THE POLLUTION EXCLUSION CLAUSE: IN FAVOR OF THE INSURER OR THE INSURED? *JUST v. LAND RECLAMATION, LTD.* 155 Wis. 2d 737, 456 N.W.2d 570 (1990)

The comprehensive general liability policy (CGL) is the instrument most often used to afford liability protection for commercial ventures.[1] In the 1970s, the insurance industry added a clause to the CGL policy to protect itself against the seemingly limitless fount of environmental litigation.[2] This clause excludes insurance coverage of damages arising from pollution unless the discharges are "sudden and accidental."[3] In-

1. Through such standardized contracts, insurers hoped to achieve uniformity of coverage and of judicial interpretation. Bradbury, *Original Intent, Revisionism, and the Meaning of the CGL Policies*, 1 ENVTL. CLAIMS J. 279, 280 (1989). The basic indemnification clause promises:

> to 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, and arising out of any other operation, activity, or use of property, real or personal, except an occurrence incident to a non-business pursuit.

Tyler & Wilcox, *Pollution Exclusion Clauses: Problems in Interpretation and Application Under the Comprehensive General Liability Policy*, 17 IDAHO L. REV. 497, 498 (1981).

2. For a history of the pollution exclusion clause, see Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237 (1987). Environmental liability has become a leading legal problem in the field of insurance litigation, as evidenced by the common law and statutory expansions of liability throughout the 1980s. This raises in turn important questions of public policy centering on society's reliance on dangerous technologies. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942 (1988).

3. The standard pollution exclusion clause in a comprehensive general liability insurance policy (CGL) excludes from coverage:

> *[B]odily 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.*

Just v. Land Reclamation, Ltd., 155 Wis. 2d 737, 742-43, 456 N.W.2d 570, 571-72 (1990) (emphasis in original; emphasis added).

surers and insureds, however, differ in their interpretations of the phrase "sudden and accidental" in coverage litigation.[4] In *Just v. Land Reclamation, Ltd.*,[5] the Wisconsin Supreme Court held that the phrase "sudden and accidental" in the pollution exclusion clause means unexpected and unintended damage, permitting the insured coverage for unexpected pollution damage that occurred over a substantial period of time.[6]

In *Just*, homeowners alleged that Land Reclamation, Ltd. (LRL) operated a landfill that was the source of unexpected and unintended pollution causing them bodily injury and property damage.[7] Pursuant to a duty to defend clause, LRL's insurer, Bituminous Casualty Corporation (Bituminous), joined in LRL's defense but later withdrew and denied coverage.[8] In its motion for summary judgment, Bituminous claimed that the word "sudden"[9] in the pollution exclusion clause unambiguously signified "abrupt and immediate," and therefore the

4. Williams, *The "Sudden and Accidental" Exception to the Pollution Exclusion*, 1 ENVTL. CLAIMS J. 323, 324 (1989). Advocates of insureds argue that the phrase "sudden and accidental" does not apply to gradual releases which the exclusion otherwise precludes, so long as the insured did not expect or intend the damage. Insurers, by contrast, argue that "sudden" means "quick" and that coverage extends only to releases happening in a brief or abrupt time frame. *Id.*

5. 155 Wis. 2d 737, 456 N.W.2d 570 (1990).

6. *Id.* at 738, 456 N.W.2d at 571. Other courts called upon to interpret the phrase "sudden and accidental" have found it ambiguous and thus interpreted the exclusion in favor of the insured. *See, e.g.*, Claussen v. Aetna Casualty & Sur. Co., 259 Ga. 333, 380 S.E.2d 686 (1989) (rejecting the contention that it merely repeated the definition of "occurrence," the court explained that while "the pollution exclusion clause focuses on whether the *'discharge, dispersal or release'* of the pollutants is unexpected or unintended, the definition of occurrence focuses on whether the *property damage* is unexpected and intended."); United States Fidelity & Guar. Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 387, 535 N.E.2d 1071, 1077 (Ct. App. 1989) (noting that interpreting "sudden" to mean "abrupt" and "instantaneous" contravenes the insurance industry's intent in adding the pollution exclusion clause to the CGL). *But see* American Motorists Ins. Co. v. General Host Corp., 667 F. Supp. 1423, 1429 (D. Kan. 1987) (rejecting the contention that the pollution exclusion clause is ambiguous, the court stated that "read as a whole, the policy covers 'continued and repeated exposure' except for exposures to pollution; then it covers only 'sudden and accidental' events.").

7. *Just*, 155 Wis. 2d at 738, 456 N.W.2d at 572. Plaintiffs alleged that over the course of time LRL operated the landfill negligently and in violation of federal, state and local law, rules, ordinances and regulations, resulting in water contamination, noise, dust, smells and blowing garbage. *Id.*

8. *Id.* at 740, 456 N.W.2d at 572.

9. *Id.* The insurance policy itself failed to explicitly define the meaning of the terms "sudden and accidental." *See supra* note 3 for the pertinent language of the CGL policy.

damages did not come within the scope of the policy's coverage.[10] The circuit court granted summary judgment dismissing Bituminous, and LRL appealed.[11] The court of appeals affirmed, holding that the pollution exclusion clause precluded LRL from coverage because nothing in the record specifically set forth allegations of immediate discharge on a specific date and time.[12] On appeal, the Wisconsin Supreme Court reversed and remanded, holding that "sudden and accidental" is an ambiguous term,[13] which would not support exclusion from coverage for unexpected and unintended pollution damage.[14]

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10. Just v. Land Reclamation, Ltd. 151 Wis. 2d 593, 445 N.W.2d 683 (Ct. App. 1989).

11. *Id.* at 603, 445 N.W.2d at 687. In holding that LRL failed to meet its burden of proving that the claims came within the coverage provision, the court stated "[t]hat [because] pollution has occurred does not of itself raise a reasonable inference of a sudden discharge." *Id.* at 605, 445 N.W.2d at 688.

12. *Just*, 155 Wis. 2d at 738, 456 N.W.2d at 571.

13. The court found that dictionaries differ on the meaning of the term "sudden," thereby furthering the conclusion that the term is ambiguous:

> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) defines "sudden" in a variety of different ways. Webster's first defines the term as "happening without previous notice . . . occurring unexpectedly [and] not foreseen." Only later does Webster's define the word "sudden" in any sense of timeliness, listing the synonyms "prompt" and "immediate." *Id.* In contrast, the RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987), first defines the word "sudden" in temporal terms as "happening, coming, made or done quickly."

Id. at 740, 456 N.W.2d at 573 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1900 (2d ed. 1987); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2284 (1986)). The court noted that especially in exclusionary clauses, ambiguous language must be construed against the party who drafted the ambiguous language, here (as is usually the case) the insurer. *Id.* Therefore, the court defined "sudden and accidental" to mean damages that are unexpected and unintended. *Id.* This interpretation naturally favors insureds because insurers must indemnify for damage resulting from continuous pollution. *Id.* at 738, 456 N.W.2d at 571.

14. Attorneys for the insurers argued without success that rules governing the construction and interpretation of insurance policies required the state's supreme court to uphold the lower courts' rulings:

> [I]n interpreting insurance policies, the objective is to ascertain and carry out the true intentions of the parties. In ascertaining the intention of the parties, a practical construction is the most persuasive. When language is plain and unambiguous, the apparent import of the words must govern. In addition, it is fundamental that no insurance contract be rewritten to bind an insurer to a risk which it did not contemplate and for which it was not paid, unless the policy's terms are ambiguous or obscure.

Brief of Defendant-Third Party Plaintiff-Respondent Bituminous Casualty Corporation at 9, Just v. Land Reclamation, Ltd., 155 Wis. 2d 737, 456 N.W.2d 570 (1990) (No. 88-1656) (citing Milwaukee v. Allied Smelting Corp., 117 Wis. 2d 377, 385-86, 344 N.W.2d 523, 527 (Ct. App. 1983) (holding that if a condition is caused by accident, coverage is

The first generation of CGL policies established insurers' indemnification duties triggered by the occurrence of an "accident."[15] In 1966, the insurance industry revised the CGL policies to allow coverage for an "occurrence."[16] An occurrence happens when damages arise from an accident that is neither expected nor intended.[17] Although insurers intended the occurrence definition to limit the scope of coverage, courts construed the revision as broadening coverage.[18] In an attempt to achieve clarity, insurers most recently added the pollution exclusion clause, under which they would cover only pollution-related losses that arose from occurrences both "sudden and accidental."[19]

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limited to injuries caused by a sudden and identifiable event with respect to both location and time)).

15. *See* Tyler & Wilcox, *supra* note 1, at 499 (an "accident" may be defined as "a distinctive event that takes place by some unexpected happening at a date that can be fixed with reasonable certainty" (quoting 11 G. COUCH ON INSURANCE 2D, § 44:283, at 700 (1963))). The term "accident" does not embrace gradual damage. Note, *supra* note 2, at 1242. *See also* Clark v. London & Lancashire Indem. Co. of Am., 21 Wis. 2d 268, 283, 124 N.W.2d 29, 37 (1963) (where the damage results from a long, continuing nuisance condition and the insured fails over many months to take effective steps to abate the nuisance, the damage is not "caused by accident" within the meaning of the insurance contract).

16. Note, *supra* note 2, at 1246. The insurance industry changed its policy in response to consumer demands for greater coverage, the uncertainty of judicial interpretations, and a trend toward judicially expanded coverage. *Id.*

17. Tyler & Wilcox, *supra* note 1, at 499. The insurance industry interprets the term occurrence 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." *Id.* (citing Fish, *An Overview of the 1973 Comprehensive General Liability Policy and Products Liability Coverage*, 34 J. MO. B. 257 (1978)).

18. Note, *supra* note 2, at 1248. "Coverage for pollution or contamination *is not provided in most cases* under present [occurrence-based] policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence." *Id.* (quoting The Mutual Insurance Rating Bureau). The occurrence-based policies, however, eliminated the word "sudden" contained in previous accident-based policies. With "suddenness" no longer a requirement, courts seized the opportunity to expand coverage and denied coverage only if the losses were foreseeable. *Id. See, e.g.*, Wilmington v. Pigott, 64 N.C. App. 587, 307 S.E.2d 857, 859 (Ct. App. 1983) (" '[A]ccidental' means that which happens by chance or fortuitously, without intent or design, and which is unexpected, unusual, and unforeseen.").

19. Note, *supra* note 2, at 1252. By reintroducing the suddenness requirement, insurers hoped to cut back coverage from the broader definition of occurrence. *Id. See also* Broadwell Realty v. Fidelity & Casualty Co., 218 N.J. Super. 516, 528 A.2d 76, 85 (Super. Ct. App. Div. 1987). Holding that the "sudden and accidental" exception was simply a restatement of the definition of "occurrence," the *Broadwell* court noted that "the exclusion was designed to decrease claims for losses caused by expected or in-

Because state law governs the interpretation of insurance contracts, occasional inconsistencies arise among the states. The courts have variously interpreted "sudden and accidental" within the pollution exclusion clause as permitting or precluding coverage, given similar "occurrences" involving pollution damage.[20] One line of authority holds that unintended and unexpected damages fall within the "sudden and accidental" exception to the pollution exclusion clause.[21] The

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tended pollution by providing an incentive to industry to improve its manufacturing and disposal processes." *Id.*

20. *See generally* Williams, *supra* note 4 for an overview of the ways courts have traditionally interpreted the pollution exclusion clause and recent trends in interpretations.

21. Two theories have been advanced under this rubric. Some courts have determined that "sudden and accidental" is another way of defining "occurrence." *See, e.g.*, United States Fidelity & Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich. 1988) (where policy defined occurrence as accident, including continuous repeated exposure, unexpected or unintended damage falls within the sudden and accidental exception to the pollution exclusion clause); Kipin Indus., Inc. v. American Universal Ins. Co., 41 Ohio App. 3d 228, 535 N.E.2d 334 (Ct. App. 1987) ("occurrence" not restricted to momentary event, but includes any event which causes unexpected or unintended damages); United Pac. Ins. Co. v. Van's Westlake Union, 34 Wash. App. 708, 664 P.2d 1262 (Ct. App. 1983) (pollution exclusion clause in liability policy was meant to deprive active polluters, and simply restates the definition of "occurrence").

Other courts have found the phrase "sudden and accidental" ambiguous, and therefore construe the clause in favor of the insured. *See, e.g.*, New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359 (D. Del. 1987) (the word "sudden" means an unexpected discharge, dispersal, release or escape of pollutants); Claussen v. Aetna Casualty & Sur. Co., 259 Ga. 333, 380 S.E.2d 686 (1989) (courts construe the term "sudden" in favor of insureds to mean "unexpected and unintended" because it includes more than one meaning); United States Fidelty & Guar. Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 535 N.E.2d 1071 (Ct. App. 1989) (interpretation of liability policy in favor of insured appropriate if ambiguity arises in policy exclusion); CPS Chem. Co. v. Continental Ins. Co., 199 N.J. Super. 558, 489 A.2d 1265 (Super. Ct. Law Div. 1984) (court views unexpected or unforeseen character of word "accident" as used in insurance policy from standpoint of insured); Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co., 186 N.J. Super. 156, 451 A.2d 990 (Super. Ct. Law Div. 1982) (court must sustain coverage if a problem of interpretation in construing policy exists); Niagara County v. Utica Mut. Ins. Co., 80 A.D.2d 415, 439 N.Y.S.2d 538 (App. Div. 1981) (where terms of insurance policy are ambiguous, the court must construe the policy most favorably to insured); Allstate Ins. Co. v. Klock Oil Co., 73 A.D.2d 486, 426 N.Y.S.2d 603 (App. Div. 1980) (court should not limit term "sudden" to an instantaneous happening and should construe ambiguous terms in favor of insured); Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co., 17 Ohio App. 3d 127, 477 N.E.2d 1227 (Ct. App. 1984) (court may find release of hazardous waste materials generated by insured "sudden and accidental" absent any allegations that insured intended or expected release of materials or damage).

other line of authority interprets the phrase as having a temporal meaning, allowing coverage only if the discharge is immediate.[22]

An early New York case interpreting the pollution exclusion clause is *Allstate Insurance Co. v. Klock Oil Co.*[23] In *Klock Oil*, a landowner sued Klock Oil Company (Klock) for property damage caused by a leaking gasoline storage tank.[24] Klock sought to compel its insurer to defend it in spite of the pollution exclusion clause.[25] The court held that the negligent installation or maintenance of the storage tank could result in an accidental discharge or escape of gasoline which would be both "sudden and accidental" though undetected for a substantial pe-

22. *See, e.g.*, FL Aerospace v. Aetna Casualty & Sur. Co., 897 F.2d 214 (6th Cir. 1990) (court should give term "sudden" its plain everyday meaning, so as to impart a temporal component); United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988) (phrase "sudden and accidental" not ambiguous or a synonym for unexpected and unintended); Ray Indus. Inc. v. Liberty Mut. Ins. Co., 728 F. Supp. 1310 (E.D. Mich. 1989) (contamination of a landfill continuously for approximately 13 years not "sudden and accidental" discharge and thus fell within pollution exclusion); C.L. Hauthaway & Sons Corp. v. American Motorists Ins. Co., 712 F. Supp. 265 (D. Mass. 1989) (slow and gradual discharge not a "sudden and accidental" discharge within meaning of an exception to pollution exclusion); Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 702 F. Supp. 1317 (E.D. Mich. 1988) ("sudden" not defined as unexpected and unintended, but includes a temporal aspect); United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co., 693 F. Supp. 617 (M.D. Tenn. 1988) (term "sudden" not restatement of definition of "occurrence," but a provision to limit coverage to accidents distinct in time and place); American Motorists Ins. Co. v. General Host Corp., 667 F. Supp. 1423 (D. Kan. 1987) (damages excluded from coverage where salt plant operator knew of pollution for nearly 50 years); Fischer & Porter Co. v. Liberty Mut. Ins. Co., 656 F. Supp. 132 (E.D. Pa. 1986) (pollution exclusion clause not ambiguous and applied to contamination that resulted from continuous dumping of toxic chemicals); International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co., 168 Ill. App. 3d 361, 522 N.E.2d 758 (Ct. App. 1988) (term "sudden" means that resulting flow or dispersal of pollutants occurred without notice, or on brief notice, abruptly or hastily, and not merely unintended and unexpected); Technicon Electronics Corp. v. American Home Assurance Co., 141 A.D.2d 124, 533 N.Y.S.2d 91 (N.Y. App. Div. 1988) ("sudden and accidental" event is one which is unexpected, unintended, and occurs over short period of time); Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374 (1986) ("sudden and accidental" exception requires event not only to be unexpected, but to happen instantaneously); Lower Paxton Township v. United States Fidelity & Guar. Co., 557 A.2d 393 (Pa. Super. Ct. 1989) (insured barred from recovery where no contention that pollution was produced in an abrupt manner).

23. 73 A.D.2d 486, 426 N.Y.S.2d 603 (App. Div. 1980).

24. *Id.* at 487, 426 N.Y.S.2d at 604.

25. *Id.* Allstate disclaimed coverage and refused to defend on the ground that the pollution exclusion was applicable. Hurwitz & Kohane, *The Love Canal-Insurance Coverage for Environmental Accidents*, 50 INS. COUNS. J. 378, 383 (1983).

riod of time.[26] The court explained that if the resulting damage were found to be unintentional, the leak in question might constitute an accident,[27] regardless of the period of time involved.[28]

The New York courts expanded on the *Klock Oil* decision in *Niagara County v. Utica Mutual Insurance Co.*,[29] a case which arose out of the Love Canal catastrophe.[30] The court in *Niagara County* held the insurer liable for the insured's defense costs, ruling the pollution exclusion clause inapplicable where the insured's conduct was unintentional.[31] The court reasoned that where complaints merely alleged that Niagara County negligently oversaw the Love Canal site,[32] the allegations fell outside the pollution exclusion; the clause contemplated knowing pollution only.[33] Moreover, whether the contamination occurred all-at-once or over a span of years was not dispositive. The relevant inquiry focused on whether the insured expected or intended the pollution and resulting damages to occur.[34]

Courts of other states have followed the New York decisions, interpreting the clause as permitting coverage on claims where the injury was neither expected nor intended.[35] For example, in *Buckeye Union*

26. *Klock Oil*, 73 A.D.2d at 487, 426 N.Y.S.2d at 605.

27. The court focused on whether the damage was unexpected or unintended from the viewpoint of the insured. *Id.*

28. *Id.* In so holding, the court ruled that the term "sudden" should not be limited to an instantaneous happening. *Id.*

29. 80 A.D.2d 415, 439 N.Y.S.2d 538 (Sup. Ct. 1981).

30. Hurwitz & Kohane, *supra* note 25, at 380. Chemical companies used the abandoned canal as a waste disposal site for three decades. *Id.* In the 1950s, developers covered the site with earth and built homes on the surrounding property. *Id.* In 1978, the Commissioner of Health declared the existence of a health emergency. *Id.* As a result, private litigants filed hundreds of lawsuits claiming personal injuries and property damage. *Id.*

31. *Niagara County*, 80 A.D.2d at 420, 439 N.Y.S.2d at 542. The court found that the exclusion should apply only to an "active polluter," as opposed to a party who is liable because of the strict liability that attaches to the improper disposition of hazardous materials under federal and state law. Pendygraft, Plews, Clark & Wright, *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 IND. L. REV. 117, 156 (1988).

32. *Niagara County*, 80 A.D.2d at 419, 439 N.Y.S.2d at 541. Plaintiffs alleged that Niagara County negligently failed to warn its citizens and enforce its health regulations by failing to remove the chemicals.

33. *Id.* at 420, 439 N.Y.S.2d at 541-42.

34. *See* Hurwitz & Kohane, *supra* note 25, at 383.

35. *See supra* note 21 for a discussion of decisions relying on *Niagara County* and Allstate Ins. Co. v. Klock Oil Co., 73 A.D.2d 486, 426 N.Y.S.2d 603 (App. Div. 1980);

Insurance Co. v. Liberty Solvents & Chemicals Co.,[36] the State of Ohio filed an action against Liberty Solvents for damages after hazardous waste leaked into surface waters, soil and groundwater.[37] The court of appeals ordered Buckeye to defend Liberty Solvents for the damage claims.[38] The court held that insurers must indemnify insureds on claims for pollution-caused damages under liability insurance excluding coverage on such claims unless the pollution is "sudden and accidental," where the damages were neither expected nor intended from the standpoint of the insured.[39] The court reasoned that because the insurer did not allege that the insured intended or expected the release of pollutants, the pollution exclusion clause did not preclude coverage.[40]

More recently, the Ohio Court of Appeals followed this interpretation in *Kipin Industries, Inc. v. American Universal Insurance Co.*[41] As a matter of statutory construction, the court stated that "the clause must be construed strictly against the insurer because it is ambiguous."[42] In holding against the insurer, the court went even further

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cf. Technicon Elecs. Corp. v. American Home Assurance Co., 141 A.D.2d 124, 141, 533 N.Y.2d 91, 100 (App. Div. 1988)(pollution exclusion clause excludes from coverage all intentional discharges regardless of whether the consequential damages were intended or unintended).

36. 17 Ohio App. 3d 127, 477 N.E.2d 1227 (Ct. App. 1984).

37. *Id.* at 129, 477 N.E.2d at 1229. The complaint alleged that generators of hazardous waste contracted with a disposer who caused the soil and groundwater around the disposal site to become contaminated by dropping and puncturing drums of waste. *Id.*

38. *Id.* at 136, 477 N.E.2d at 1237. The court reached this conclusion even while ruling that Buckeye Union may not owe Liberty Solvents a duty to indemnify. *Id.* The duty to defend arose because one theory of recovery potentially fell within the policy coverage, but the product hazard exclusion could relieve the insurer of its duty to indemnify. *Id.* The product hazard exclusion essentially excludes coverage on theories of products liability. *Id.* at 135, 477 N.E.2d at 1236.

39. *Id.* at 134, 447 N.E.2d at 1235. The court construed the term "sudden and accidental" most favorably to the insured and in accordance with other jurisdictions' interpretation of the pollution exclusion clause. *Id.*

40. *Id.* at 133, 477 N.E.2d at 1234. The *Buckeye* court appeared to rule that so long as a complaint fails to allege that the generator knew of the improprieties committed by its disposer, the generator may seek indemnification from its insurer, even though the discharge may have been far from sudden or accidental. *See* Note, *supra* note 2, at 1274-75.

41. 41 Ohio App. 3d 228, 535 N.E.2d 334 (Ct. App. 1987). *Kipin* involved an insurer's refusal to defend an insured who had previously been found liable under the Superfund Act for improper storage of hazardous waste. *Id.* at 229, 535 N.E.2d at 336.

42. *Id.* at 232, 535 N.E.2d at 338.

than previous cases by stating that the insurance industry through the clause "intended to clarify the definition of 'occurrence' so as to exclude coverage for expected or intended results."[43]

The above-referenced cases illustrate the problems the insurance industry faces with the interpretation of the pollution exclusion clause.[44] In brief, these decisions ignore the insurers' intent to limit liability by holding that unexpected and unintended damages fall within the "sudden and accidental" exception to the pollution exclusion clause.[45]

A newer line of cases views the phrase "sudden and accidental" as having a temporal significance.[46] The focus turns from the nature of the damage, *viz.* sudden and accidental, to the nature of the release causing the damages.[47] These courts hold that coverage will be restored under the exception to the pollution exclusion only when the release occurred both quickly and accidentally.[48] The courts first apply the traditional occurrence analysis to determine whether the losses were unexpected or unintended.[49] Next, the courts apply a distinct "sudden and accidental" analysis under the pollution exclusion to determine whether the discharge falls within the exception to the clause.[50] Insurers under this analysis must provide coverage for "sudden and accidental" releases of pollution, but not for gradual or continuous discharges.[51]

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43. *Id.* The court cited the Insurance Rating Board for this linkage. *Id.* The term "occurrence" appeared in the general indemnification clause, and was held to include an event which "[took] place over a span of time." *Id.* at 231, 535 N.E.2d at 337.

44. *See* Note, *supra* note 2, at 1278 (insurers remain fundamentally concerned with the problem that courts interpret their policies consistently).

45. *Id.* at 1253.

46. Williams, *supra* note 4, at 329. *See also supra* note 22 for cases applying this definition.

47. *Id.*

48. *Id.*

49. Note, *supra* note 2, at 1267. Because these courts interpret the term "sudden" to mean instantaneous, the courts will bar coverage under the pollution exclusion even if the losses are neither intended nor expected when the discharges are not instantaneous. *See supra* note 22 for a discussion of cases which follow this analysis.

50. Note, *supra* note 2, at 1267.

51. *See, e.g.*, Wagner v. Milwaukee Mut. Ins. Co., 145 Wis. 2d 609, 427 N.W.2d 854 (Ct. App. 1988) (refusing to exclude from coverage clean-up costs for sudden damage to pipe and immediate, uninterrupted discharge of gasoline into sewer), *rev'd*, Just v. Land Reclamation, Ltd., 155 Wis. 2d 737, 456 N.W.2d 570 (1990); *see also* Williams, *supra* note 4, at 329-31 for a discussion of cases which follow this interpretation.

United States Fidelity & Guaranty Co. v. Star Fire Coals, Inc.[52] illustrates this view. In *Star Fire Coals*, a landowner alleged that he sustained personal bodily injury and damage to his property by the emission of excessive amounts of coal dust from Star Fire's coal tipple during the course of its operation.[53] Although the court assumed that an "occurrence" did in fact take place,[54] insurers would be under a duty to indemnify only if the discharges were also "sudden and accidental."[55] The court held that the release of pollutants on a regular basis was not "sudden" in the temporal sense[56] and that, therefore, the "sudden and accidental" exception to the exclusion did not apply.[57] The court took pains to note that the focus of the " 'sudden and accidental' exception is on the nature of the discharge of the pollution itself, not on the nature of the damages caused."[58]

The Illinois Court of Appeals used a similar analysis in *International Minerals & Chemical Corp. v. Liberty Mutual Insurance Co. (IMC)*[59] In *IMC*, the United States filed a complaint alleging that IMC violated federal environmental statutes[60] by reason of activities which resulted in environmental contamination at the company's barrel recondition-

52. 856 F.2d 31 (6th Cir. 1988).

53. *Id.* at 32. The discharge took place over a seven to eight year period. *Id.*

54. *Id.* at 33. The court found that the term "occurrence" as defined in the insurance policy did not have a temporal component and focused only on the insured's expectations regarding damages. *Id.* As a result, the court ruled that conditions which took place over a significant period of time but which caused unexpected damage would fall within the definition of an "occurrence." *Id.*

55. *Id.* at 34.

56. *Id.* at 34-35. The court stated that it could not define the term "sudden" "without reference to a temporal element that joins together conceptually the immediate and the unexpected." *Id.* at 34.

57. *Id.* at 35. The court concluded that the pollution exclusion clause precludes coverage where the party discharged pollutants on an ongoing basis. *Id.*

58. *Id.* at 34. The court concluded that the ultimate issue before the court was not whether the damage resulting from the discharges was unintended and unexpected, but whether Star Fire's regular discharges over a seven to eight year period were "sudden and accidental." *Id.* at 35.

59. 168 Ill. App. 3d 361, 522 N.E.2d 758 (1988).

60. *Id.* at 367, 522 N.E.2d at 762. The Government charged IMC with dumping drums containing hazardous waste, resulting in contamination of the soil and ground water. *Id.* The statutes implicated in the case included the Resource Conservation and Recovery Act of 1976 § 7003 (RCRA), 42 U.S.C. § 6973 (1989) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 §§ 106-107 (CERCLA), 42 U.S.C. §§ 9606-9607 (1989).

ing facility.[61] The court held that the discharge of hazardous wastes onto the ground clearly and unambiguously removed IMC from coverage by the terms of the pollution exclusion clause.[62] The court explained that the comprehensive insurance provision grants coverage for damage caused by an "occurrence," the sole criterion being whether the insured intended or expected the damage.[63] By contrast, the pollution exclusion clause focuses on the discharge.[64] The court continued that even if the damage constitutes an occurrence, the discharge must be "sudden" in order to compel the insurer to provide coverage.[65] In so determining, the court reasoned that to interpret "sudden" as "unintended and unexpected" would render it synonymous with "accidental," and thus mere surplusage.[66] Moreover, the court interpreted the word "sudden" to mean "happening without previous notice or with very brief notice."[67] The court accused previous courts of distorting the meaning of the word "sudden" to achieve their desired result of affording polluters insurance coverage.[68]

Until recently, Wisconsin courts have followed the minority view of "sudden and accidental" advanced in the *Star Fire Coals* and *IMC* cases.[69] In *City of Milwaukee v. Allied Smelting Corp.*,[70] two neighbor-

61. 168 Ill. App. 3d at 365, 522 N.E.2d at 761.

62. *Id.* at 374-75, 522 N.E.2d at 767. The pollution exclusion clause precluded coverage unless release of pollution was "sudden and accidental." *Id.* at 369, 522 N.E.2d at 763. Because the court found that the discharge of pollutants occurred over an extended period of time, the release could not be "sudden" and therefore fell within the pollution exclusion clause. *Id.* at 374-75, 522 N.E.2d at 767.

63. *Id.* at 377, 522 N.E.2d at 768-69.

64. The pollution exclusion clause makes this clear by stating that the exclusion will not apply "if such *discharge, dispersal, release or escape* is sudden and accidental." *Id.* at 369, 522 N.E.2d at 763 (emphasis added).

65. *Id.* at 377, 522 N.E.2d at 768. To determine whether the pollution exclusion clause governed, the court posed two questions. First, did the complaint allege a discharge? *Id.* at 375, 522 N.E.2d at 767. Second, did the discharge result in pollution damage? *Id.* The court answered both questions affirmatively and applied the pollution exclusion clause. *Id.*

66. *Id.* at 378, 522 N.E.2d at 769. The court found that such a reading "does not comport with fundamental rules of contract construction requiring that all words used in a contract be given effect." *Id.*

67. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2284 (1976)).

68. *Id.* at 377-78, 522 N.E.2d at 768-69. *See also* Note, *supra* note 2, at 1240 (most courts uniformly ignored the insurers' intent and misinterpreted the phrase "sudden and accidental").

69. *See, e.g.*, Wagner v. Milwaukee Mut. Ins. Co., 145 Wis. 2d 609, 618, 427

ing cities brought action to recover for damage to their storm sewer system caused by Allied's discharge of acid.[71] The court concluded that the exclusionary clause of the insurance policy applied because the evidence refuted a conclusion that ongoing discharges were "sudden and accidental."[72]

The court in *State v. Mauthe*[73] followed *Allied Smelting*, holding that the phrase "sudden and accidental" in the pollution exclusion clause of Mauthe's liability insurance did not include damages occurring over a long period of time.[74] Although the court acknowledged that the majority of jurisdictions had concluded to the contrary,[75] it recognized that the use of insurance to insulate industry from such costs serves as a disincentive for companies to meet their environmental responsibilities.[76] Given the inconsistencies of jurisdictions in defining "sudden and accidental," the Wisconsin Court of Appeals invited the state supreme court to address the matter.

Just v. Land Reclamation, Ltd.[77] presented the Wisconsin Supreme Court with the opportunity to define "sudden and accidental" as found

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N.W.2d 854, 858 (Ct. App. 1988) (holding that pollution exclusion clause will not preclude coverage where damage to property results from a continuous discharge of pollutants over an extended period of time). *But cf.* State v. Mauthe, 142 Wis. 2d 620, 627, 419 N.W.2d 279, 281 (Ct. App. 1987) (holding that the term "sudden and accidental" does not apply to pollution damage occurring over a substantial period of time); City of Milwaukee v. Allied Smelting Corp., 117 Wis. 2d 377, 385-86, 344 N.W.2d 523, 527 (Ct. App. 1983)(holding that the pollution exclusion clause precludes coverage for injuries incurred over a period of time).

70. 117 Wis. 2d 377, 344 N.W.2d 523 (Ct. App. 1983).

71. *Id.* at 380, 344 N.W.2d at 524.

72. *Id.* at 386, 344 N.W.2d at 527. The court relied on Clark v. London & Lancashire Indem. Co. of Am., 21 Wis. 2d 268, 124 N.W.2d 29 (Wis. 1963) (holding that the pollution exclusion clause precluded coverage where discharge occurred over an extended period of time).

73. 142 Wis. 2d 620, 416 N.W.2d 279 (Ct. App. 1987).

74. *Id.* at 626-27, 416 N.W.2d at 281. The court treated *Allied Smelting* as controlling authority. *Id.*

75. *Id.* at 627, 419 N.W.2d at 281-82. In refusing to follow the majority's viewpoint, the court invited the Wisconsin Supreme Court to address the issue. *Id.* at 628, 416 N.W.2d at 282.

76. *Id.* The court acknowledged that insurance removes accountability from companies for their conduct because the companies do not directly bear the costs for repairing environmental damage. *Id.* Note that to the extent that the *Mauthe* decision turns on such questions of policy, it suffers from the same infirmity as outcome-driven holdings to the contrary. *See supra* note 68.

77. 155 Wis. 2d 737, 456 N.W.2d 570 (1990).

in the pollution exclusion clause. The court rejected prior Wisconsin interpretations of the phrase[78] and decided instead to follow the majority definition.[79] The court interpreted the phrase "sudden and accidental" to mean unexpected and unintended, thus permitting coverage even though the damage occurred over a substantial period of time.[80] The court therefore required Bituminous to defend LRL, finding the damages to be neither expected nor intended.[81]

The court determined that the majority conclusion "comports with substantial evidence indicating that the insurance industry itself originally intended the phrase to be construed in this fashion."[82] The court also noted that while the exclusion clause clarified the definition of occurrence as excluding expected or intended damages, it did not reduce the scope of coverage.[83] Thus, while the clause denied coverage to intentional polluters, it continued to cover accidents.[84]

In dissent, Judge Steinmetz stated that the majority's interpretation provided insurance coverage where no such coverage was contemplated.[85] The dissent emphasized that the court's decision takes away from dump site owners the incentive to operate with care.[86] The dissent also stated that the term "sudden" necessarily involves a temporal

78. *Id.* at 747, 456 N.W.2d at 579 (overruling Wagner v. Milwaukee Mut. Ins. Co., 145 Wis. 2d 631, 426 N.W.2d 854 (Ct. App. 1988); State v. Mauthe, 142 Wis. 2d 620, 419 N.W.2d 279 (Ct. App. 1987)); City of Milwaukee v. Allied Smelting Corp., 117 Wis. 2d 377, 344 N.W.2d 523 (Ct. App. 1983).

79. *Id.* The court found the phrase ambiguous. *Id.*

80. *Id.* at 740, 456 N.W.2d at 573.

81. *Id.* In the court's view, the allegations in the complaint raised inferences that could support a recovery covered by the policy.

82. *Id. See also id.* at 742, 456 N.W.2d at 575 (contemporaneous statements by the insurance industry-wide organization that drafted the clause make clear that the clause was intended to clarify the occurrence definition and to exclude coverage of pollution-related damage only if the damage is expected or intended by the insured (citing Price, *Evidence Supporting Policy Holders in Insurance Coverage Disputes*, 3 NAT. RESOURCES & ENV'T. 17, 48 (1988))).

83. *Id.* The court found its interpretation consistent with the Insurance Rating Board's suggestion that the pollution exclusion clause was intended to exclude only intentional acts of pollution and would have no impact on the vast majority of risks. *Id.*

84. *Id.* (citing Claussen v. Aetna Casualty & Sur. Co., 676 F. Supp. 1571, 1573 (S.D. Ga. 1987)).

85. *Id.* at 747, 456 N.W.2d at 579 (Steinmetz, J., dissenting). The dissent argued that the policy will become "a deep pocket to pay for business mistakes." *Id.*

86. *Id.* The dissent stated that insurers must cover all negligently caused damages, even though pollution discharges from a landfill site might be expected. *Id.*

element.[87] Moreover, it noted that interpreting "sudden and accidental" to mean unexpected and unintended, would render the term "sudden" meaningless.[88] The dissent concluded that the pollution exclusion required the discharge to be both "sudden" and "accidental" in order to afford coverage.[89] Therefore, the dissent would follow the earlier Wisconsin decisions holding that the exception to the pollution exclusion clause does not provide coverage for continuous and repeated exposure.[90] Under this analysis, Bituminous would have had no duty to defend the suit against LRL.

The Wisconsin Supreme Court's decision in *Just* was incorrect for two reasons. First, the court improperly defined the term "sudden" in the "sudden and accidental" exception to the pollution exclusion clause.[91] By holding that "sudden and accidental" means unexpected and unintended, the court simply defined it as synonymous with "occurrence."[92] Because an "occurrence" encompasses gradual or continuous discharges, the *Just* court wrongly disregards the temporal significance of the word "sudden."[93] The better-reasoned view in *IMC* posits a two-part test to be applied in the determination of coverage,[94] which accounts for both the terms "occurrence" and "sudden and accidental" in the comprehensive general liability policy. Even if the pollution constitutes an occurrence, the discharges must also be

87. *Id.* at 750, 456 N.W.2d at 581.

88. *Id.*

89. *Id.* at 747, 456 N.W.2d at 579. The dissent reached this conclusion by finding the term "sudden" to be connected by the conjunction "and" to the term "accidental," while stressing that the majority's definition renders the word "sudden" meaningless. *Id.* In contrast with the majority, the dissent found that "the phrase 'sudden and accidental' is unambiguous." *Id.* at 750, 456 N.W.2d at 581.

90. *Id.*

91. *See* Abraham, *supra* note 2, at 963 (the phrase "sudden and accidental" has been "interpreted as a mere elaboration of the phrase 'neither expected nor intended from the standpoint of the insured' in the definition of insured occurrences").

92. *See* Lower Paxton Township v. United States Fidelity & Guar. Co., 383 Pa. Super. 558, 577, 557 A.2d 393, 402 (Super. Ct. 1989) (reading the term "sudden and accidental" to mean only unexpected and unintended rewrites the policy and excludes an important coverage requirement — "abruptness of the pollution discharge").

93. *Id.* The *Paxton* court stated that any interpretation other than its own would be unreasonable because the insurance industry never would have devised the pollution exclusion clause if it merely reiterated the definition of "occurrence." *Id.*

94. *See supra* notes 59-68 and accompanying text for discussion of International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co., 168 Ill. App. 3d 361, 522 N.E.2d 246 (Ct. App. 1988) (the release of pollutants must occur abruptly to constitute "sudden" events).

immediate to require an insurer to defend a damage claim or provide indemnification.[95]

Second, the court misconstrued the intent of the insurance industry to limit the ever-increasing scope of liability for environmental pollution damages.[96] The court's redefinition of the exclusion clause allows coverage in most instances.[97] Knowing this, insureds can intentionally pollute while claiming that the consequences were unintended. Therefore, the insurer is forced to pay for the insured's environmental irresponsibility.[98]

The *Just* court takes a step backwards from the nascent judicial recognition of the need to protect the environment.[99] By allowing coverage in instances where the damage is neither unexpected nor unintended, the court unwittingly gives industry a license to pollute. Burdened by growing environmental damage costs, insurers may cease to issue insurance policies to businesses which pollute regularly, thus undermining the nation's efforts to clean up after itself.[100]

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95. *See supra* notes 46-68 and accompanying text for a discussion of cases which follow this thinking.

96. *See* Note, *supra* note 2, at 1252.

97. *See, e.g., IMC*, 168 Ill. App. 3d at 372, 522 N.E.2d at 765 (the "occurrence" definition standing alone will cover any unintended damage whether or not the event takes place gradually or instantaneously, rendering the class of events which qualify for coverage potentially unlimited); *see supra* notes 59-68 and accompanying text for further discussion of *IMC*.

98. *See* Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 697-98, 340 S.E.2d 374, 381 (1986) (placing the financial responsibility for pollution that may occur over an extended time upon the insured "places the responsibility to guard against such occurrences upon the party with the most control over the circumstances most likely to cause the pollution").

99. *See, e.g.*, Technicon Elec. Corp. v. American Home Assurance Co., 141 A.D.2d 124, 143, 533 N.Y.S.2d 91, 103 (App. Div. 1988) (the court recognized that two legitimate competing public policy concerns exist — the need to protect the environment and the need to provide financial compensation for persons suffering from damages caused by pollution); *see also* Note, *supra* note 2, at 1280-81:

> The judiciary's reach into the deep pockets of the insurance industry to compensate blameless victims of environmentally related losses has backfired. The result of compensating isolated victims has been to inject uncertainty into the pollution exclusion analysis. The indirect result has been to create an expanding class of victims while toxic waste cleanup crews and fully functional disposal sites stand idle for want of insurance.

Id.

100. *See id.* at 1278 (responding to judicially imposed costs of cleaning up the envi-

ronment, insurers have refused to furnish coverage, hindering an already sluggish environmental cleanup effort).

* J.D. 1992, Washington University.

RECENT DEVELOPMENTS