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Insurance Coverage for Pollution Liability in the United States and the United Kingdom: Covering Troubled Waters*

"Contrariwise," continued Tweedledee, "if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic."

Despite the "common roots of their political and legal systems," American and British policies with respect to environmental control diverge in a number of important aspects. The American environmental regulation system has been characterized as "the most rigid and rule-oriented to be found in any industrial society," and the British, "the most flexible and informal." With respect to the control of toxic substances in both industrialized nations, the American adversarial approach creates intense conflict between industry and government, whereas British industry enjoys a more cooperative relationship with regulatory officials. The American system of pollution control has been criticized as ineffective because its strict regulatory scheme causes enforcement difficulties,

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1 L. Carroll, Through the Looking Glass 52 (1946). A subsequent passage, "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean - neither more nor less," id. at 94 (emphasis in original), was used as the basis for comparing judicial interpretation of insurance policy pollution exclusion clauses to "Alice In Wonderland" logic in Note, The Pollution Exclusion Clause Through the Looking Glass, 74 GEO. L.J. 1237 (1986).

Carroll's parody, in this earlier passage, of the inflectional forms of the verb "to be" is particularly germane to an inquiry into the possible meanings of "occurrence," a subject which has also produced an onslaught of pollution liability insurance coverage disputes.

2 D. Vogel, National Styles of Regulation: Environmental Policy in Great Britain and the United States 21 (1986).

3 Id.

4 Id.


[Superfund's] liability-based approach . . . provides potentially conflicting incentives and inefficiencies. For example, both the EPA and private parties proceed in an atmosphere in which they are legal adversaries; at the same time, they are encouraged to cooperate to identify suitable remedies. . . Because the EPA needs evidence strong enough to
whereas the British system may be perceived as somewhat lax because of the intimate role of business in environmental policy making. Britain's localized style of pollution control is also in tension with European Economic Community ("EEC") environmental policies, enumerated as broad "directives," which are more closely modelled after U.S. environmental policies.

Insurance coverage for environmental liability is increasingly at issue in U.S. law, raising questions as to the insurability of environmental perils (which tend to be "low-probability, high consequence") and the propriety of using the insurance market as a mechanism for achieving socially acceptable levels of environmental risk. If Great Britain continues to develop environmental policies like those in America, similar issues are likely to arise on the other side of the Atlantic as well.

As Judge Learned Hand wrote, the relationship between Great Britain and the United States shares a central common ground:

There is a spiritual cousinage between us that will not down; and though, like other cousins, we shall continue to differ, and our differences will appear the more exasperating just on that account, still there is always hope, and always the chance, that in the end we shall both recognize the bond . . . that rests upon common moral fealties . . .

support liability claims in court, its site investigations are elaborate and expensive. And Superfund's provisions for unlimited liability may discourage some polluters from cooperating.

Id. at 172.

Compared to that of other political constituencies, most notably that of environmentalists, the political position of [British] business is clearly a privileged one: it is closely consulted before pollution controls are both made and enforced . . . While business does not always win, its views are always given careful consideration by government officials . . .

In America, on the other hand, while business certainly does not lack opportunities to influence environmental policy, its participation is neither assumed nor assured: it must be constantly asserted.

Id. at 172.


"The British will now have to get accustomed to living with unenforceable guiding principles."

Id.

8 M. KATZMAN, CHEMICAL CATASTROPHES: REGULATING ENVIRONMENTAL RISK THROUGH POLLUTION LIABILITY INSURANCE ix (1985).

9 Id. at 1.

10 Id. at ix.

INTRODUCTION TO POLLUTION REGULATION IN THE UNITED STATES

Americans are increasingly aware of the problems associated with hazardous wastes since the emergence in the 1970s of such hazardous waste disasters as Love Canal, New York, Times Beach, Missouri, Stringfellow, California, and Woburn, Massachusetts, and public concern is continually bringing environmental issues to the forefront of federal, state and local policy decisions. Indeed, it is difficult to look about the room in any contemporary setting without encountering an item which involved industrial waste at some stage of its production. Potentially hazardous waste sites in the United States have been discovered at an alarming rate. U.S. Environmental Protection Agency ("EPA") figures for 1986 indicated that more than 25,000 potentially hazardous waste sites had been identified, and current estimates exceed 30,000 sites.

Existing environmental laws in the late 1970s, primarily the Resource Conservation and Recovery Act ("RCRA"), the Clean Water Act ("CWA") and the Safe Drinking Water Act ("SDWA"), proved ineffective at dealing with the problem of often long-abandoned hazardous waste sites. Congress enacted the Comprehensive Environmental


At Times Beach, Missouri, thousands of gallons of dioxin were disposed of by being spread upon the town's dirt roads in the early 1970s. See Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 811 F.2d 1180 (8th Cir. 1987), rev'd in part, 842 F.2d 977 (8th Cir. 1988).

At the Stringfellow, California, site over 34 million gallons of hazardous wastes, which had been dumped into "acid pits" over a sixteen year period ending in 1972, created serious groundwater contamination. See United States v. Stringfellow, 783 F.2d 821 (9th Cir.), cert. denied 476 U.S. 1157 (1986).


13 As of March, 1988, contaminated sites were being discovered in the United States almost daily. Crisham & Davis, CGL Coverage For Hazardous Substances Clean-Up, 30 FOR THE DEFENSE 21 (Mar. 1988).


15 By the end of 1988, approximately 30,000 sites had been investigated, and almost 1,200 sites placed on the EPA's National Priorities List. Acton, supra note 5, at 25-26.


Response, Compensation and Liability Act of 1980 ("CERCLA"), or "Superfund" as it is commonly known, to deal with the failure of pre-CERCLA federal laws to establish liability for cleanups, as well as variation in state laws as to the availability of damages and injunctive relief. The legislative history makes clear that Congress enacted CERCLA mindful of two important considerations: the magnitude of the hazardous waste problem in the United States, and the inadequacy of then existing environmental laws to remedy it.

Where previous environmental statutes such as RCRA, CWA and SDWA had been enacted as prospective regulations affecting manufacturing guidelines and standards, CERCLA employed a unique approach, imposing liability on a strict, joint-and-several, and retroactive basis. As amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), CERCLA holds polluters liable for both remedial cleanup costs and injury-related damages resulting from past manufacturing, disposal and transportation activities which often occurred many years prior to CERCLA's enactment in 1980.

CERCLA took the point of view that the polluter should bear primary responsibility for financing cleanups. As a matter of policy, Congress could have decided that those who benefit from a reduced risk to health or the environment should pay.

By and large, the health, environmental, and aesthetic consequences of a hazardous waste facility are highly localized, as are the beneficiaries of site remediation.

Cleanup costs for Superfund sites can easily exceed several million dollars, and polluters (once they are identified as Potentially Responsible Parties ("PRPs") by the EPA or the state equivalent) are likely to seek indemnification from their insurance carriers under comprehensive general liability ("CGL") policies.
Pollution liability insurance coverage disputes have been increasingly litigated since shortly after the enactment of CERCLA in 1980. The trend shows no signs of abatement, especially because of the enormous financial magnitude of most disputes. Applicable State law is mercurial and, since federal courts apply state law under the *Erie* doctrine in choice of law and contract interpretation matters, the Supreme Court has been especially reluctant to become embroiled in a resolution.

INTRODUCTION TO POLLUTION REGULATION IN GREAT BRITAIN

The United Kingdom, a densely populated nation since before medieval times, has been developing laws which might be considered "environmental" for many centuries. The development of nuisance law serves as an example. The United Kingdom was one of the first countries to industrialize and urbanize, and the development of its environmental laws was somewhat piecemeal, as needs and circumstances arose. This developmental process has resulted in three main "strands" of environmental law: countryside protection, pollution control and land-use planning. No national waste disposal regulations of consequence existed until certain disposal incidents spurred hurried legislation in 1972, but a cohesive national pollution control policy, as exists in the United States, has not yet been implemented.

British pollution control statutes tend to be prospective, as opposed to retrospective, and they are enforced more administratively than judicially. This difference, relative to the approach in the United States, may lie in central differences in the judicial, legislative and administrative systems of government in both countries, as well as in differences between each nation's individual environmental problems and priorities.

Enforcement of British environmental statutes is often based upon common law and tort principles of nuisance and negligence. Statutory


31 *Macrory*, *supra* note 7, at 287.

32 *Id.* at 289.

33 *Id.* at 289-90.


35 D. *VOGEL*, *supra* note 2, at 171.

36 *Id.* at 151-52.
sanctions for pollution offenders exist, but they tend to be relatively mild and are seldom imposed.\textsuperscript{37} Instead of a federally implemented enforcement scheme, as exists under the EPA in the United States, British pollution regulations are generally enforced by local officials acting with broad discretion to work informally with polluting offenders.\textsuperscript{38} Often the administration of enforcement consists of simple conferences between administrators and polluters on a case by case basis, balancing the degree of health and environmental risk with peripheral factors such as economic benefits of a particular industry “on site.”\textsuperscript{39}

Of course, not all differences between Great Britain’s and the United States’ environmental outlooks are necessarily policy based:

Because Great Britain has a relatively large number of rapidly flowing rivers, a proportionately long coastline, and relatively high and strong winds, much of its environment is capable of absorbing relatively large amounts of pollution without adverse affects [sic] on the environmental quality experienced by its citizens. Certainly no British city has the peculiar geographical and climatic disadvantages of Los Angeles.\textsuperscript{40} However, Great Britain also is much smaller and has approximately ten times the population density of the United States,\textsuperscript{41} factors which increase the necessity of pollution regulation. Recent estimates conclude that over ten thousand hectares\textsuperscript{42} in England and almost four thousand hectares in Wales are contaminated, but there are no indications that undiscovered toxic sites exist anywhere near the scale present in the United States.\textsuperscript{43} “Perhaps because of this, no specialized legislation deals with the problems of past sites and the resulting responsibilities for damage or clean-ups.”\textsuperscript{44} However, “[v]arious amendments and changes to the details of the present [British] law currently are under consideration . . . .”\textsuperscript{45}

\textbf{Comparative Introduction}

This note will compare “occurrence” based liability insurance coverage in the United States and Great Britain, with particular emphasis upon the meaning of the terms “sudden” and “accidental” as they apply to the definition of “occurrence” and to the “sudden and accidental” ex-

\textsuperscript{37} Id. at 146.
\textsuperscript{38} Id.
\textsuperscript{39} Macrory, \textit{supra} note 34, at 333.
\textsuperscript{40} D. Vogel, \textit{supra} note 2, at 148.
\textsuperscript{41} Id.
\textsuperscript{43} Macrory, \textit{supra} note 34, at 339-40.
\textsuperscript{44} Id. at 340.
\textsuperscript{45} Id. at 334.
ception to the pollution exclusion contained in the standard CGL insurance policy.” For the United States, the focus will be upon CGL insurance coverage for CERCLA based delayed manifestation pollution liability. For Great Britain, because of the relative lack of litigated pollution related indemnity claims, the focus will be upon general liability insurance. British underwriters also provide primary and excess CGL coverage in the United States, and the possibility of each country’s insurance and environmental laws being imported by the other increases the significance of a mutual understanding.

Polluter liability under CERCLA in the United States is strict, rendering intent to pollute immaterial, but the interpretation of “accidental” for insurance coverage purposes, in both the pollution exclusion exception and the definition of “occurrence,” requires an assessment of polluter intent. The appropriateness of insurance coverage for polluter liability, as a matter of national policy in either Great Britain or the United States, may be questionable. Neither the pollution regulatory policies nor the insurance coverage laws of either country are free of differences. For instance, federal pollution statutes and regulations in the United States are strictly drafted, and liability is harshly imposed. Yet U.S. courts, applying state law, have been inconsistent with respect to insurance coverage for pollution-related liability. In Great Britain, pollution laws tend to be legislated and enforced rather permissively, yet insurance policy coverage tends to be more strictly based upon specific policy provisions.

Pollution law and insurance law both serve compensation and deterrence functions. At first blush, the notion of insurability for pollution related liability seems at odds with CERCLA’s Congressional mandate that polluters bear the remedial expenses for past pollution in an effort to internalize industry’s otherwise external costs. The possibility of polluters being able to avoid the consequences of CERCLA liability, via general liability insurance coverage, brings into question CERCLA’s ability to deter future pollution activity. On the other hand, the purchase of insurance coverage in the first place (on a prospective basis) represents an internalization of at least some of the costs associated with the unex-

46 M. KATZMAN, supra note 8, at 3.

An efficient policy of deterrence minimizes the cost of accidents and accident prevention. This efficiency goal has generally guided the application of tort law. As articulated by Judge Learned Hand, proper care requires that the costs of reducing accidents be balanced against the costs of accidents times the change in their probability of occurrence. Because this principle ignores where the losses fall, it may conflict with the equity objective of just compensation. A cost-minimizing policy may leave the victim bearing the losses, whereas current environmental policy is based on the view that the polluter pays.

Id. (citations omitted).

47 See Abraham, supra note 23, at 956-60 (addressing the problems posed to the insurance industry by retroactive and joint and several liability).
pected and unintended consequences of the risks associated with "doing business."

The extent to which insurance coverage for retroactive CERCLA liability undermines the law's deterrence feature is questionable because the insurance industry has already adapted its policy forms to specifically exclude coverage for pollution related claims. Of course, insurance coverage for intended harm is not available, as a matter of public policy. But insurance coverage for intentional, calculated risk-taking is seldom excluded in either the United States or Great Britain.

A comparison of coverage for pollution liability in Great Britain and the United States necessarily involves a comparison of the bases for the imposition of polluter liability. It also involves a comparison of the nature of "accidental" occurrences of insurable events under both legal regimes. The vast amount of litigation over such matters in the United States indicates and contributes to what has been called an "insurance crisis" for environmental liability coverage, a major part of the recent tort liability insurance crisis. However, the existence of an insurance crisis does not necessarily mean that the insurance industry is a completely inappropriate mechanism for dealing with the problems associated with environmental liability. The costs and effects of retroactively imposing strict joint and several liability upon industry alone must also be considered.

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48 Insurance coverage for intentionally caused losses is consistently excluded, on the basis that "insurance should only be employed to transfer risks associated with fortuitous occurrences," R. Keeton & A. Widiss, Insurance Law 518 (Student ed. 1988) [hereinafter Keeton & Widiss]. The notion of insurability for intentional wrongs or illegal acts is counter to public policy. Wanton or reckless acts, however, although a basis for constructive intent for punitive damages purposes, do not usually constitute a basis for the denial of liability insurance coverage for "accidental" losses. Id. at 524-25.

When an innocent individual is injured as a result of someone's wanton or reckless action, there is considerable concern with assuring compensation for the individual who sustains injuries. . . . On the other hand, there is also concern about allowing insureds to shift the economic responsibility for the type of conduct that society would like to discourage and deter. Frequently, it is difficult to either discern or predict the appropriate accommodation between these goals or interests. Id. at 525.

49 Abraham, Making Sense of the Liability Insurance Crisis, 48 Ohio St. L.J. 399, 404-05 (1987) (stating that, as measured by comparisons to the Consumer Price Index, Gross National Product, and level of insurance company payouts and associated counsel fees, the magnitude of recent tort liability costs has created havoc in the insurance industry's premium setting behavior).

50 Although the author of the following passage was referring to a cost/benefit consideration raised in a case dealing with the Clean Air Act, one must remain mindful of the benefits associated with modern life:

We cannot entirely eliminate hazards created by people; rather, we must accept some risks that are insignificant, uncertain, or impossible to control; we must accept others because the costs of controlling them still further, even from an ethical point of view, are grossly disproportionate to the additional safety we may gain. To close down an electric company
I. LIABILITY FOR POLLUTION

A. United States Pollution Liability

CERCLA, enacted hurriedly in 1980 at the end of the 96th Congress in a monumental effort to pass the legislation before the end of the Carter administration, created a $1.6 billion fund for hazardous waste cleanup. The Superfund was increased under SARA, in 1986, by another $8.5 billion for the period 1986-1991, and imposes "broad-based liability intended to cover any and all parties who at any time handled" hazardous waste.

CERCLA provides for causes of action on behalf of both the U.S. EPA and individual states. Upon identification and investigation of a hazardous waste site, and notification of PRPs, the government can pursue a "response action" under CERCLA § 104 (and then bring subsequent action to recover its costs to reimburse the Superfund under CERCLA § 107) in either of two ways: (i) via "removal" actions, i.e., temporary mitigating measures, or (ii) "remedial" actions, i.e., permanent measures in response to an actual or threatened release of hazardous material. The government can also elect to pursue injunctive "administrative enforcement," compelling a responsible party to perform the clean-up responses itself, under CERCLA § 106. Although the EPA has a series of legislatively mandated factors to consider in deciding upon which of these alternative actions to initiate, the EPA has broad discretion depending upon the specific circumstances involved.

B. British Pollution Liability

The primary method of disposal, accounting for approximately if it is unable, in spite of making impressive efforts, to meet air quality standards ... may be a Pyrrhic victory for health and safety regulation, because people need electricity as well as clean air to survive.


Acton, supra note 5, at vii.


Section 107(a)(1)-(4) defines potentially responsible parties, and imposes liability for: A) government removal or remedial action costs, B) citizen response costs, C) damaging natural resources and related assessment costs, and D) health assessment costs. 42 U.S.C.A. § 9607(a) (1988).


ninety-five percent of the United Kingdom’s approximately 500 million tons of annual waste, is landfill burial. 58 About eighty-five percent of hazardous waste, not specifically defined other than that “creating particular disposal difficulties, possible environmental harm and public hazards,” also makes its way into landfills. 59

Liability for hazardous waste pollution in Britain is regulated by several statutes: 60 the Public Health Act of 1936; 61 the Deposits of Poisonous Waste Act of 1972, 62 replaced by the Control of Pollution Act of 1974; 63 and the Control of Pollution (Special Wastes) Regulations of 1980 64 (designed to comply with the European Community Directive on Dangerous and Toxic Wastes) 65

1. Statutory Liability

The Control of Pollution Act 1974, § 31, assesses criminal liability for pollution of rivers and coastal waters:

... a person shall be guilty of an offense if he causes or knowingly permits —

(a) any poisonous, noxious or polluting matter to enter any stream or controlled waters or any specified underground water . . . ; or

(b) any matter to enter a stream so as to tend (either directly or in combination with other matter which he or another person causes or permits to enter the stream) to impede the proper flow of the water of the stream . . . in a manner leading or likely to lead to a substantial aggravation of pollution due to other causes or of the consequences of such pollution; or

(c) any solid waste matter to enter a stream or restricted waters. 66

This provision of the Act was held, in Southern Water Authority v. Pegrum, 67 to impose strict criminal liability upon a farmer whose effluent drainage system failed and overflowed into a nearby stream during a rainstorm. 68 Liability was imposed, despite lack of intent or negligence, because the pig farmer’s operation “caused” the pollution. The Queen’s Bench analogized “to the strict civil liability concerning the escape from

58 Macrory, supra note 34, at 335.
59 Id.
60 Id. at 335-339.
61 See id. at 335 n. 8 (citing Public Health Act, 1936, 26 Geo. 5 & 1 Edw. 8, ch. 49, §§ 48, 72-74).
62 See id. at 336 n. 9 (citing Deposit of Poisonous Waste Act, 1972, ch. 21).
63 See id. at 336 n. 10 (citing Control of Pollution Act, 1974, ch. 40).
64 See id. at 338 n. 16 (citing The Control of Pollution, S.I. 1980, No. 1709).
65 See id. at 338 n. 17 (citing 21 O.J. EUR. COMM. (No. L 84) 43 (1978)).
66 Control of Pollution Act, 1974, ch. 40, § 31 1)(a)-(c).
68 The effluent, about five times greater concentration than “average domestic sewage,” was toxic to aquatic life in the stream. Id. at — [LEXIS p.6].
land of harmful material recognized by the courts in *Rylands v. Fletcher* [citations omitted].”

The Control of Pollution Act, § 88, also provides for civil liability:

88. - (1) Where any damage is caused by poisonous, noxious or polluting waste which has been deposited on land, any person who deposited it or caused or knowingly permitted it to be deposited, in either case so as to commit an offense under section 3(3) [unlicensed disposal of waste] or by virtue of section 18(2) [disposal of uncontrolled waste] of this Act, is liable for the damage except where the damage -

(a) was due wholly to the fault of the person who suffered it; or
(b) was suffered by a person who voluntarily accepted the risk thereof.

...

(3) In this section —

"damage" includes the death of, or injury to, any person (including any disease and any impairment of physical or mental condition);

2. Liability in Tort

British courts are likely to require a showing of negligence before liability will attach for contamination-producing waste disposal, a difficult showing when the original polluter is no longer identifiable, and “British courts . . . would resist holding original waste producers strictly liable.”

The possibility of holding developers who fail to investigate sites, subsequent owners, or possibly permit-granting local authorities liable for cleanup expenses has not been tested in Britain.

Liability might also be founded in nuisance, which requires either interference with the use of or physical damage to the property of the plaintiff and, per *Rylands v. Fletcher*, strict liability attaches for damages to neighboring land resulting from “unduly dangerous” activities. In *Maberley v. Peabody & Co.* the plaintiff brought an action for damages and an injunction against a neighbor who had piled up debris against the wall separating their properties. The debris contained chemi-

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69 Id. at — [LEXIS p.3].
70 Control of Pollution Act, 1974, ch. 40, § 88 (1)(a)-(6), (3).
71 Macrory, supra note 34, at 341.
72 Id.
76 2 ALL E.R. 192 (1946).
cal contaminants which percolated through the wall and was in the process of damaging it. The court awarded injunctive relief, but not monetary damages, to abate damage which had not yet, but threatened to become substantial.\textsuperscript{77}

II. INSURANCE COVERAGE FOR POLLUTION LIABILITY

Not surprisingly, PRPs are often businesses which have, or have had during periods of past pollution activity, comprehensive general liability ("CGL") insurance policies. Insureds' reimbursement claims for CERCLA cleanup costs have been met with substantial resistance by insurance companies, especially when pollution has been the result of gradual seepage or ordinary business practices over the course of many years.\textsuperscript{78}

Insurers rely upon the language of policy terms and provisions to argue that, as a matter of contract, coverage for the vast majority of CERCLA related claims is specifically excluded. Coverage was intended, insurers argue, to be limited to accidental mishaps, occurring suddenly, and resulting in actual injury to third-party persons or property. However, several courts have held insurers liable for cleanup costs resulting from gradual, cumulative occurrences, or for cleanup costs on the insured's property.\textsuperscript{79}

Insurance companies tend to deny coverage on the basis of at least one of several interpretations of policy terms: that gradual pollution over a long period of time does not constitute an insurable "occurrence"; that no "occurrence" took place within the policy period; that pollution-related damages are expressly excluded; that the exception to the "pollution exclusion" does not apply because pollution resulting from gradual or intentional discharges is not "sudden and accidental"; or that remedial (cleanup) expenses do not constitute "damages" under CGL policy terms.\textsuperscript{80}

Conversely, insureds generally claim that: The manifestation of injury or damages constitutes an "occurrence" because the realization of the harm is "accidental"; coverage is triggered if the policy was in force for any of the period between initial discharge and discovery of a delayed manifestation; the "pollution exclusion" applies only to intentional pollution, not to intentional discharges resulting in unexpected polluting consequences or to passive pollution; and the meaning of "damages"

\textsuperscript{77} Id. at 196. See also Halsey v. Esso Petroleum Co. Ltd., 2 ALL E.R. 145 (1961) (a nuisance action involving noxious smell); but see Smith v. Great W. Rail Co. 42 T.L.R. 391 (1926) (a nuisance action where damages were awarded against oil company for consigning leaky oil tank to railway company, causing pollution to cattle farmer's water supply).

\textsuperscript{78} Cheek, supra note 27, at 75.

\textsuperscript{79} Id.

\textsuperscript{80} See generally Note, supra note 55, at 832-33 (providing detailed citations to authority advancing these theories).
includes agency-mandated cleanup costs.\textsuperscript{81}

Although the propriety of insurance coverage for environmental pollution liability may be debatable, because of the Congressional mandate underlying CERCLA that the polluter pay, insurance coverage nevertheless constitutes a comprehensive contractual arrangement whereby liability is covered unless specifically excluded. Insurers' and insureds' respective arguments ultimately rely upon differing tenets of contract interpretation.

The extent to which coverage terms under CGL policies actually constitute bargained-for agreements is also debated. Insurers argue that large corporations are not entitled to the same judicial treatment as are lay people. Insurers argue that corporations tend to be more sophisticated and are more likely to be represented by counsel when it comes to the resolution of ambiguity of policy terms.\textsuperscript{82} On the other hand, even for corporate clients, the extensive use of form policies containing virtually identical language undercuts the notion that the purchase of insurance constitutes a bargained-for contractual arrangement in the first place.\textsuperscript{83} The insurance industry is carefully regulated by state law\textsuperscript{84} (in some respects the insurance industry may be viewed as incorporating elements of legislation),\textsuperscript{85} and by the Insurance Service Office ("ISO") which created and promulgated standardized CGL forms to assist the insurance industry in complying with individual state requirements.\textsuperscript{86}

\begin{enumerate}
  \item \textsuperscript{85} Boeing Co. v. Aetna Casualty & Surety Co., 113 Wash. 2d 869, 881-82, 887, 784 P.2d 507, 513-14, 516, (1990).
  \item \textsuperscript{85} Boeing Co. v. Aetna Casualty & Surety Co., 113 Wash. 2d 869, 881-82, 887, 784 P.2d 507, 513-14, 516, (1990).

\textsuperscript{82} See Abraham, supra note 23, at 985-86 (discussing possible deregulation of the insurance industry).
Insurance coverage is “triggered” by what pertinent CGL policies define as an insurable event. Under policies issued prior to 1966, coverage is triggered by the happening of an “accident,” generally defined as “a fortuitous event that was out of the ordinary and unanticipated,” or a “distinctive event that takes place at a date that can be fixed with reasonable certainty.” In 1966, the CGL policy was revised to trigger coverage on a more liberal “occurrence” basis, for the purpose of including more gradual events under CGL policy coverage. The change was made partly in response to consumer demands for broader protection, as well as in reaction to expansive judicial interpretation of the term “accident.” “By this change, the [insurance] industry did not intend to provide pollution liability insurance to its commercial clients who voluntarily and knowingly discharge polluting substances into the environment.”

The general absence of British case law on pollution liability coverage may be the result of a general lack of claims for pollution liability

87 For a brief discussion of the primary “trigger-of-coverage” theories as to what constitutes an “occurrence” in delayed-manifestation injuries, see Keeton & Widiss, supra note 48, at 599-601.

In Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), reh’g granted in part, denied in part 657 F.2d 814 (6th Cir. 1981), cert. denied, 454 U.S. 1109 (1981), the court adopted the “exposure” theory, under which injury occurs and coverage is triggered upon initial exposure to asbestos, even though recognizable symptoms of asbestosis might not become manifest until years later.


Under the “injury-in-fact” theory, applied in American Home Products Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485 (S.D.N.Y. 1983), aff’d, 748 F.2d 760 (2d Cir. 1984), an injury, from DES for example, must be determined to have been genuine, despite being dormant, during the policy period.

The “multiple trigger” theory, articulated in Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1041 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982), holds all insurers who were “on the risk” at any time between initial exposure and delayed manifestation liable for coverage.


89 M. Katzman, supra note 8, at 73.

90 Hadzi-Antich, supra note 88, at 780. See also Keeton & Widiss, supra note 48, at 544-45 (stating that the 1966 form revision was probably employed to allow coverage for continuing conditions (“occurrences”) as opposed to sudden events (“accidents”)).


92 Id. at 499-500. “The industry position with respect to the change from accident-based to occurrence-based coverage is that ‘insurers did not intend by this change to broaden liability contracts to include claims against insureds for deliberate pollution damage.’” Id. at 500 n. 22 (citation omitted).
which rise to the level of litigation in Great Britain. British insurers undoubtedly keep track of developments in the United States.

A. Occurrence

1. United States Approach

Whether a delayed manifestation pollution claim constitutes an "occurrence" under the terms of a CGL policy is the primary hurdle to insurance coverage. "Occurrence" based comprehensive general liability insurance policies fashioned upon the 1973 ISO CGL form typically provide:

[The insurer] 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 policy applies caused by an occurrence, . . . and [the insurer] shall have the right and duty to defend any suit against the insured seeking damages on account of such injury or damage. . . .

"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.

Insurers contend that the "neither expected or intended by the insured" language in the definition of "occurrence" prohibits coverage for intentional releases of pollutants, especially in the course of normal business practices over extended periods of time. Insureds contend, on the other hand, that although the releases themselves may have been intended, subsequent damaging consequences were unintended and unexpected.

Courts generally resolve the "expected or intended" issue in favor of finding an "occurrence" by focusing upon the polluter's lack of intent with respect to the harmful results of otherwise intentional acts. "It is not legally impossible to find accidental results flowing from intentional causes, i.e., that the resulting damage was unintended although the origi-
nal act or acts leading to the damage were intentional."

The focus is typically on the insured's expectation regarding damage, as judged by a subjective standard. In Ray Industries v. Liberty Mutual Insurance Co. the court noted that:

Sea Ray did not actually expect or intend that any property damage would result from its drum disposal practices. Sea Ray did not know its wastes were hazardous when it disposed of the barrels. In fact, Sea Ray cannot yet be certain these wastes were hazardous. Finally, Sea Ray believed its drums and disposal practices conformed with the laws existing at the time. . . . Even if Sea Ray expected or intended the release of its resins into the landfill, it did not expect or intend the damage, contamination [citations omitted].

Some courts have interpreted "expected nor intended from the standpoint of the insured" to require an element of foreseeability, so that a "substantial probability" of resulting harm may preclude a finding of an "occurrence." The court in New Castle III concluded that, although the insured landfill operator had some notice of developing leachate problems at another nearby landfill,

[...] there was neither a "substantial probability" nor an "expectation" that off-site pollution would occur . . . . The County could reasonably rely on the expectations of the professionals who designed the site and the reports confirming the landfill was behaving in a manner consistent with its design. The Court holds there was an occurrence, within the meaning of the policy . . . .

It may well be appropriate for courts to consider foreseeability from an objective (reasonable person) standard, as a subjective standard may motivate insureds to take calculated risks. For example, in a business,

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98 McGroarty v. Great Am. Ins. Co., 36 N.Y.2d 358, 364, 329 N.E.2d 172, 175 (1975) (applying "transaction as a whole" test as to whether insured's excavation actions in piling debris against neighbor's building, although a calculated risk in the face of plaintiff's warnings, led to accidental results).


100 Id. (citing Allstate Ins. Co. v. Freemand, 432 Mich. 656, 443 N.W.2d 734 (1989)).

101 Id. at 315. The court went on to hold, however, that the policy's pollution exclusion released the insurer from the duty to indemnify.


103 New Castle III, at 816. See also City of Carter Lake v. Aetna Casualty & Sur. Co., 604 F.2d 1052, 1058-59 (8th Cir. 1979) (stating that results are "substantially probable" if indications are sufficient to forewarn of high likelihood of occurrence).
the continued use of deteriorating equipment might be tolerated because of the presence of insurance coverage. Under an objective standard of foreseeability, a resultant loss would not be an “occurrence.”

Determination of reasonable intent is generally a factual issue and, because the “expected or intended” language is a limitation of occurrence-based policy coverage, the burden of proof lies with the insurer.

The necessity for such determinations may contribute to the litigiousness surrounding the “occurrence” issue, but the interests of fairness require that occurrence-based coverage be broadly construed. Such an inquiry as to the fortuity of an insured’s actions would be similar to a determination of intent in tort law, which “focus[es] on the consequences, not the acts.”

Because Superfund liability is strict, liability is assessed with no regard for the intent of hazardous waste producers or handlers whatsoever. It is certainly arguable that courts, generally unable to manipulate the statutory imposition of CERCLA liability, have engaged in manipulation of insurance policy provisions in an effort to ameliorate the draconian

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104 KEETON & WIDISS, supra note 48, at 521-22 (citing City of Carter Lake v. Aetna Casualty & Surety Co., 604 F.2d 1052, 1059 (8th Cir. 1979)).

105 See Shell Oil Co. v. Accident & Casualty Ins. Co. of Winterthur, No. 278953, slip op. at 27 (Cal. App. Dep't Super. Ct., Tentative Decision Concerning Phase I Issues, July 13, 1988) (citing 19 COUCH, Cyclopedia of Insurance Law, Section 79:385 (2d ed. 1983) for proposition that insurer has burden of proving applicability of exclusion or inapplicability of exception to exclusion).

106 In a famous dissenting opinion, Justice Cardozo called a similar difficulty posed by judicial attempts to distinguish between accidental means and accidental results a “Serbonian Bog,” (referring to the “large marshy tract of land in . . . ancient Egypt in which entire armies are said to have been swallowed up.” RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1302 (1967)).

107 The reasonable expectation of the insured is often protected by judicial interpretation of the meaning of “accidental,” and refusal to distinguish between means and results can be an avenue of achieving broader coverage. See KEETON & WIDISS, supra note 48, at 503-06.

108 KEETON & WIDISS, supra note 48, at 475 (emphasis in original). See also PROSSER & KEETON, supra note 75, § 8 at 35 n.15 (noting the difficulty which sometimes arises in designating “precisely . . . what consequences must be intended,” as in Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955), where a boy's intention in pulling a chair out from under a woman may or may not have been to cause harm).

"[A]n actor is [not] presumed to intend the natural and probable consequences of the actor's conduct . . . [but a jury] may infer that the actor's state of mind was the same as a reasonable person's state of mind would have been." Id. § 8 at 36.

Intent is equated with “substantial certainty,” whereas consciousness of acting in the face of “appreciable risk of harm” constitutes negligence or recklessness, depending upon the degree of risk involved. Id. “The line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable person would avoid, and becomes in the mind of the actor a substantial certainty. Id. (citations omitted).
effects of the statute when faced with a desire to provide insurance coverage for "appealing defendants" or to compensate "sympathetic plaintiffs." 109

Judicial decisions . . . generally hold that liability insurance does not provide coverage when an insured intentionally causes a loss. It is considerably less clear, however, as to whether coverage is provided by contemporary liability insurance policies when the insured urges that even though its action was intended, the specific consequence was not intended. 110

There are several possible approaches to a resolution of the question of liability insurance coverage for intentional torts:

One approach . . . precludes coverage for a tortfeasor who intended any type of harm to any person . . .

Another approach . . . adopts the view that innocent victims should be entitled to indemnification from a tortfeasor's liability insurer so long as the insured did not intend the specific harms that resulted to the specific persons harmed. . .

A third approach . . . focuses on what a reasonable person would view as the probable consequences of an act, rather than on the tortfeasor's subjective state of mind. . . . This type of approach is arguably compatible with the coverage terms now used in many types of liability insurance which exclude coverage unless an injury "is neither expected nor intended from the standpoint of the insured." 111

An objective standard, from the viewpoint of a reasonable insured person, is similarly appropriate for the determination of whether the delayed manifestation of pollution constitutes an accidental "occurrence" within the meaning of CGL insurance policies. It strikes a balance between requiring actual subjective intent to cause polluting consequences (which is often difficult to discern, and may lead to excessive incidence of indemnification) and requiring little more than intent to make the discharge for the preclusion of coverage (which, once established as a factual matter, may effectively preclude coverage in the vast majority of cases). 112 Assessing intent from a reasonable, objective standard would allow indemnification for insureds' good faith efforts to dispose of industrial waste by the employment of state of the art methodology or compliance with existing regulations, while preventing insureds from claiming blind ignorance of the consequences of repeated, calculated risks.

109 Abraham, supra note 23, at 977 n. 117.
110 KEETON & WIDISS, supra note 48, at 519-20.
111 Id. at 520-22 (citations omitted).
112 Id. at 505.
2. British Approach

British insurance companies underwrite CGL coverage for industrial clients in the United States, typically as reinsurers or excess insurers. They also provide "occurrence" based liability coverage in Great Britain for a host of situations where interpretation of the meaning of "occurrence" is required. Such analogous situations provide a basis for comparative analysis of the meanings of the terms and tenets of insurance policy construction between the two legal regimes.

A typical British liability insurance policy provides:

The Company . . . will pay on behalf of the insured, all sums which the insured shall be obligated to pay by reason of liability imposed upon the insured by law or assumed under contract or agreement for damages resulting from:

(i) Personal Injury
(ii) Property Damage
(iii) Advertising Injury

caused by and/or arising out of each occurrence happening anywhere in the world.

The term occurrence wherever used herein shall mean an accident, including continuous or repeated exposure to conditions, which results in personal injury, property damage, or advertising injury, neither expected nor intended from the standpoint of the insured, during the policy period.113

British insurance law has been more restrictive than the recent line of cases in the United States on the issue of "trigger of coverage", or "time of loss" as it is called in England. In Cartledge v. E. Jopling & Sons,114 the House of Lords held that a worker's claim against his employer for contracting pneumoconiosis as a result of improper factory ventilation was barred because of his failure to bring the claim within the statutorily prescribed limitations period. The occurrence of the disease was held to accrue upon the plaintiff's suffering of material damage, despite his lack of symptoms until after the tolling of the statutory limitations period. The court expressed lament in reaching such an onerous result:

It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and therefore before it is possible to raise any action. If this were a matter governed by the common law I would hold that a cause of action ought not to be held to accrue until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances. . . .

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113 Munden, supra note 73, at 11-12.
114 1 All E.R. 341 (1963).
But the present question depends on statute, the Limitation Act, 1939, and s. 26 of that Act appears to me to make it impossible to reach the result which I have indicated.\textsuperscript{115}

A similar approach to the meaning of "occurrence" was recently upheld by the Court of Appeal, Queen's Bench, in Kelly v. Norwich Union Fire Ins. LTS.\textsuperscript{116} The court held that, where burst water pipes had caused heaving of desiccated clay under the foundation of the insured's house, the occurrence for insurance coverage purposes was the incursion of water into the clay (before coverage was obtained), not the relatively sudden cracking of the foundation years later during the policy period.

\textbf{B. Pollution Exclusion}

Once the existence of an "occurrence" is established under the typically broad terms of occurrence-based liability insurance policies, coverage may be limited by at least one of several "exclusions" contained in CGL policies, such as the "pollution exclusion" or "damages" clauses.\textsuperscript{117} Exclusions generally serve to limit coverage for certain types of occurrences which would otherwise create potential for adverse selection and moral hazard (where the insured may be afforded an advantage because of its superior ability to assess certain types of risk).\textsuperscript{118} Such limitation serves to give the insured a "stake" in taking measures to avoid harms, as does the presence of a deductible.

The "pollution exclusion" (added to the CGL form policy in 1973, probably in response to recent Torrey Canyon and Santa Barbara offshore drilling disasters of 1969)\textsuperscript{119} typically provides:

This insurance does not apply:

\begin{itemize}
  \item (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.\textsuperscript{120}
\end{itemize}

\textsuperscript{115} Id. at 343.
\textsuperscript{116} 1 W.L.R. 139 (1990).
\textsuperscript{118} Abraham, \textit{supra} note 23, at 962.
\textsuperscript{119} Fields, \textit{Superfund: The Court Search for Insurance Money}, THE BRIEF, Fall, 1984, at 7. See also, M. KATZMAN, \textit{supra} note 8, at 76.
\textsuperscript{120} Pendygraft, \textit{supra} note 28, at 141 (emphasis added). \textit{See also} Tyler & Wilcox, \textit{supra} note 91, at 500; M. KATZMAN, \textit{supra} note 8, at 76.
As evidenced by the magnitude of litigation over the meaning and scope of the pollution exclusion, especially since the advent of CERCLA liability in 1980, it is doubtful that the insurance industry's initial expectations have been afforded their full import by judicial decisions.

Through the development of the pollution liability exclusion, the insurance industry has attempted to create a distinction between sudden/accidental and gradual/nonsudden occurrences. Sudden occurrences would remain covered under comprehensive general liability policies, while nonsudden and gradual occurrences would not.

This exclusion created a gap in liability coverage for nonsudden or gradual environmental impairment.121

Interpretation of the "pollution exclusion" generally focuses on its exception, which rescinds application of the pollution exclusion and restores coverage if the "discharge, dispersal, release or escape is sudden and accidental." Although considerations of polluter intent and expectation, as advanced in Ray Industries, are generally helpful to an insured's position with respect to the happening of an "occurrence," interpretation of the meaning of the "sudden and accidental" exception to the pollution exclusion clause has generated considerable divergence in judicial authority.122

1. "Accidental"

a. United States Approach

Insurers maintain that most pollution is not "accidental" because the continual deposit or discharge of wastes over time can seldom be free from intentional, or at least foreseeable, polluting consequences.123 But several courts have looked to the CGL policy definition of "occurrence" to define "accidental" in terms of the "neither expected nor intended from the standpoint of the insured" language contained therein,124 despite the insurance industry's attempt to limit the definition of "accidental" with the additional term "sudden."125

Insureds point out that when the insurance industry was seeking

121 M. Katzman, supra note 8, at 76.
123 Pendygraft, supra note 28, at 143.
125 Id. at 510.
approval of its proposed introduction of the pollution exclusion in 1970, the Mutual Insurance Rating Bureau explained the reasoning behind the exclusion as follows:

1. It is in the public interest that willful pollution of any type be stopped in order to protect the ecological balance. . . .
2. This endorsement is actually a clarification of the original intent, in that the definition of occurrence excludes damages that can be said to be expected or intended. . . .\textsuperscript{126}

Insureds maintain that the wording of the exception to the pollution exclusion simply restates the definition of occurrence, and therefore, only intentional pollution is excluded.\textsuperscript{127} Insurers maintain that such an interpretation would make the term "sudden and accidental" devoid of meaning.

Insureds reasonably contend that the meaning of the clause is at least sufficiently ambiguous that standard rules of contract construction require resolution in favor of coverage.\textsuperscript{128} Coverage is especially appropriate, the argument goes, in cases where the insured is a "passive" polluter: merely turning wastes over to a third party for disposal,\textsuperscript{129} or becoming the subsequent owner of a site already containing wastes dis-


A contemporary insurance industry bulletin similarly stated:

In one important respect, the exclusion simply reinforces the definition of occurrence. That is, the policy states that it will not cover claims where the "damage was expected or intended" by the insured and the exclusion states, in effect, that the policy will cover incidents which are sudden and accidental — unexpected and not intended.

\textit{Id.} at 87 (quoting \textit{Fire, Casualty \\& Surety Bulletin}, Property and Casualty Section, Public Liability, Cop-l, (May 1971) at 126).


\textsuperscript{127} See Penda\_graff, \textit{supra} note 28, at 143; Anderson & Sear, \textit{supra} note 126, at 87.

\textsuperscript{128} Specialty Coatings Co., 180 Ill. App. 3d at 384-85, 535 N.E.2d at 1075-76.


charged by someone else.\textsuperscript{130}

The consequences of pollution related liability have been particularly unforeseen by "passive" polluters, as well as by "innocent landowners,"\textsuperscript{131} making the alleviation of polluter liability for CGL policyholders a sensible solution. The definition of "occurrence" incorporates policyholder expectations, which should properly encompass some notion of foreseeable consequences. For passive polluters, the imposition of CERCLA liability is particularly onerous and in a sense the liability itself arose "suddenly and accidentally" from the standpoint of the insured.

In Powers Chemco, Inc. v. Federal Ins. Co.,\textsuperscript{132} the New York Court of Appeals held that waste discharge resulting from the dumping of drums by a prior landowner, although an "occurrence," was not "accidental" for purposes of the pollution exclusion exception:

We also reject plaintiff's contention 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. Simply put, there is nothing in the language of the pollution exclusion clause to suggest that it is not applicable when liability is premised on the conduct of someone other than the insured.\textsuperscript{133}

The New York Supreme Court in Powers Chemco had relied, in part, upon Technicon Electronics Corp. v. American Home Assurance Co.\textsuperscript{134} in focusing upon the insured's intent with respect to the actual discharging activity, as opposed to the resultant consequences.\textsuperscript{135} The court rejected the insured's argument\textsuperscript{136} that application of the pollution exclusion to "passive" polluters serves no deterrence function, thereby constituting a misapplication of the exclusion,\textsuperscript{137} and refused to "vary the contract of insurance to accomplish [this court's] notions of abstract justice or moral

\textsuperscript{130} See Specialty Coatings, 180 Ill. App.3d at 384-85, 535 N.E.2d at 1075-76.
\textsuperscript{131} See generally Hitt, Desperately Seeking SARA: Preserving the Innocent Landowner Defense to Superfund Liability, 18 REAL EST. L. J. 3, 7 n. 22 (1989) (stating that SARA has somewhat ameliorated liability for subsequent owners of property who had "no reason to know that hazardous materials had ever been disposed on the land." CERCLA § 101(35), 42 U.S.C.A. § 9601(35) (West Supp. 1987)).
\textsuperscript{133} Id. at 911, 548 N.E.2d at 1302, 549 N.Y.S.2d at 651.
\textsuperscript{137} Powers Chemco, 144 A.D.2d at 447-48, 533 N.Y.S.2d at 1011-12 (1988).
The court’s refusal to depart from strict adherence to policy language, however, seems as much an exercise of “abstract justice” as does basing the meaning of “accidental” upon a notion of foreseeability from the standpoint of the insured. Cannot courts also advance notions of abstract justice by strictly construing contract terms “on their face?” Either type of judicial decision making in this area can have far-reaching societal consequences. The appropriateness of judicial decision making to reflect social consciousness can, however, serve the important social function of prompting legislative response.

The District Court for the Middle District of Pennsylvania, in *Federal Ins. Co. v. Susquehanna Broadcasting Co.* recently praised the *Powers Chemco* approach in denying CGL coverage to the insured for turning its wastes over to a local waste hauling and disposal business. The court found that liability for response cost “damages” itself constituted an “occurrence,” and because coverage was triggered before pollution exclusion policies came into effect in 1973, the court held in favor of coverage. But the court went on, in dicta, to address the pollution exclusion issue, and concluded that the *Powers Chemco* approach, favoring application of the exclusion despite the insured’s lack of intent (as a

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138 *Id.* at 448, 533 N.Y.S.2d at 1012 (*quoting* Breed v. Ins. Co. of N. Am., 46 N.Y. 2d 351, 355 413 N.Y.S.2d 352, 355, 385 N.E.2d 1280, 1282 (1978)). The Supreme Court of New York, Appellate Division, also relied upon the same quote in justifying its temporal interpretation of “sudden and accidental” based upon the “plain and clear language in the policy”:

“[T]his court may not make or vary the contract of insurance to accomplish its notions of abstract justice or moral obligation, since '[e]quitable considerations will not allow an extension of the coverage beyond its fair intent and meaning’” (*Breed v. Insurance Co., quoting from* Weinberg & Holman v. Providence Wash. Ins. Co., *see also,* 1 Couch, Insurance § 184, at 376) [citations omitted].

139 See Abraham, *supra* note 23, at 976-77. “[J]udge-made insurance [can result] from disregarding the terms and purposes of environmental liability insurance policies.” *Id.* (stating that legislatures can do little to curb judicial intervention, although insurance commissioners might possibly reshape policy provisions to increase judicial deference).


141 In a nutshell, the “damages” issue boils down to whether CERCLA mandated response costs need constitute “damages” in the technical sense of the term (insurer argument) or whether the lay person’s reasonable expectations as to whether the costs of complying with equitable actions are “damages” (insured argument) should control application of the term as used in the CGL policy context.

"passive" polluter), was superior. The court criticized the approach taken in *Jackson Township*,¹⁴² which distinguished between "active" and "passive" polluters in not applying the pollution exclusion to deny coverage for mere ownership of polluted land.¹⁴³

The *Susquehanna* court refused to distinguish between active and passive polluters because "the intent of the parties is ascertained first from the language of the policy if possible. The pollution exclusion makes no reference at all to active or passive polluters."¹⁴⁴ The court relied upon an argument from *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*,¹⁴⁵ i.e., that the policy terms control the scope of coverage.¹⁴⁶

Since the *Susquehanna* court refused to engage in notions of "abstract justice or moral obligation,"¹⁴⁷ however, it is interesting to note that the court implemented a unique approach to the calculation of damages for CGL coverage purposes under Pennsylvania law.¹⁴⁸ The court stated that the proper measure of damages for injury to property is the cost of repairing the damage, consistent with CERCLA, but proceeded to apply a limitation on damages, inconsistent with CERCLA, based upon either the value of the property (if remedial efforts are undertaken), or its decrease in economic value (if the damage is permanent). The obvious problem with such an approach is that CERCLA mandates remedial response, the cost of which, especially in light of associated negotiation and litigation expenses, often significantly exceeds the value of the damaged property.¹⁴⁹

The *Jackson Township* attempt to ameliorate liability for "passive" polluters was a sensible approach, but the decision went too far in afford-

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However, the "active"/"passive" polluter distinction has been upheld in some jurisdictions, on the basis of ambiguity in insurer intent as to applicability of the pollution exclusion:

It is not clear from the circumstances of this case . . . that the parties intended the exclusionary clause to apply whether the insured was an active polluter or not. Certainly, those engaged in manufacturing processes would be expected to have sought other or additional insurance had they known that the mere act of engaging an independent agency such as a waste disposer in the ordinary course of having industrial wastes removed from their property would result in the denial of insurance coverage. . . . This ambiguity must be resolved against [the insurer].


¹⁴⁴ Susquehanna Broadcasting Co., 727 F. Supp. at 176-77 (citation omitted).

¹⁴⁶ "Insofar as the term 'active polluter' is a rubric for analyzing whether coverage exists under the terms of the policy, it is at best unnecessary. If, however, the term imports some additional criteria not found in the policy, it is not part of the parties' contract." *Id.* at 1325.
¹⁴⁹ See Abraham, supra note 23, at 969-70 (calling insurance coverage for Superfund cleanup liability far in excess of the value of the property a "windfall for insureds").
ing coverage for all but the most egregious acts of intentional pollution. The court equated the term “sudden and accidental” (in the exception to the pollution exclusion) with the “unexpected or unintended” nature of the result, i.e., as a restatement of the definition of occurrence. This interpretation in effect emasculates the pollution exclusion to a bare exclusion for willful pollution. A more sensible approach would focus on the reasonableness of the insured’s lack of expectation or intention to pollute.

Coverage has not been precluded in other areas of insurance law where risk, which a reasonable person might easily classify as reckless, was foreseeable and yet was subjectively perceived as manageable. In Knight v. Metropolitan Life Ins. Co. an experienced diver, to impress his friends, dove off the Coolidge Dam in what was “a real nice swan dive” until, unfortunately, the last instant. The court refused to deny coverage, under an “accidental means” life insurance policy contrary to the insurer’s theory that natural and probable consequences of intentional actions are not accidental. “The test is, what effect should the insured, as a reasonable man, expect from his own actions under the circumstances.”

When he pays that premium month after month he does not intend that any act committed by him, no matter how daring, reckless or foolhardy, be adjudicated by a court under “reasonable man tests” or “natural and probable consequence” standards to deprive his beneficiary of contractual rights arising out of his unintended and unexpected and, therefore, accidental death.

In the 1970s insurers never anticipated the imposition of CERCLA liability upon insureds, and therefore never engaged in calculations to account for it in the pricing of CGL coverage. But neither did insureds anticipate such liability. In extreme cases, but for CERCLA’s liability scheme, many insureds might simply have elected to walk away from hazardous waste sites. The prospect of limiting coverage to the original value of the property, regardless of the policy limit, seems as absurd as a notion of limiting automobile liability coverage for injury to third parties to the value of the insured’s car.

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151 103 Ariz. 100, 437 P.2d 416 (1968).

152 Id. at 101 n.1, 437 P.2d at 418 n. 1. A witness testified that his friend “just misjudged his distance” to the water, and “[b]ut what for he hit on his back you couldn’t beat it for a swan dive.” Id.

153 Id. at 103, 437 P.2d at 419.

154 Id. at 104, 437 P.2d at 420.

155 Abraham, supra note 23, at 966-970.
b. British Approach

A number of British cases have ruled on the meaning of the term "accident." In *Fenton v. Thorley*, an action brought by a factory worker for an on-the-job hernia caused by overexertion at a machinery wheel, the House of Lords stated: "The word accident is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss." The lower court had upheld the insurer's contention that a workman's deliberate straining at the wheel (which would not budge) could not result in an "injury by accident," because "an entire lack of the fortuitous element." The House of Lords, however, refused to distinguish between the "accidental" nature of cause and effect, or to distinguish carelessness from fortuity.

The foregoing interpretation of "accidental" is parallel to the holdings of American cases, which generally uphold the applicability of "occurrence" based insurance coverage for harm resulting from an insured's miscalculation or inadvertence. "The word 'accident' is not made inappropriate by the fact that the [insured] hurt himself." The court upheld the insurer's contention that a workman's deliberate straining at the wheel (which would not budge) could not result in an "injury by accident," because "an entire lack of the fortuitous element." The House of Lords, however, refused to distinguish between the "accidental" nature of cause and effect, or to distinguish carelessness from fortuity.

Subsequent British decisions have followed the *Fenton* articulation of "accident" by focusing on the "unintended and unexpected" nature of the event ("occurrence"), not the (proximate) "cause" leading to the event.

In *Mills v. Smith*, the court upheld coverage, under a householder's policy covering:

Section 2 (e). Liability to public. All sums for which the assured as occupier may be held legally liable in respect of claims made by any person for damage to property caused by accident.

The damage at issue was caused by the roots of the insured's tree which dried up the soil under his neighbor's foundation, causing uneven settling and cracking of the foundation. This chain of events was obviously gradual, and the court held that "an accident means any unintended and un-

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157 *Id.* at 453.
158 *Id.* at 443. "Injury by accident" was the triggering event for coverage under the Workmen's Compensation Act, 1897. *Id.* at 447-48.
159 *Id.* at 446. Counsel for the insurer had argued that the worker "must have done something which he did not intend," *Id.* at 444, and that, in effect, if the deliberate act was the proximate cause of subsequent injurious results, then no "accident" could occur. *Id.* at 447. *E.g.*, if the "accident" was not in the means which led to the result, then the result could not be "accidental."
160 *Id.* at 453.
161 *Id.* at 452.
163 *Id.* at 1079.
expected occurrence which produces hurt or loss." The court struggled with which of these several causes constituted an "accident," and concluded that "[i]t is true that foundations settle . . . and that the settling may be gradual. . . . [H]owever, there has come a point of time when the movement has overstepped the safety limit. . . . There is no accident until the overstepping takes place, [despite the fact that the cause of the accident was gradual]."

Such an approach, holding that an accident occurs upon an unexpected consequence of what may have been a long-term progression, seems appropriate in delayed manifestation environmental pollution cases. Insurers often point to the intended actions associated with, for example, dumping wastes at a landfill, in concluding that such actions are not accidental. But, in the case of an underground storage tank or water pipe which suddenly bursts, (even after a prolonged period of corrosion), it seems more appropriate to view the accident as occurring upon the happening of the unintended consequence, the accidental "event."

2. "Sudden"

A vigorously contested question remains, however, as to the meaning of "sudden" as used in conjunction with "accidental" in the pollution exclusion. On certification from the Eleventh Circuit, the Supreme Court of Georgia's recent decision in *Claussen v. Aetna Casualty & Sur. Co.* dealt squarely with the issue of the temporal meaning of the word "sudden" in the pollution exclusion context. Claussen's CGL coverage claim, for local groundwater contamination resulting from hazardous leachate from land which he had leased to a nearby city for use as a landfill over a six-year period in the early 1970s, was denied by Aetna when the EPA claim arose eight years later, on the basis of the pollution exclusion. The federal district court had agreed with Aetna, concluding that prolonged dumping of hazardous substances over a six-year period cannot, in any sense of the word, be considered "sudden." But on Claussen's appeal, the Court of Appeals certified the following question to the Georgia Supreme Court:

Whether, as a matter of law, the pollution exclusion clause contained in the comprehensive general liability insurance policy precludes coverage to its insured for liability costs for liability for the environmental contamination caused by the discharge of pollutants at

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165 *Id.* at 1081-82.
168 *Id.*
the site over an extended period of time?\textsuperscript{169}

As to the meaning of the word "sudden," Claussen argued that it means "unexpected" and Aetna argued that it means "abrupt."\textsuperscript{170} This issue has spawned a great deal of litigation recently. It goes to the heart of contract construction issues, with a host of conflicting interpretations. Courts often begin with a consideration of a dictionary definition of "sudden," and to the average person "sudden" at least includes a temporal element, as in "2: marked by or manifesting abruptness or haste 3: made or brought about in a short time."\textsuperscript{171} However, "sudden" has meaning apart from a temporal one, as in "1: happening or coming unexpectedly <a ~ shower>,"\textsuperscript{172} and the court in \textit{Claussen} examined such alternative dictionary definitions of "sudden":

Perhaps, the [abrupt] meaning is so common in the vernacular that it is, indeed, difficult to think of "sudden" without a temporal connotation: a sudden flash, a sudden burst of speed, a sudden bang. But, on reflection one realizes that, even in its popular usage, "sudden" does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death. Even when used to describe the onset of an event, the word has an elastic temporal connotation that varies with expectations: Suddenly, it's spring. . . . Thus, it appears that "sudden" has more than one reasonable meaning.\textsuperscript{173}

In \textit{Claussen}, Aetna also argued that interpretation of the word "sudden" as "unexpected," apart from its temporal "abrupt" connotation, is at odds with the rule of construction that all parts of a contract are to be afforded meaning.\textsuperscript{174} Aetna argued that, since an "unexpected" interpretation of the word "sudden" in the pollution exclusion clause would be redundant with the term "unexpected" in the definition of "occurrence," the term "sudden" must be afforded its temporal meaning to make sense of its inclusion in the exclusion. The court disagreed:

The pollution exclusion clause focuses on whether the 'discharge, dispersion or release' of the pollutants is unexpected and unintended; the definition of occurrence focuses on whether the property damage is unexpected and unintended. The pollution exclusion clause therefore has the effect of eliminating coverage for damage resulting from the intentional discharge of pollutants.\textsuperscript{175}

\textsuperscript{169} Id.

\textsuperscript{170} 259 Ga. at 335, 380 S.E.2d at 688.

\textsuperscript{171} WEBSTER'S NEW COLLEGIATE DICTIONARY 1164 (3d ed. 1975).

\textsuperscript{172} Id. For a more involved discussion and survey of dictionary definitions of the word "sudden," see Ballard & Manus, \textit{supra} note 150, at 613-16.

\textsuperscript{173} 259 Ga. at —, 380 S.E.2d at 688.

\textsuperscript{174} Id.

\textsuperscript{175} 259 Ga. at —, 380 S.E.2d at 688-89 (emphasis in original).
Aetna's position, that each clause of the policy was intended to convey a unique meaning, is also undercut by indications that at the time the pollution exclusion was under consideration for addition to the general policy form, the insurance companies themselves indicated that the purpose of the "sudden and accidental" clause was to clarify the meaning of the definition of "occurrence." 176

The British approach to the meaning of "sudden" will be discussed in conjunction with that of "sudden and accidental" in the following section.

3. "Sudden and Accidental"

a. United States Approach

The Claussen court's approach to the meaning of "sudden" seems reasonable. Not all courts agree, however, that in combination, the terms "sudden and accidental" should be construed solely in terms of the insured's expectation.

In *Technicon Elecs v. American Home Assurance Co.*, 177 the New York Supreme Court, Appellate Division, held that the terms "sudden and accidental" in the exception to the pollution exclusion clause represent two separate conditions, both of which must be met with respect to the discharge of hazardous materials.178 The court afforded the term "sudden" a temporal meaning of abruptness, occurring over a time period of short duration and without warning.179 The court applied the term "accidental," meaning unintended or unexpected, to the discharge itself, without regard to the resulting consequences.

Technicon had intentionally discharged waste water, containing mercury, into a creek at its medical equipment manufacturing plant in Puerto Rico, causing personal injury to local residents. Technicon conceded that the discharges had been made intentionally and repeatedly over the course many years, but contended that, since such discharges were made in compliance with local permits and without intent or expectation as to harmful results, that an unexpected and unintended connotation should be afforded to the term "sudden and accidental", thereby effectuating coverage per the pollution exclusion exception. The court's interpretation in *Technicon* is consistent with a previous New York deci-

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176 Insureds cite internal memorandums and letters submitted to state insurance boards during that time period. *See supra* text accompanying note 126.


179 Id. at 134, 533 N.Y.S.2d at 97-98.
sion where the N.Y. Supreme Court held that “‘sudden and accidental’ should be construed in its entirety, without undue reliance upon discrete definitions.”

b. British Approach

A commentator has stated that British courts are likely to treat the term “sudden,” as used in the “sudden and accidental” exception to the pollution exclusion, in terms of a temporal element which would exclude, for instance, the continual leeching of pollutants from a landfill over time. However, in light of the approach taken to events resulting from prolonged tree root growth in Mills v. Smith, the focus of “sudden and accidental” might be upon the first advent of leaching, not upon the continual dumping that ultimately led to its occurrence.

In Burts & Harvey v. Vulcan Boiler, the Court for the Queen’s Bench Division held that insurance coverage for consequential loss resulting from “[s]udden and accidental damage by any fortuitous cause” applied to loss caused by an internal leak in a heat exchanger used in the production of chemical compounds. The policy contained a specific exclusion for “[w]ear and tear, deterioration or gradually developing flaws or defects,” and although the heat exchanger had been in service for some time, the court held that the leak and resulting damage occurred “suddenly and accidentally” within the meaning of the policy. The possibility existed that a manufacturing imperfection may have led to the heat exchanger’s eventual failure during the strain of exposure to extreme temperature fluctuations during the course of operation, but the court focused on the “sudden” nature of the failure as an insurable event.

The foregoing analysis seems applicable to American cases dealing with delayed manifestation situations, such as asbestosis symptom manifestation, building dry rot, underground storage tanks corrosion, and landfill leachate. Courts should consider the ensuing “failure” or “catastrophe” as the “accidental” event, not the gradual deterioration which led to the failure, for purposes of applying the “sudden and accidental”

181 Id. at 182, 538 N.Y.S.2d at 632. See also Ballard & Manus, supra note 150, at 617. Thus, when combined as a phrase in the “sudden and accidental” exception to the standard form pollution exclusion, the words suggest that coverage is provided for, and limited to, discharges, releases, dispersals or escapes of pollutants that begin abruptly, are fortuitous, and that arise unexpectedly.
182 Munden, supra note 73, at 19-20.
185 Id. at 170.
exception to the pollution exclusion. The focus of “sudden and accidental” should be upon the reasonable expectation of the insured.

Even if one of several causes of the ensuing loss was reasonably foreseeable, the exclusion might not apply if other intervening causes contributed to the loss as well. American courts have held that coverage for loss resulting from multiple causes, only one of which is a covered risk, is possible, despite explicit exclusion of other contributing causes. In such cases, if the insurer has the burden of proving the applicability of the exclusion, then it also has the related burden of demonstrating that the occurrence’s proximate cause was an excluded one.187

4. Construction

Insurance coverage disputes are resolved by “the principles of construction applicable to commercial contracts,”188 which may be briefly characterized as tending to honor the wording of the policy as indicative of the parties’ intent, giving terms their plain and ordinary meaning, and, in the case of ambiguity, applying the “contra proferentum” rule.189 Insurance policy exceptions or exclusions are affirmative defenses for which the insurer has the burden of proof. Therefore, unless squarely opposite with the terms of coverage, coverage should generally be provided for events for which the insured reasonably expected coverage. Ambiguity is resolved in favor of the insured, especially in the interpretation of an exclusionary clause.

III. CONCLUSION

The foregoing analysis explores several of the pertinent issues relevant to hazardous waste control policy concerns. The issue is complex enough, and the monetary stakes are high enough, that a reasonable “all-encompassing” solution is difficult to formulate. On one hand, the policy reasons for imposing liability upon industries for costs of “doing business” is consistent with the view that such costs should ultimately be borne by the enterprise. On the other hand, the indemnification of

186 See Dickson v. United States Fidelity & Guar. Co., 77 Wash.2d 785, 466 P.2d 515 (1970) (en banc) (where crane accident caused by earth movement as well as defective weld, “latent defect” clause in “all-risk” contractor’s equipment floater policy excluded equipment repair expenses, but not resulting damages); Sabella v. Wisler, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963) (where house settling caused by leaking sewer as well as negligent construction atop fill dirt, coverage not excluded by “settling, cracking” clause in “all physical loss” building policy because sewer break viewed as intervening external cause).
187 See generally KEETON & WIDISS, supra note 48, at 553-63.
188 Munden, supra note 73, at 13.
189 Id. at 13-15.
191 See Abraham, supra note 23, at 965 n.72 (referring to Justice Traynor’s Concurrence in
those industries which have, in a sense, had the foresight to purchase liability insurance seems equitable and in line with the advantages of risk pooling and risk spreading provided by the insurance industry.

Courts need to be aware of the ramifications to society in addressing statutorily mandated questions as, “Who should pay for corporate pollution?” As with all statutory enforcement decisions, and particularly because of the additional policy concerns interjected by the involvement of insurance coverage, courts must be aware of the proper judicial role. But in the absence of legislative clarification, the courts are left to balance competing policy concerns.

The complexity of identifying, and then ranking, the nature of the insured risks in pollution liability matters, as an initial matter, as well as imposition of the ultimate burden for CERCLA’s retroactive, joint and several, strict-liability (which no one could have foreseen when pertinent insurance contracts were formed), indicates the inherent dangers of deciding as a “matter of law.” It may be appropriate, then, for courts to decide environmental liability insurance cases on an ad hoc basis. Many of the ramifications and policy rationales are still being identified, but assessment of polluter expectation and intent is critical to the process. A state-of-the-art defense is not currently available under CERCLA in the United States, and retroactive strict liability is difficult for the insur-

Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) for proposition that manufacturer can distribute products liability costs to the public).

192 The effects judicial “manipulation” of insurance policy provisions upon the insurance industry are addressed in Abraham, supra note 23, at 960-72 (stating that “judge-made insurance,” although serving as a consumer protection device, can be destabilizing enough to the insurance market to make continued coverage impossible). “[J]udicial interpretations of policy language that insurers had regarded as fixed, clear, and limiting have expanded the scope of coverage against . . . environmental liability.” Id. at 960.

The proper roles of both judicial “activism” and “restraint” are aptly described as an antinomy by Archibald Cox:

The great judge must manage to strike an accommodation between the needs of society in the times in which he lives and the need of a free society at all times for a legal system that binds the judges as well as the litigants. Without the last, judges would indeed be despots.


Surely, if the people could be asked whether judges should decide without restraint, a heavy majority would reply, “No, they should follow the law.” But if asked whether precedent should always be binding, surely the majority would reply, “No, precedent should not always be binding. Sometimes past law was unjust.”

Id. at 377.

193 In products liability law, the producer of a dangerous or unsafe product may be able to assert, as an affirmative defense to charges of negligent design or marketing, that the product was marketed with the benefit of best available design or safety technology. This state-of-the-art defense is generally defined according to “the state of scientific and technological knowledge available . . . [when] the product was placed on the market.” J. Phillips, Products Liability in a Nutshell 16 (3d ed. 1988) (citing Tenn. Code Annot. § 29-28-105(b)).

With respect to polluter’s reasonable conduct, use of state-of-the-art procedures would reduce the foreseeability of damaging consequences.
ance industry to accommodate,\textsuperscript{194} but when the possibility of CGL coverage as a contractual matter is involved, a consideration of polluter intent and expectation is critical. The state-of-the-art defense applies in British asbestos cases,\textsuperscript{195} and probably would in delayed manifestation environmental pollution cases if they ever come about in Great Britain.\textsuperscript{196}

The courts in \textit{Technicon} and in \textit{New Castle County}, one emphasizing the word “sudden” and the other the word “accidental,” both seem to have grappled with the same issues of policy and fairness with respect to CGL coverage for corporate polluters. The polluter in \textit{Technicon} may be properly regarded as having crossed the line of foreseeability of dire consequences by continued daily dumping into a stream, despite compliance with local ordinances. The landfill operator in \textit{New Castle County} is properly regarded as not having crossed the same line, because of its efforts in researching and implementing state of the art landfill procedures. A determination of what constitutes intentional disregard for the possible effects of polluting activities is consistent with the policy reasons for the coverage exclusion. “Occurrence” based insurance coverage should turn on a determination of “intent” or “expectation” to pollute. The “sudden and accidental” exception to the pollution exclusion should be to effectuate such an assessment by viewing the meaning of the term with reference to the insured’s point of view, as judged by the reasonableness of the expectation.

What if it turned out that dumping coffee grounds down the kitchen sink was hazardous, and that suddenly hordes of homeowners were held liable for damages? The continual household practice is certainly not “sudden and accidental,” but the consequences (and imposition of liability for them) would be. Liability insurance coverage under a CGL policy would be quite reasonable. But the same conclusion can no longer be maintained with respect to, for example, used motor oil or automobile antifreeze because reasonable people are increasingly aware of the toxic effects associated with these substances.

United States courts should have a certain amount of leeway to ameliorate the draconian effects of CERCLA’s strict, retroactive liability, but they should do so in such a way that only “intentional” polluters pay and

\textsuperscript{194} See Abraham, \textit{supra} note 23, at 957.

\textsuperscript{195} Telephone interview with Alison Watts, Barrister, Gray’s Inn, London (Jan. 31, 1990).

\textsuperscript{196} A recent article in London’s Sunday Observer Magazine indicates that pollution liability litigation may be forthcoming in Britain. The article divulges the results of a governmental survey, unpublished for 16 years, which established the location and potentially hazardous condition of approximately 1,300 toxic dumps. The consequences could be particularly troublesome because, as a result of ineffective enforcement of the Control of Pollution Act, little if any arrangements were ever implemented for the separation of toxic materials from “regular” garbage at British landfills. Lean & Ghazi, \textit{Britain’s Buried Poison}, \textit{Observer Mag.}, Feb. 4, 1990, at 11, 17.
“merely negligent or unaware” polluters can be afforded insurance coverage. This determination should be made with reference to an objective, “reasonable under the circumstances,” standard.

Whether pre-existing insurance coverage is the appropriate mechanism for funding environmental cleanups under Superfund may not yet be answerable. It may be left for Congress to decide how the financial burden for the industrial by products of the past fifty years should be distributed. In the meantime, the insurance industry’s “occurrence” based concept of “accident” will serve as a fair standard by which to direct the burden either directly back to industry or more generally to society as a whole through the insurance industry. The challenge is to implement a liability regime which will create incentives for industry to minimize polluting by products from now on.

Superfund has been criticized for imposing unreasonably strict standards upon industry, as evidenced by its general inability to enforce them. Great Britain’s system of hazardous waste controls, on the other hand, while enjoying relatively successful enforcement of what regulations exist, has been criticized for being unrealistically lax. It is as if the United States has mandated environmental standards without concern for the economic and societal ramifications, and Great Britain has overemphasized the economic effects at the expense of its citizens’ health and future well-being. Each country needs to move a little closer to the middle. In the United States, the insurance industry often serves as a mechanism for ameliorating the harsh effects of frustrating environmental legislation. In Great Britain, it exists as a mechanism through which more effective environmental policy can be effected.

Looking East or West over 3,000 miles of ocean is not always the best way to appreciate the finer points of what we may each be trying to do. But . . . I am sure our similarities are many. We both seek change without which a system of law ceases to reflect the society it serves and command its respect. Without change, old rules may impose an absurd tyranny. . . . Only if lawyers on either side of the Atlantic have knowledge of and respect for the corresponding legal systems and structures can we hope to continue to draw upon the respective strengths of each other’s systems.197

IV. POSTSCRIPT

Since the completion of this note, several developments have continued to fashion judicial interpretation of the “sudden and accidental” exception to the CGL policy pollution exclusion.

In *Just v. Land Reclamation, Ltd.*, the Supreme Court of Wisconsin held that "sudden and accidental," reasonably ambiguous in the standard form CGL policy pollution exclusion, means "unexpected and unintended" and not necessarily "prompt" or "immediate." The court's opinion gives a particularly interesting summary of the Mutual Insurance Rating Bureau's submission to the West Virginia Commissioner of Insurance, stating that the "sudden and accidental" language was added to the pollution exclusion to clarify the definition of occurrence and exclude coverage for intentional polluters. The court relied upon the distinction between polluting act and resultant damage, and discounted the relevance of the frequency of ongoing dumping as long as the resultant damage is unintended or unexpected. As the dissenting opinion pointed out, if the standard is taken to require a subjective lack of intention or expectation, the danger exists that "all negligently caused damages are now covered, as long as the damages are not deliberate."

But as a general proposition, although statutory liability is strictly imposed under CERCLA, if insurance coverage does not cover negligently incurred liability there is not much reason to purchase liability insurance in the first place.

Representative of the other extreme, in *Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc.*, the Supreme Judicial Court of Massachusetts focused upon the circumstances surrounding the release of pollutants, requiring such release to have occurred suddenly for coverage to apply. Such a strictly temporal approach, however, (and by the court's own admission) leaves unanswered the "proper construction of the exception, if a release or discharge, initially both accidental and sudden, continues for an extended period. As the discharge or release continues, at some point, presumably, it would likely cease to be accidental or sudden (even in the sense of unexpected)." Furthermore, a strictly temporal approach creates confusion regarding exactly which discharge matters in delayed manifestation cases. In the abstract, when a polluter places hazardous waste into a vessel which subsequently leaks and causes seepage into the surrounding environment, which discharge must occur suddenly: the initial (usually ongoing) discharge into the vessel, or the subsequent (usually unexpected and unintended) discharge into the environment?

In *Fireman's Fund Ins. Cos. v. EX-CELL-O Corp.*, the District
Court for the Eastern District of Michigan held that the insurer met its burden of proving the insured’s subjective expectation or intent of damage resulting from day-to-day manufacturing processes. Under Michigan law, “intent may be presumed under certain circumstances. . . . ‘[T]he insured’s intent may be actual or inferred from the nature of the act and the accompanying reasonable foreseeability of harm. . . .’” The insurer met its burden of proof by demonstrating evidence of the insured’s knowledge of the hazardous nature of its effluent wastes (based upon environmental inspections and analyses) and its failure to adopt adequate treatment methods (from among specific proposals including capital investment and annual operational costs). The court found that the insured’s denial of expectation or intent, in light of the chosen disposal method (percolating lagoons), “[flew] in the face of common sense.”

In Boeing Co. v. Aetna Casualty & Surety Co., the District Court for the Western District of Washington recently found that Boeing expected or intended damage, for later years of coverage (after 1971), resulting from ongoing disposal practices that had been taking place since 1961 at two disposal sites, and since 1957 at a third site, in King County, Washington. The jury found that continuous polluting business practices had occurred for almost ten years before Boeing’s reasonably foreseeable expectation rose to a sufficient level to preclude liability coverage for environmental impairment. As Robert Sayler recently noted:

[Boeing’s case was that] Boeing did not know at the time that these sites were bad sites. Boeing was taking its stuff where it had to take it, the only place it was legal to go. This was an awful long time ago [and] it was not fair to judge, by 1990 lenses, what happened in 1960 and 1965. . . .

Boeing had investigated its waste disposal practices from the beginning.

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205 Id. at 1350-51.
206 Id. at 1350 (citation omitted).
207 Id. at 1351-54.
208 Id. at 1354 (citation omitted).
209 No. C86-352WD (W.D. Wash. oral decision Apr. 16, 1990). The court found genuine issues of material fact, as to whether and when Boeing expected resultant property damage, sufficient to overcome Aetna’s motion for summary judgment and ruled that at Washington law “‘expected’ means that the insured knew that there was a high degree of probability or a substantial certainty that damage would result . . . .” Id. at 6. The insured carries the burden of proving lack of expectation or intention, and at Washington law the term “sudden” in insurance exclusions means “unforeseen and unexpected,” not “instantaneous.” Id. at 7, 9 (citing Anderson & Middleton Lumber Co. v. Lumberman’s Mutual Casualty Co., 53 Wash. 2d 404, 333 P.2d 938 (1959)).
and had generated documents showing “that they knew that there was a risk, that nobody in 1960 was sure how to handle hazardous waste. They’re not in 1990 either, and honest companies would write the same documents today: ‘we don’t know for sure, we’ll do our best.’ . . .”\(^{212}\) Despite this smoking gun, the jury agreed that Boeing did not expect or intend damage until 1971, when Boeing “should have expected or intended damage.”\(^{213}\)

In the effort to fashion acceptable limits of how much foreseeable harm a polluter may cause without endangering its comprehensive general liability coverage, courts should continue to be reluctant to impose strict liability standards upon insurance contract interpretation matters, particularly for environment damaging practices employed decades ago. A foreseeability standard, requiring something greater than negligence and in a sense analogous to the British recognition of a “state-of-the-art” defense, seems appropriate in judging the point at which ongoing pollution causing activities should preclude insurance liability coverage.

Resolution of delayed manifestation environmental impairment liability correctly involves a factual inquiry, directed towards establishing when a polluter knew, or reasonably should have known, that its ongoing (business) practices were causing deleterious consequences. A “reasonably foreseeable” inquiry, in accordance with the information and level of knowledge available at the time of the ongoing polluting activities, serves to balance the competing concerns as to whether foreseeable consequences of polluting activities should be judged objectively or subjectively. At some point, ongoing polluter negligence becomes reckless enough that intent or expectation should be presumed and liability coverage should no longer be available.

Thomas C. Gilchrist*  

\(^{212}\) Id.  
\(^{213}\) Id.  