" under the exclusion. *See* Hayes v. Maryland Casualty Co., 688 F. Supp. 1513 (N.D. Fla. 1988); United States Fidelity & Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich. 1988); Independent Petrochemical Corp. v. Aetna Casualty & Surety Co., 654 F. Supp. 1334 (D.D.C. 1986); Centennial Ins. Co. v. Lumhermens Mutual Casualty Co., 677 F. Supp. 342 (E.D. Penn. 1987). Both of these broad areas of contention are beyond the scope of this Note.

118. Averhack, Note, *supra* note 3, at 612; *see, e.g.*, Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991); Claussen v. Aetna Casualty & Surety Co., 380 S.E.2d 686 (Ga. 1989); Shapiro v. Public Service Mutual Ins. Co., 477 N.E.2d 146 (Mass. App. Ct. 1985); Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990).

119. *Id.* at 623-24; *see, e.g.*, National Grange Mutual Ins. Co. v. Continental Casualty Co., 650 F. Supp. 1404 (S.D.N.Y. 1986); Lansco, Inc. v. Department of Environmental Protection, 350 A.2d 520 (N.J. Super. Ct. 1975), *aff'd*, 368 A.2d 363 (1976); Lumhermens Mutual Casualty Co. v. Belleville Indus., Inc., 555 N.E.2d 568 (Mass. 1990).

120. *See, e.g.*, Technicon Elect. Corp. v. American Home Assurance Co., 542 N.E.2d 1048 (N.Y. 1989); Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374 (N.C. 1986).

121. *See, e.g.*, Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 662 F. Supp. 71 (E.D. Mich.

utilizing this approach, courts are able to give separate meaning to each word in the exclusion.

B. State Supreme Court Interpretations

While insurance traditionally has been considered a state concern, few state supreme courts have ruled on the correct interpretation of the pollution exclusion under state law. Many pollution liability cases arise in connection with CERCLA liability, making the litigation a federal question and offering the opportunity to bring the claim in federal court. Unfortunately, however, this means that federal judges will be interpreting state law for the meaning of the coverage language. In the majority of cases, a state's supreme court has not ruled on the issues involved, leaving the federal courts with little guidance for determining what that state's law would be.¹²²

1. Maine: *Travelers Indemnity Co. v. Dingwell*¹²³

In 1980 the Maine Supreme Court confronted the familiar, but still undefined, language of the pollution exclusion. *Travelers Indemnity Co. v. Dingwell* was one of the earliest cases to reach a state supreme court on the "sudden and accidental" interpretive issue. The insured, Dingwell, operated an industrial waste facility in Gray, Maine. The residents of the town brought a class action suit against him, seeking damages for contamination of the town's well water. Dingwell's three insurers brought a declaratory judgment action to determine whether they were obligated to defend and indemnify Dingwell under the CGL policies. While the language in the three policies varied, each of the insurers contended that its pollution exclusion negated any duty to defend Dingwell against the class action.¹²⁴ The court disagreed, holding that each insurer had a duty to defend.¹²⁵

While it did not clearly define the meaning of "sudden and accidental" under Maine law, the court did hold that the phrase "expected and intended" was not interchangeable with "sudden and acciden-

1987); *Technicon Elect. Corp. v. American Home Assurance Co.*, 542 N.E.2d 1048 (N.Y. 1989); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374 (N.C. 1986).

122. Recently, the Eleventh Circuit in deciding a case under Georgia law in which coverage turned on the "sudden and accidental" issue, certified the question to the Georgia Supreme Court. *Claussen v. Aetna Casualty & Sur. Co.*, 865 F.2d 1217 (11th Cir. 1989). Perhaps that action will spark a judicial trend, encouraging federal courts to obtain definitive rulings from the highest court of the applicable state before adjudicating the coverage claim. Such an approach would certainly impose more consistency on judicial interpretations within a state than exists currently.

123. 414 A.2d 220 (Me. 1980).

124. *Id.* at 223.

125. *Id.*

tal.”¹²⁶ The court, however, based the duty to defend on the fact that the insurers had not alleged sufficient facts to determine that the occurrence fell under the pollution exclusion. The Maine Supreme Court found that the pollution exclusion focuses on the initial release of pollutants, while the complaint at issue focused on the damage subsequent to release.¹²⁷ The court viewed the post-release migration of the pollutants as irrelevant to the scope of the exclusion.¹²⁸ In order to exempt themselves from defending Dingwell against the class action, the insurers had to show that the initial *release* of pollutants had not been sudden and accidental.¹²⁹ In the court’s view, the characterization of the release of the pollutants was critical to trigger the coverage exclusion.

2. Iowa: *Weber v. IMT Insurance Co.*¹³⁰

While the Iowa Supreme Court did not address the meaning of “sudden” in the 1990 *Weber* case, it did define “accidental,” and held the entire pollution exclusion applicable to odors from waste material that damaged another’s property.¹³¹ Newman, a sweet corn farmer and neighbor to Weber, alleged extensive damage to his crop due to the odor from consistent spillage of hog manure that Weber transported between fields. For several years, Weber had hauled hog manure from one area of his farm to another utilizing a common roadway between Newman’s farm and his own. Weber used a manure spreader to transport the material.¹³² This method of transportation consistently led to spillage, and the odor from the spilled manure adversely affected Newman’s sweet corn crop. Predictably, Weber’s insurer refused to defend him in the litigation, denying coverage due to the pollution exclusion clause in Weber’s farm liability policy.

The court considered the spillage to be waste material under the exclusionary language, raising the issue of whether the discharge of the material was “sudden and accidental.” Because the phrase “sudden and

126. The court noted that a release of pollutants “may be unexpected and unintended, without being sudden and accidental.” *Id.*

127. *Id.* at 225.

128. *Id.* The court specifically noted that the lower court in ruling upon this case had failed to distinguish between the gradual permeation of the ground, by which the water table was ultimately polluted, and the initial release of the pollutants from Dingwell’s facility. The class action plaintiffs, at this point, have no way of knowing how the toxic wastes entered the ground. There may have been either intentional dumping or burial or unintentional spills, leaks, or other accidents.

Id. at 224-25.

129. *Id.*

130. 462 N.W.2d 283 (Iowa 1990).

131. *Id.* at 286.

132. A manure spreader systematically drops manure and then tracks over it to spread the manure on the ground as fertilizer. *Id.* at 287.

accidental" is conjunctive, the court determined that a release must be both sudden *and* accidental to restore coverage under the exclusion.¹³³ The court acknowledged the diversity of meanings of the word "sudden," but studiously avoided judicial interpretation of the word itself.¹³⁴ Instead, the court held that the exception to the pollution exclusion was not satisfied since the release was not accidental.¹³⁵ The court examined other jurisdictions' interpretations of "accidental" before adopting one that comported with both Iowa precedent and persuasive extrajudicial decisions.¹³⁶ Thus, the court held "accidental," as used in the policy exclusion, to mean an unexpected and unintended event.¹³⁷

The evidence presented to the court showed a several year history of manure spillage during transport. In the court's view, Weber should have expected such spills—the operation of a manure spreader and habitual spillage over a lengthy period of time were enough to alert Weber to both the possibility of damage and its likely occurrence.¹³⁸ This foreseeability negated a determination that the event was accidental. Because the release did not fulfill the accidental prong of the exclusionary clause, the court declined to define "sudden."¹³⁹ In Iowa at least, a contaminating release must be both "accidental" and "sudden" to reinstate coverage for damage created by pollution.

From this decision, it seems that the Iowa Supreme Court may give "sudden" a temporal meaning. The court did not view "accidental" as simply mirroring the coverage under "occurrence." Thus, it might be inferred that the court would follow the line of cases that have refused to find that the "occurrence" requirement and the "sudden and accidental" language are coextensive.¹⁴⁰ To avoid redundancy in the policy language, the court might define a "sudden" release temporally.

3. New York: *Technicon Electronics Corp. v. American Home Assurance Co.*¹⁴¹ and *Powers Chemco, Inc. v. Federal Insurance Co.*¹⁴²

In 1989 *Technicon* provided the highest court of New York with a relatively uncomplicated set of facts with which to confront the pollu-

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* The court examined both prior cases in which it had defined "accident" and Eighth Circuit Court of Appeals cases defining "accidental" and "expected." *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *See infra* part III.B.4.

141. 542 N.E.2d 1048 (N.Y. 1989).

142. 548 N.E.2d 1301 (N.Y. 1989).

tion exclusion. Technicon operated a blood sample analysis machine manufacturing plant in Puerto Rico that intentionally discharged toxic chemicals, including heavy metals such as mercury, into a nearby creek.¹⁴³ Residents of an adjacent area sued Technicon for personal injuries allegedly caused by exposure to the pollutants. Soon after the suit was filed, the EPA warned Technicon that the agency was considering the imposition of CERCLA charges.¹⁴⁴

In its answers to interrogatories in connection with the pending litigation, Technicon admitted that the discharges were intentional, but claimed they were lawful. Technicon's insurers refused to defend the claims, alleging noncoverage under the CGL's pollution exclusion. Technicon then brought a declaratory judgment action against seventeen of its insurers to ascertain their legal obligations to the company.¹⁴⁵

While the court found that such damages fit under the "occurrence" language of the policy, since the damages were unintended and unexpected, it held that the pollution exclusion negated that coverage.¹⁴⁶ The court described the exclusion as "unambiguously plain and operative," and it specifically held that the exception modified the "occurrence" coverage by narrowing the kinds of events for which coverage legitimately is applied.¹⁴⁷ The court then found that an intentional discharge of pollutants into the waterway could not be construed as an "accidental" release under the exception to the exclusion.¹⁴⁸

Using the same construction as the Iowa court in *Weber*, the Court of Appeals for New York noted the conjunctive requirement of the exception. A release must be both sudden *and* accidental to reinstate coverage otherwise negated by the exclusion.¹⁴⁹ Because Technicon intended to discharge waste material, the exception to the exclusion clause remained unactivated. Having decided that Technicon's claim for coverage failed the "accidental" prong of the reinstatement test, the court refused to consider the interpretation of "sudden."¹⁵⁰ Since the court specifically held that the exclusionary language was not coterminous with the "occurrence" language, the court appears to be inclined in future litigation to impart some temporal aspect to the meaning of "sudden."

143. 542 N.E.2d at 1049.

144. *Id.*

145. *Id.*

146. *Id.* at 1050.

147. *Id.*

148. *Id.* at 1050-51.

149. "[D]ischarges that are either nonsudden or nonaccidental block the exception from nullifying the pollution exclusion." *Id.* at 1050.

150. *Id.* at 1051.

In *Powers Chemco, Inc. v. Federal Insurance Co.*¹⁵¹ the court reaffirmed its holding in *Technicon* that intentional discharges of contaminants do not satisfy the "sudden and accidental" clause. When the previous owner of the property released the pollutants without the knowledge of the current owner—the insured—the pollution exclusion nonetheless excluded coverage of the second owner for damages related to the earlier disposal.¹⁵² The scope of the pollution exclusion under New York law thus is not limited to liability based on actions of the insured, and the landowner may be liable for damages from intentional releases by a previous owner.¹⁵³

4. North Carolina: *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*¹⁵⁴

In 1986 the Supreme Court of North Carolina interpreted the pollution exclusion clause in *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.* This decision was a major step away from the decisions in both *Lansco* and *Dingwell*.¹⁵⁵

In *Waste Management* the EPA alleged that a landfill owned by Waste Management of Carolinas, Inc., had leached dangerous chemicals into groundwater, rendering the well water for the surrounding community hazardous for human consumption. Waste Management impleaded Trash Removal Systems, Inc. (TRS), the transporter of waste to the landfill, alleging that TRS had represented the waste to be nonhazardous. The TRS insurers denied any duty to defend the company under the policy since the policy contained a pollution exclusion. TRS brought a declaratory judgment action to determine the duties of its insurers under the policy.

The North Carolina Supreme Court refused to find the exclusion ambiguous.¹⁵⁶ The court expressly criticized the *Dingwell* decision as too restrictive.¹⁵⁷ The court instead utilized a tripartite analysis, at-

151. 548 N.E.2d 1301 (1989).

152. *Id.* at 1302.

153. The court rejected *Powers Chemco's* argument that: since it was not the actual polluter, but merely inherited the problem from the prior landowner, the pollution exclusion clause cannot bar its present insurance claim, and that there is nothing in the language . . . to suggest that it is not applicable when liability is premised on the conduct of someone other than the insured.

Id.

154. 340 S.E.2d 374 (N.C.), *reh'g denied*, 346 S.E.2d 134 (N.C. 1986).

155. *See supra* parts II.B.2.b, III.B.1.

156. 340 S.E.2d at 379.

157. *Id.* at 381 (stating that when "[c]ourts consider the release alone to be the key to the pollution exclusion clause, the sudden and accidental exception can be bootstrapped onto almost any allegations that do not specify a gradual release or emission"). The *Peerless* court required a broader analysis in order to give meaning to all of the policy language.

tempting to read separate meaning into "occurrence," the pollution exclusion, and the "sudden and accidental" exception to the exclusion. First, the court found that the "occurrence" requirement focuses on the anticipation of the insured as to the damages sustained.¹⁵⁸ Unexpected and unintended damages satisfy this occurrence requirement. Next, the court found that the body of the pollution exclusion requires that the occurrence actually result in contamination.¹⁵⁹ Finally, the court inferred a temporal aspect to the "sudden and accidental" phrase, holding that the phrase means both instantaneous and unexpected.¹⁶⁰

By refusing to follow *Lansco's* holding that the exclusionary clause reiterates the "occurrence" language, the North Carolina Supreme Court gave meaning to each requisite word and phrase in the policy. The court noted that to hold otherwise would render the policy provisions redundant and indistinguishable from one another, an unwanted result for insurance policies in which each word is drafted carefully for coverage purposes.¹⁶¹ Thus, according to the North Carolina Supreme Court, a pollution event's damage coverage is not reinstated under the exception unless the release was "sudden and accidental," that is, instantaneous and unexpected.

Waste Management is significant for its recognition that the pollution exclusion limits the coverage available under the initial "occurrence" language. Under the *Waste Management* court's analysis, the gradual leaching of hazardous materials does not meet the temporal requirements of the language of the exclusion.¹⁶²

5. Massachusetts: *Lumbermens Mutual Casualty Co. v. Belleville Industries, Inc.*¹⁶³

Unlike the Iowa court's decision in *Weber*, the Massachusetts court in *Lumbermens* clearly defined "sudden" as containing a temporal element. In the 1970s Belleville Industries produced electrical capacitors using polychlorinated biphenyls (PCBs) in its manufacturing process. In the district court action, both state and federal governments alleged that PCBs from Belleville's plant had polluted the New Bedford Harbor. Citing the pollution exclusion, Lumbermens Mutual Casualty refused to defend Belleville in the ensuing litigation. Belleville, however,

158. *Id.* at 382.

159. *Id.* at 380-81.

160. *Id.* at 382 (stating that "[t]he exception also describes the event—not only in terms of its being unexpected, but in terms of its happening instantaneously or precipitantly").

161. *Id.* at 381-82. In the course of determining the proper interpretation of the language, the court also discussed the public policy purposes underlying the exclusion. *Id.* at 381.

162. *Id.* at 383.

163. 555 N.E.2d 568 (Mass. 1990).

argued that the release of pollutants was "sudden and accidental" and thus covered by its CGL policy.¹⁶⁴

Prior to *Lumbermens*, Massachusetts courts had interpreted the "sudden and accidental" clause in conflicting manners. In *Shapiro v. Public Service Mutual Insurance Co.*¹⁶⁵ the court found the exception ambiguous and allowed coverage for gradual pollution. In *C.L. Hawthaway & Sons Corp. v. American Motorists Insurance Co.*,¹⁶⁶ however, the court refused to follow *Shapiro's* reasoning and questioned whether the state supreme court likewise would decline to follow the *Shapiro* court's rationale.¹⁶⁷

In *Lumbermens* the Massachusetts Supreme Judicial Court¹⁶⁸ refused to find that the "sudden and accidental" clause was ambiguous, or that it merely echoed the "occurrence" language. The court stressed that policy language should not be interpreted to promote surplusage.¹⁶⁹ Instead, the court noted that the term "occurrence" focuses inquiry on whether the *damage* was expected or intended from the insured's point of view, while coverage under the exception turns on whether the *release* of the pollutants happened suddenly.¹⁷⁰ The court stressed the importance of the release itself, holding that the "sudden and accidental" phrase concerns neither the cause of the release of a pollutant nor the damage resulting from the release.¹⁷¹

The court held that "sudden," when used in conjunction with "accidental," is unambiguous and has a crucial temporal element requiring an abrupt release.¹⁷² Finding no reasonable alternative to the construction given "sudden" in the context of the exclusion, the court summarily rejected the prior cases that found ambiguity in the term.¹⁷³ The court, however, injected some uncertainty into its otherwise clear opinion by noting that it left undecided the extent to which the drafting history of a phrase in a standard form policy would resolve interpretive

164. *Id.* at 570.

165. 477 N.E.2d 146 (Mass. Ct. App. 1985); *see also* *Allstate Ins. Co. v. Quinn Constr. Co.*, 713 F. Supp. 35 (D. Mass. 1989) (accepting, in dicta, the *Shapiro* holding).

166. 712 F. Supp. 265 (D. Mass. 1989).

167. *Lumbermens*, 555 N.E.2d at 571.

168. *Lumbermens* was before the Massachusetts Supreme Judicial Court on certification from the United States District Court for the District of Massachusetts. This certification allowed the state supreme court to rule on the insurance issues presented, thereby giving guidance to the federal court and promoting consistency of judicial interpretation under Massachusetts law.

169. *Lumbermens*, 555 N.E.2d at 572.

170. *Id.* at 570.

171. *Id.* at 571.

172. "If the word 'sudden' is to have any meaning or value in the exception to the pollution exclusion clause, only an abrupt discharge or release of pollutants falls within the exception." *Id.* at 572.

173. *Id.* at 573.

disputes over policy language.¹⁷⁴ Thus, for the time being, litigants in Massachusetts should consider carefully the import of conflicting drafting histories.¹⁷⁵

6. Wisconsin: *Just v. Land Reclamation, Ltd.*¹⁷⁶

Just months before the Massachusetts Supreme Judicial Court decided *Lumbermens*, the Wisconsin Supreme Court reached the opposite conclusion, holding that the "sudden and accidental" language in the CGL is ambiguous.¹⁷⁷ A comparison between *Lumbermens* and *Just* points out the variations on pollution exclusion interpretations.

Land Reclamation, Ltd. (LRL) operated a landfill in Racine County, Wisconsin. Nearby landowners brought suit against LRL, alleging that over the course of time, the company had operated the site negligently. The landowners complained that LRL operated the landfill in violation of federal, state, and local laws and that LRL's actions resulted in water contamination, noise, dust, odor, blowing trash, pest infestation, and an increase in medical abnormalities among nearby residents.¹⁷⁸ Bituminous, LRL's insurer, conceded that the pollution was an "occurrence" under the liability policy, but refused to defend LRL, alleging that LRL's actions did not satisfy the "sudden and accidental" exception to the pollution exclusion.

While both the trial and appeals courts found that the meaning of the "sudden and accidental" phrase was plain, the Wisconsin Supreme Court disagreed, finding the term "sudden" to be ambiguous.¹⁷⁹ Although it agreed with the lower courts that "sudden and accidental" could mean abrupt or immediate, the court held that a phrase is ambiguous when it is susceptible to more than one interpretation and quoted different meanings given to the word "sudden" in two different dictionaries.¹⁸⁰ To the Wisconsin Supreme Court, the fact that two dictionaries differed on the primary definition of "sudden" showed that the term is ambiguous.¹⁸¹

The court's finding of ambiguity led it to construe the policy according to the doctrine of *contra preferentem*.¹⁸² The court thus construed "sudden and accidental" against the insurer by finding that it

174. *Id.*

175. *See supra* part II.B.2.a.

176. 456 N.W.2d 570 (Wis. 1990).

177. *Id.* at 573.

178. *Id.* at 572.

179. *Id.* at 571.

180. *Id.* at 573.

181. *Id.*

182. *Id.*

means "unexpected and unintended."¹⁸³ The court noted that this interpretation comports with the particular drafting history that considers the phrase to restate the coverage available under "occurrence."¹⁸⁴

The dissent disagreed with the finding of ambiguity,¹⁸⁵ stating that "sudden," when viewed in the context of the exception, necessarily must have a temporal meaning.¹⁸⁶ According to the dissent, to construe "sudden" as "unexpected and unintended" strips it of any discernible meaning distinct from that of its conjunctive term "accidental."¹⁸⁷ To the dissent, the majority's interpretation strained the language and led to useless surplusage.¹⁸⁸

7. Georgia: *Claussen v. Aetna Casualty & Surety Co.*¹⁸⁹

Henry Claussen owned a fifty-two acre tract of land that he leased out as a municipal landfill. For six years the site was used almost exclusively for chemical and industrial waste. In 1977 the site was closed and returned to Claussen with the fill completely graded and seeded. In 1985 the EPA ranked the site as one of the most hazardous in the nation.¹⁹⁰ The leaching of hazardous materials from the former landfill had contaminated the groundwater. When confronted with a suit brought by the EPA, Claussen claimed that he had had no knowledge of hazardous waste dumping at the site.¹⁹¹

Claiming that the pollution exclusion negated coverage, Claussen's insurer, Aetna, refused to defend him against the EPA action. The action was removed to the District Court for the Southern District of Georgia, which gave summary judgment to Aetna.¹⁹² On appeal to the Eleventh Circuit, the court certified the policy interpretation issues to the Georgia Supreme Court.¹⁹³

In the Georgia Supreme Court, Aetna argued that "sudden" could only mean "abrupt," while Claussen argued that it meant "unexpected."¹⁹⁴ The court consulted four dictionaries and found that "sud-

183. *Id.*

184. *Id.*

185. *Id.* at 579 (Steinmetz, J., dissenting).

186. *Id.*

187. *Id.* at 579-80. The dissent wondered why the policy would reinstate coverage for "unexpected and unintended" releases. *Id.*

188. *Id.* "The term 'sudden,' read in context, adds nothing and is therefore meaningless unless its plain meaning is construed to add the element of brevity, the temporal element, to the characterization of the polluting discharge." *Id.* at 580.

189. 380 S.E.2d 686 (Ga. 1989).

190. *Id.* at 687.

191. *Id.*

192. 676 F. Supp. 1571 (1987).

193. 865 F.2d 1217 (11th Cir. 1989).

194. *Claussen*, 380 S.E.2d at 688.

den" has several reasonable meanings.¹⁹⁵ The court began its decision by stating that Georgia contract interpretation law requires words to bear their common meanings.¹⁹⁶ If the common meaning is "doubtful" then the courts will construe the term so as to provide coverage.¹⁹⁷ Since "sudden" could have any one of several meanings, the court held that the definition proposed by the insured—unexpected—should be used.¹⁹⁸

Faced with this adverse determination, Aetna then argued that such a construction would violate another basic interpretive rule, that contracts should be read to give each word separate meaning.¹⁹⁹ Aetna argued that interpreting the term "sudden" to mean "unexpected" would merely restate the meaning and coverage of "occurrence."²⁰⁰ The court disagreed and held that the pollution exclusion focuses on whether the *release* of pollutants is unexpected, whereas the "occurrence" definition focuses on whether the *damage* is unexpected.²⁰¹

Having failed with its other arguments, Aetna then proposed that public policy mandates a different construction of "sudden." The insurer stated that the use of the "unexpected" interpretation gives a policyholder an incentive to remain unaware of how his land is being used.²⁰² The court acknowledged the persuasiveness of this reasoning, but thought the point moot.²⁰³ Because the absolute pollution exclusion replaced the old pollution exclusion clause in 1985, the court believed that its decision would have little impact on the future behavior of insureds.²⁰⁴

195. "Thus, if an insurance contract is capable of being construed two ways, it will be construed against the insurance company and in favor of the insured." *Id.*

196. *Id.* at 687-88. The court stated that perhaps the temporal meaning of "sudden": 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.

Id. at 688.

197. *Claussen*, 380 S.E.2d at 688 (citing GA. CODE ANN. § 13-2-2(5) (Michie 1982)).

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* Thus, the court held that the exclusion has only the effect of negating coverage for intentional discharge leading to damage.

202. *Id.* at 689. To follow Aetna's argument to its logical conclusion, as long as a landowner does not know how his land is being used, he cannot expect any release of pollutants. Thus, as long as he remains unaware—"keeps his head in the sand"—a landowner will always have liability coverage under the "sudden and accidental" exception to the exclusion.

203. *Id.* at 689-90.

204. *Claussen*, 380 S.E.2d at 690. On remand, the district court held that the Georgia Supreme Court assumed the validity of a true "head in the sand" defense. *Claussen v. Aetna Casu-*

Three Justices dissented from the opinion, preferring to find the exclusion unambiguous.²⁰⁵ While they agreed that "sudden" does have different meanings in different contexts, they thought that it could only mean "abrupt" in the particular context at issue.²⁰⁶ The dissenters did not believe that the policy language could be construed to allow coverage for six years of toxic waste dumping as an established business procedure.²⁰⁷

8. Colorado: *Hecla Mining Co. v. New Hampshire Insurance Co.*²⁰⁸

From 1938 to 1953 the Hecla Mining Company discharged slag materials into a drainage tunnel. These materials eventually filled the tunnel and blocked the normal flow of water through it. In the early 1980s the blockage was expelled by a surge of water when the water pressure behind the blockage grew too high. This surge carried the mining waste down into the California Gulch drainage basin system, contaminating the water and turning a twenty-mile segment of the Arkansas River orange. The State of Colorado initiated a CERCLA claim against Hecla, seeking joint and several liability for the expense of decontaminating the polluted area.²⁰⁹

Hecla's insurers refused to defend it under its CGL policy, alleging that the discharge had occurred over a period of years and thus was not sudden and accidental. Following the *Claussen* court's reasoning and quoting extensively from the *Claussen* decision, the Colorado Supreme Court ruled that the term "sudden" is susceptible to several definitions, thus making it ambiguous.²¹⁰ This ambiguity allowed the court to rule against the insurer by construing the phrase "sudden and accidental" as equivalent to "unexpected and unintended."²¹¹

The court believed that it could not imbue "sudden and accidental" with purely temporal meaning because to do so would be inconsistent with the given definition of "occurrence."²¹² The court stated that the occurrence language covered unexpected and unintended, continu-

alty & Surety Co., 754 F. Supp. 1576, 1582 (S.D. Ga. 1990). The court rejected the *Powers Chemco* rationale and found that only the insured's intent to release pollutants is pertinent to coverage, not a third party's expectations. *Id.*

205. *Claussen*, 380 S.E.2d at 690 (Hunt, J., dissenting).

206. *Id.*

207. *Id.*

208. 811 P.2d 1083 (Colo. 1991).

209. *Id.* at 1085.

210. *Id.* at 1092 n.13. While the existence of conflicting authority alone is not sufficient to establish that an insurance policy term is ambiguous, the Colorado court maintained that it does cast doubt on the insurer's insistence that the policy language is clear and unambiguous. *Id.* at 1092.

211. *Id.* at 1092.

212. *Id.*

ous and repeated exposure to harmful conditions created by the insured.²¹³ None of the complaints at issue alleged that Hecla had expected or intended the discharge of pollutants into the California Gulch, so the Colorado Supreme Court aligned itself with the Georgia Supreme Court's decision in *Claussen*²¹⁴ and held that Hecla's insurers had a duty to defend under the issued CGL policy.

9. California and Washington: Two States Anticipating Interpretation

While the California Supreme Court has not yet ruled on a particular construction of the pollution exclusion, it has laid the groundwork for such a decision. In *AIU Insurance Co. v. FMC Corp.*²¹⁵ the court interpreted the main CGL coverage language, expressly reserving the proper construction of the pollution exclusion.²¹⁶ Under California law, the court held that undefined terms in the body of the exclusion should be given their plain and ordinary meanings, and that any ambiguities in the language should be resolved in favor of coverage.²¹⁷ Thus, a proinsured pollution exclusion decision seems likely in California.

In a similar case, *Boeing Co. v. Aetna Casualty & Surety Co.*,²¹⁸ the Washington Supreme Court ruled that each phrase in an insurance policy must be construed in context to give effect to each word or clause.²¹⁹ Undefined terms must be given their plain, ordinary, and popular meanings, to be ascertained from standard dictionaries.²²⁰ The court refused to give a term a legal or technical meaning unless it is clear that both parties intended something other than the common definition.²²¹ Furthermore, the court declined to apply a different interpretive rule simply because the insured was a large corporate entity and not an individual.²²²

213. *Id.*

214. *See supra* part III.B.7.

215. 799 P.2d 1253 (Cal. 1990).

216. At issue in *AIU Insurance* was whether costs incurred under CERCLA for mandatory injunctive relief and cleanup are considered "damages" under the CGL and thus are covered under the policy.

217. *Id.* at 1264-65.

218. 784 P.2d 507 (Wash. 1990).

219. *Id.* at 511.

220. *Id.*

221. *Id.* at 513.

222. Because CGL policies are standardized, the court's ruling binds each insured and insurer to the court's interpretation regardless of the size of the insured's business or its expertise in negotiating insurance coverage. *Id.* at 514.

IV. WRESTLING WITH THE INTERPRETIVE DIFFERENCES

There appears to be no easy way to reconcile judicial interpretations of the pollution exclusion.²²³ Implementing any kind of consistency and predictability for future cases arising under the exclusion seems to be a dim hope because "sudden and accidental" is undefined and uncertain. The usual judicial tools of interpretation are not helpful in resolving coverage disputes under the pollution exclusion. Most notably, the drafting history behind the provision points to no definitive interpretation because the intent of the ISO in drafting the provision is fuzzy at best. With the shadow of CERCLA falling across polluted sites, courts may feel pressured to produce result-oriented decisions, and with costs of pollution cleanup running high, courts may seek to impose liability upon a party simply to ensure that someone ameliorates a hazardous situation.

Finally, courts must consider the financial viability of both insureds and insurers. In formulating any resolution to the interpretive problems of the CGL pollution exclusion, courts must be sensitive not only to the present viability of businesses but also to the future liabilities that undoubtedly will arise. While the short-term goal of litigation in this area is to resolve liability for cleanup of a presently known polluted site, the precedential effect of these coverage cases will determine how industrial pollution damage will be handled in the distant future.

While the confusing strands of the pollution exclusion are difficult to untangle, numerous scholars and commentators have attempted to provide better, more efficient methods of resolution than litigation.²²⁴ It is obvious from the state supreme court decisions that the litigation in this area is time-consuming and does nothing to promote a consistent national policy for cleanup of hazardous sites.

At least one of these courts seems almost deliberately obtuse about the future ramifications of its decision.²²⁵ The Georgia Supreme Court's decision in *Claussen*²²⁶ exhibits blatant shortsightedness. The *Claussen*

223. One scholar believes that the insurance companies rejected the pollution exclusion too soon. Asserting that a proinsurer trend began in 1987, this scholar believes that the ISO adopted the absolute pollution exclusion just as courts were beginning to give the old exclusion its proper effect. Comment, *supra* note 3. This seems to indicate that the judicial trend was pointing strongly toward narrow interpretations of coverage under the exclusion. However, there is no evidence to support such a clear proinsurer trend. Instead, the ISO appears to have eliminated the pollution exclusion wisely, preferring instead to cover only individualized pollution risks with riders and not in the form policy. Under this approach insurers can exercise greater control over what kinds of pollution risks they are willing to underwrite.

224. See *infra* notes 243-48 and accompanying text.

225. In contrast, the New Jersey courts have used result-oriented decisionmaking with the seeming intent of attracting new industry to the state. See *supra* note 114 and accompanying text.

226. *Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686 (Ga. 1989); see *supra* part III.B.7.

court believed that its "sudden and accidental" interpretation would have few repercussions because CGL policies no longer include the phrase.²²⁷ Because an absolute pollution exclusion is now used in CGL policies,²²⁸ the court apparently thought the scope and effect of its decision would be limited. However, policies containing the pollution exclusion, in use from 1970 to 1985, will remain actionable for many years to come. Because pollution damage may not even be discovered for years, the policies containing the exclusion—those in use when the release of pollutants occurred—will determine future cleanup liability. The *Claussen* decision may provide an incentive to landowners to take a "head in the sand" approach, by seldom checking on the use of their land. As long as the pollution exclusion is litigated, there will be an incentive to make such an argument.

If litigation is not promoting consistency and predictability in ascribing liability for cleaning up polluted sites, what method will determine liability in a more workable fashion? Commentators have expressed a wide variety of viewpoints. They have tried to promote particular drafting histories,²²⁹ legislative change,²³⁰ and new methods of arriving at the efficient amount of resources to be allocated by both insurers and insureds to clean up a contaminated site.²³¹ Viewpoints run the gamut from hopeful resolutions to tangled ideas of fortuitous, result-oriented decisionmaking.²³²

One commentator has suggested a model in which, by fixing precisely the focus of a policy,²³³ and by defining exactly three parameters, activeness, directness, and suddenness, every contaminating activity could be categorized for coverage assessment.²³⁴ Unfortunately, defining policy terms with pinpoint accuracy is the exact difficulty with the pollution exclusion. Attempting to place pollution events into distinct cate-

227. 380 S.E.2d at 689-90.

228. One scholar claims that the absolute pollution exclusion inserted into CGL policies in 1985 demonstrates the ISO's ability to exclude virtually all pollution coverage claims. Jackson, *supra* note 3, at 224 (stating that "when the insurers wanted to [exclude coverage], they knew how to do it"). But this view is not necessarily accurate. In drafting the old pollution exclusion, the ISO might have drafted the most effective language at the time, not realizing that intense pressure to fund cleanups would force courts to strain their interpretive skills. Moreover, the absolute pollution exclusion has not been in existence long enough to demonstrate how airtight its language is when subjected to the scrutiny of litigation. For an analysis of potential ambiguities under the absolute pollution exclusion, see Comment, *supra* note 3.

229. See generally Greenlaw, Note, *supra* note 3,; Ballard & Manus, *supra* note 1, at 620-29.

230. See *infra* notes 235-36 and accompanying text.

231. See *infra* notes 233-34, 237-38 and accompanying text.

232. See, e.g., Jackson, *supra* note 77 (proposing various methods of cooperation between insurers and insureds, and concluding in an optimistic tone); Note, *supra* note 47 (taking a proinsurer stance and designing an interpretational framework to effectuate that perspective).

233. Note, *supra* note 47, at 1241.

234. *Id.* at 1281.

gories by using narrow definitional parameters seems likely to create only more confusion in this area.

Mitchell Lathrop believes that a first step in resolving coverage under the exclusion is to modify the heavy burden of CERCLA.²³⁵ He states that only federal legislation can spread the monumental costs of cleanups more equitably throughout the national economy.²³⁶ The strict liability nature of the statute sets the stage for aggressive and tenacious lawsuits. The staggering amounts of money involved under CERCLA may make litigating coverage a necessity under some circumstances. By moderating the scope of CERCLA, some of the incentives to litigate coverage disputes might disappear. While Lathrop's proposal would not aid in resolving the interpretive problems of the CGL policy language, at least it might eliminate some of the disputes arising under that language.

Another commentator has noted some governmental and industrial interest in establishing a fund from which to pay costs of environmental remediation.²³⁷ There are several different funding schemes currently being circulated for comment in the environmental liability field, the most viable of which would require a mandatory two percent surcharge on both premiums paid by insureds and on the coverage provided by insurance companies.²³⁸ This proposal has several weaknesses common to all fund schemes. The transaction costs associated with an environmental cleanup fund can be staggering. Administering the fund, collecting the surcharges, validating payouts, and organizing cleanups all raise the overhead involved in putting together a cleanup pool. Moreover, most common pool funding programs provide only attenuated incentives not to pollute, unlike the strong disincentives provided when individual liability is at stake. Finally, with the exorbitant costs of pollution cleanup and the de facto strict liability scheme of CERCLA, a fund may be depleted quickly.

Attorneys Ballard and Manus²³⁹ agree with the holding in *Claussen*.²⁴⁰ They view the pollution exclusion as limiting only coverage for unanticipated or unintended pollution discharges.²⁴¹ Unfortunately, these commentators put far too much emphasis on the inability of courts to discern how short the duration of the pollution release was in

235. LONG, *supra* note 15, § 10A.04.

236. *Id.*

237. Michael C. Pruett, Note, *Environmental Cleanup Costs and Insurance: Seeking a Solution*, 24 GA. L. REV. 705 (1990).

238. *Id.* at 723. In other words, both insureds and insurers would pay into a fund based on the total amount of pollution liability provided.

239. Ballard & Manus, *supra* note 1.

240. *Id.* at 643; see *supra* part III.B.7 (discussing *Claussen*).

241. Ballard & Manus, *supra* note 1, at 643.

order to see if that release qualifies for coverage under the "sudden and accidental" exception to the exclusion. Durational limits may be better served by focusing instead on foreseeability and ordinary business processes. An industry that pollutes as part of its manufacturing process should not be able to claim coverage, while one that experiences an equipment malfunction resulting in a release of pollutants should. It is the middle ground between the two scenarios that is difficult to fit under the language of the exception.

Perhaps there is no way to reconcile all of the contradictory factors at work in coverage under the pollution exclusion. As one commentator points out, as long as both sides continue to adhere to the hard line, neither side has any incentive to compromise.²⁴² The coverage claim might as well be litigated if neither side is willing to concede some amount of liability. If coverage is limited to instantaneous calamities,²⁴³ as insurers like to argue, then almost no pollution damages will be covered under the policy and businesses lose little by litigating their claims. CGL insurance was not meant to cover risks associated with everyday business processes that cause pollution whether or not the business knew that such processes would cause environmental damage.²⁴⁴ By refusing to cover ordinary business operations, insurers create an incentive for industry to investigate the environmental results of its manufacturing processes. Extending coverage to grant indemnity under those circumstances would dissipate any such incentive.²⁴⁵

Arbitration and mediation are two relatively unexplored avenues of resolution in this area.²⁴⁶ The mechanics of these approaches, however, may not be well-suited to resolving the multitude of coverage claims that currently exist or that will arise in the future. Most proposed forms of arbitration or mediation, would resolve disputes on a case-by-case basis.²⁴⁷ Due to the large number of these disputes, however, transaction costs again would escalate. Moreover, knowledgeable mediation experts and arbitration panels set up to deal with these claims would be besieged with parties seeking resolution. A backlog of claims could re-

242. Jackson, *supra* note 77, at 769.

243. *Id.*

244. Comprehensive general liability insurance was designed originally to cover unanticipated damage to third parties, not to cover injuries resulting from industrial practices whose harmfulness was highly likely. See *supra* notes 6-9 & 30 and accompanying text.

245. But see Carl A. Salishury, *Pollution Liability Insurance Coverage, the Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia*, 21 ENVTL. L. 357 (1991) (stating that insurers should be held accountable for all policy language). The article, however, does not discuss the accountability of polluting companies or the need to provide incentives to clean up the environment.

246. See Note, *supra* note 237.

247. *Id.*

sult in a delay in environmental remediation, perhaps leading to irreparable environmental and public health damage.

While carefully planning the framework within which such alternate resolution would take place may overcome some of these concerns, others remain. The greatest weakness of such case-by-case resolution is that it does little to promote predictability and consistency. Much like the fact-specific rulings occurring in judicial resolution of pollution exclusion questions, alternative means of resolution provide neither insurers nor insureds with certainty about whether coverage will or will not be afforded under a certain set of facts.

Certainly any nonlitigation approach to resolving these difficult coverage claims must provide for some cost sharing between insurers and insureds.²⁴⁸ Neither party can foot the bill for an entire cleanup and neither party should be required to do so. With the intent of insurers as to the "sudden and accidental" exception to the exclusion shrouded in impenetrable conflicting drafting history, and with CERCLA and a growing public movement creating disincentives for industrial pollution, it is equitable to make each party pay some amount to clean up pollution damage. Individual negotiation between insurers and insureds, however, may not be desirable due to judicial precedent and the acrimonious history of their relationship in dealing with coverage in this area.

Perhaps the most equitable solution would be to make insurers and insureds split the cost of environmental remediation equally. While it may sound simplistic, such a solution would be easily workable with few transaction costs, would still provide an incentive for industry to develop clean, safe manufacturing processes, and would force insurers to allow some coverage under the CGL policies. Moreover, this approach would provide the maximum amount of predictability. It could make the inefficient and costly litigation over coverage obsolete and make each party shoulder a fair share of the liability for pollution damages.

Recognizing that the ends of the liability spectrum are untenable may promote greater cooperation between insureds and insurers. In the face of rampant forum shopping, interpretive uncertainties, and potentially deleterious costs of cleanup, some kind of alternative dispute resolution or cost sharing may be the only way to resolve the inequities that abound in this area of the law.

V. CONCLUSION

The pollution exclusion is a confusing amalgam of contradictory drafting histories, public policy concerns, business incentives, and unde-

248. See Jackson, *supra* note 3, at 243.

fined terms. While the exclusion has not been in use since 1985, the language of the pollution exclusion will continue to be litigated since many pollution events caused injury when the exclusion was still in effect. Discovering contamination takes time, making pollution liability a long-tailed risk. As a result, interpretations of the exclusion will affect litigants far into the future.

Not only do these judicial interpretations influence potential litigants, but they also determine the availability of pollution coverage and provide both incentives and disincentives to clean up hazardous waste. Currently, there is no middle ground for liability. Some solution must be imposed to right the inequities of the situation. While neither policyholders nor insurers foresaw the tremendous liabilities associated with CERCLA, judicial interpretations of CGL policies still are extending coverage for the astronomical damages associated with that statute. Bankrupting businesses to pay for cleanup is not the answer, but neither is bankrupting insurers or forcing the cost of pollution riders so high as to make any written coverage virtually nonexistent.

The answer to the interpretive problem is not contained in the murky drafting history of the exclusion. Moreover, to search standard dictionaries to define the meanings of key policy terms seems to yield whatever results a court sets out to find. Thus, cooperation is needed to break the uncertainty under which CGL pollution coverage is interpreted. Society should be able to live in a nonhazardous environment. How to achieve the proper balance of incentives to promote cleaner, less harmful industrial processes, and a reasonable amount of indemnity by the insurers in underwriting risk, is the seemingly unsolvable problem. The Gordian Knot is awaiting Alexander's sword.

Sharon M. Murphy

