

1991

The Insurance Industry's 1970 Pollution Exclusion: An Exercise in Ambiguity

John S. Vishneski III

Assoc. Keck, Mahin & Cate, Chicago, IL.

Todd G. Zimmerman

Assoc. Keck, Mahin & Cate, Chicago, IL.

Robert A. Creamer

Partner Keck, Mahin & Cate, Chicago, IL

Judith N. Levi

Assoc. Prof. of Linguistics, Northwestern University

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>

 Part of the [Environmental Law Commons](#), and the [Insurance Law Commons](#)

Recommended Citation

John S. Vishneski III, , Todd G. Zimmerman, , Robert A. Creamer, & Judith N. Levi, *The Insurance Industry's 1970 Pollution Exclusion: An Exercise in Ambiguity*, 23 Loy. U. Chi. L. J. 67 (1991).

Available at: <http://lawcommons.luc.edu/lucj/vol23/iss1/4>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

The Insurance Industry's 1970 Pollution Exclusion: An Exercise in Ambiguity

*John S. Vishneski, III**

*Todd G. Zimmerman***

*Robert A. Creamer****

*Judith N. Levi*****

TABLE OF CONTENTS

I.	INTRODUCTION	68
II.	BACKGROUND	71
	A. <i>The Pollution Exclusion Clause</i>	71
	B. <i>The Guiding Principle of Construction of Insurance Policy Provisions, Especially Exclusionary Provisions, Is That Ambiguities Must Be Construed in Favor of Coverage</i>	72
III.	ANALYSIS	73
	A. <i>The 1970 Pollution Exclusion Is Ambiguous as to Whether it Applies Only to the Insured's Polluting Acts or to the Polluting Acts of Others as Well ...</i>	73
	B. <i>The 1970 Pollution Exclusion Is Ambiguous with Respect to What Constitutes an Accidental Discharge of Pollutants</i>	77
	1. <i>Whether a Discharge Is Accidental Must Be Determined from the Policyholder's Point of View</i>	78
	2. <i>The Phrase "Discharge, Dispersal, Release or Escape" Is Ambiguous</i>	79
	C. <i>The 1970 Pollution Exclusion Is Ambiguous with Respect to What Constitutes a Sudden Discharge of Pollutants</i>	83
	1. <i>The Term "Sudden" Is Ambiguous with</i>	

* Associate at Keck, Mahin & Cate, Chicago, Illinois; B.A., 1985, J.D., 1988, University of Virginia.

** Associate at Keck, Mahin & Cate, Chicago, Illinois; B.A., 1987, St. Louis University; J.D., 1990, University of Virginia.

*** Partner at Keck, Mahin & Cate, Chicago, Illinois; B.A., 1963, Northwestern University; LL.B., 1967, Harvard University.

**** Associate Professor of Linguistics at Northwestern University; B.A., 1964, Antioch College; M.A. (linguistics), 1972, Ph.D. (linguistics), 1975, University of Chicago.

	Respect to Whether it Means Unexpected or Temporally Quick	83
2.	Whether a Discharge Is Sudden Must Be Determined from the Policyholder's Point of View	91
3.	The Phrase "Discharge, Dispersal, Release or Escape" Is Ambiguous.....	92
4.	The Term "Sudden" Is Ambiguous as to How Probable the Discharge Must Be to Be Considered Not Sudden.....	92
IV.	PROPOSAL.....	93
	A. <i>Once the Numerous Ambiguities of the 1970 Pollution Exclusion Are Correctly Resolved, Clear Rules Emerge to Determine Whether Coverage Should Be Granted</i>	93
	B. <i>The Results of Reported State Court Decisions Are Consistent with the Above-Described Analysis</i>	94
	1. Uninvolved Liable Parties	94
	2. Intentional Polluters	96
	3. Unintentional Polluters	97
V.	CONCLUSION	101

I. INTRODUCTION

Over the past decade, insurance coverage litigation regarding environmental liability has become big business. The impetus for this boom in coverage litigation was the passage of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").¹ CERCLA imposes liability for actual and "threatened" environmental contamination that is not only strict liability, but also liability without traditional proximate causation.² CERCLA also applies retroactively so that businesses are held liable today for practices that were legal at the time they were conducted.³

The United States Environmental Protection Agency ("EPA"), armed with CERCLA, has placed numerous contaminated sites onto its National Priorities List ("NPL"), a listing of the nation's most contaminated sites.⁴ To effect a cleanup of each of these sites,

1. 42 U.S.C. §§ 9601-9657 (1991).

2. 42 U.S.C. § 9607 (1991).

3. 42 U.S.C. § 9613(d) (1991).

4. Thomas Reiter et al., *The Pollution Exclusion Under Ohio Law: Staying the Course*, 59 U. CIN. L. REV. 1165, 1170-71 (1991). The EPA has placed 1,200 sites on the

the EPA usually designates as many liable parties as it can identify, called "responsible parties" under the statute, and orders these parties to clean the site. At many sites, there are more than one hundred responsible parties. If responsible parties refuse to perform the required cleanups, often costing tens of millions of dollars, the EPA has the power to clean the site itself and then sue under CERCLA for reimbursement of its costs plus penalties.⁵

Faced with such broad, retroactive, strict liability, responsible parties around the country have turned to their comprehensive general liability ("CGL") insurers for coverage. CGL policies cover liability for bodily injury or property damage taking place during a designated policy period. Many of the contaminated sites sought to be cleaned by the EPA were polluted during the 1960s and 1970s. Hence, responsible parties today are calling upon their CGL insurers who issued policies during the 1960s and 1970s to cover their costs for these cleanups.

Most CGL policies issued after 1970 contain a standard-form "pollution exclusion,"⁶ the focus of this Article. The 1970 pollution exclusion has caused widespread confusion as to when CGL insurance covers CERCLA liability. Different state courts of last resort disagree as to its meaning;⁷ appellate courts within states, such as Illinois, disagree as to its meaning,⁸ and even some federal courts have refused to follow the interpretation of the exclusion by the appellate courts of the states in which they sit.⁹

Seven state supreme court decisions that have construed the 1970 pollution exclusion illustrate the confusing nature of the clause. The highest courts of Georgia,¹⁰ Wisconsin,¹¹ and Colorado¹² have interpreted the exclusion narrowly, finding coverage for most CERCLA liability. In contrast, the highest courts of

NPL with each site projected to cost an average \$29 million to clean up, and it estimates that 2,100 sites will appear on the NPL by the year 2000. *Id.*

5. *Id.* The EPA originally estimated the total cleanup bill for industry under CERCLA at approximately \$8 billion, but more recent estimates range from \$150 billion to \$700 billion. *Id.*

6. *See infra* text accompanying note 24.

7. *See infra* notes 10-19 and accompanying text.

8. *See infra* notes 95-115 and accompanying text.

9. *See, e.g.,* *Aerospace v. Aetna Casualty & Sur. Co.*, 897 F.2d 214 (6th Cir. 1990) (specifically rejecting the Michigan Appellate Court decision in *Jonesville Prod., Inc. v. Transamerica Ins. Group*, 402 N.W.2d 46 (Mich. Ct. App. 1987)).

10. *Claussen v. Aetna Casualty & Sur. Co.*, 380 S.E.2d 686 (Ga. 1989).

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

12. *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991).

North Carolina,¹³ New York,¹⁴ Michigan,¹⁵ and Massachusetts¹⁶ have interpreted the exclusion broadly, blocking coverage for most CERCLA liability. This confusion exists because the 1970 pollution exclusion contains numerous ambiguities, any one of which can alter the result in a particular case depending on which of the two or more available meanings a court chooses to apply. Clearly, no consensus has yet emerged to resolve this confusion.

The question of how to interpret the 1970 pollution exclusion most likely will continue to be widely litigated in the foreseeable future. As of this writing, the highest courts of Illinois¹⁷ and Ohio¹⁸ have accepted appeals in which they are expected to interpret the 1970 pollution exclusion, and the Eleventh Circuit Court of Appeals has certified a question concerning the interpretation of the 1970 pollution exclusion to the Supreme Court of Florida.¹⁹

Much of the confusion in the courts has resulted because courts have failed to recognize one or more of the numerous ambiguities contained in the pollution exclusion clause and have consequently chosen coverage-defeating interpretations.²⁰ The only way for a court to find its way through this labyrinth of ambiguity is for it first to identify carefully the numerous ambiguities.²¹ Then, in accordance with black letter insurance law, a court should construe these ambiguities in favor of the policyholder, because the language in question is an exclusion and has been principally drafted by insurance industry experts.²²

There are three major ambiguities within the pollution exclusion clause which cause most of the confusion. Once courts recognize these ambiguities and construe them in favor of the policyholder, clear rules emerge: policyholders who did not proximately cause discharges of pollutants should be covered; policyholders who in-

13. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374 (N.C. 1986).

14. *Powers Chemco, Inc. v. Federal Ins. Co.*, 548 N.E.2d 1301 (N.Y. 1989).

15. *Upjohn Co. v. New Hampshire Ins. Co.*, Nos. 86906, 86907, 86908, 1991 Mich. LEXIS 1811 (Mich. Aug. 26, 1991).

16. *Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc.*, 555 N.E.2d 568 (Mass. 1990).

17. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 570 N.E.2d 1154 (Ill. App. Ct.), *appeal granted*, 575 N.E.2d 917 (Ill. 1991).

18. *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 574 N.E.2d 1075 (Ohio July 3, 1991) (Table, No. 91-641).

19. *Industrial Indem. Ins. Co. v. Crown Auto Dealerships, Inc.*, 935 F.2d 240 (11th Cir. 1991).

20. *See infra* part III.

21. *See infra* part III.

22. *See infra* part III.

tentionally caused discharges of pollutants should not be covered; and policyholders who unintentionally, but nevertheless, proximately caused discharges of pollutants should be covered, except when the policyholder was aware of a substantial probability that it was causing a discharge of pollutants.²³

II. BACKGROUND

A. *The Pollution Exclusion Clause*

Drafted by industry experts in 1970, the standard-form pollution exclusion states:

This insurance does not apply: . . . to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.²⁴

As is apparent from this language, the insurance industry's 1970 standard-form pollution exclusion is only a partial exclusion. It provides coverage for some environmental claims, but does not provide coverage for others. Far from fulfilling its purpose of delineating which environmental claims against a policyholder are covered and which are not, the 1970 pollution exclusion has caused widespread confusion.²⁵

23. See *infra* part IV.

24. See *United States Fidelity & Guar. Co. v. Specialty Coatings Co. of Ill.*, 535 N.E.2d 1071, 1075 (Ill. App. Ct.), *appeal denied*, 545 N.E.2d 133 (Ill. 1989). The insurance industry's usual procedure for drafting and adopting new policy language provides the reason why the above-quoted exclusion is in such widespread use, and hence, today the subject of judicial construction in every state of the Union. Typically, new policy language is first drafted by a large insurance trade organization, currently the Insurance Services Office. That organization then solicits approval of that policy language from each state's Commissioner of Insurance for use in each of the 50 states. Once approval is granted in a particular state, individual insurance companies may then incorporate the new language into their policies. Individual insurance companies can and do make individual filings with state Insurance Commissioners, but this is the exception rather than the rule. The particular drafting and approval history of the 1970 pollution exclusion has been the subject of numerous articles and has figured prominently in several court decisions construing the exclusion. For an excellent summary and discussion of the 1970 pollution exclusion drafting and approval history uncovered to date, see Reiter et al., *supra* note 4, at 1174.

25. See *supra* notes 7-19 and accompanying text.

*B. The Guiding Principle of Construction of Insurance Policy Provisions, Especially Exclusionary Provisions, Is That Ambiguities Must Be Construed in Favor of Coverage*²⁶

Courts consistently have adhered to the rule that ambiguities in an insurance policy should be construed in favor of coverage when interpreting insurance policy language susceptible to numerous meanings, such as the 1970 pollution exclusion. Most recently, the Illinois Supreme Court stated that an insurance policy's "provision is ambiguous if it is subject to more than one reasonable interpretation. All doubts and ambiguities must be resolved in favor of the insured."²⁷

The policy reasons for this rule are twofold. First, as with the pollution exclusion clause in this case, the insurer or an insurance industry trade association drafted the disputed policy terms, and thus had the opportunity to make any vague or ambiguous terms more specific.²⁸ More importantly, it is established public policy that insurance forfeitures are disfavored.²⁹

The rule requiring construction of ambiguous terms in favor of coverage is especially applicable to ambiguous exclusionary clauses³⁰ because exclusions attempt to limit an insurer's liability. Consequently, exclusions are contrary to the primary purpose of insurance, which is to protect the insured and the public.³¹ Courts, therefore, should identify any relevant ambiguities and construe them in favor of coverage, especially when an exclusionary clause is at issue.

This Article will first describe the ambiguities inherent in the 1970 pollution exclusion. Next, it will apply black letter insurance law principles to the ambiguities so that ambiguous portions of the

26. For general propositions of law, this Article will cite to Illinois cases. Although there is some variation, these general propositions hold true in other jurisdictions as well.

27. *United States Fidelity & Guar. Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926 (Ill. 1991); *see also Dora Township v. Indiana Ins. Co.*, 400 N.E.2d 921 (Ill. 1980); *Bellmer v. Bellmer*, 488 N.E.2d 1338 (Ill. App. Ct. 1986).

28. *See Dora Township*, 400 N.E.2d at 922.

29. *Bellmer*, 488 N.E.2d at 1340. As the *Bellmer* court stated:

Insurance forfeitures are disfavored as insurance serves important functions in contemporary society and, even in doubtful cases, courts should be quick to find facts which support coverage; and language of the policy should be liberally construed in favor of coverage, toward the end that the insured is not deprived of the benefit of insurance for which [it] paid.

Id. (citation omitted).

30. *See Reliance Ins. Co. of Ill. v. Martin*, 467 N.E.2d 287, 289 (Ill. App. Ct. 1984) (involving the 1970 pollution exclusion); *Dobosz v. State Farm Fire & Casualty Co.*, 458 N.E.2d 611, 614 (Ill. App. Ct. 1983) (involving homeowner coverage for water damage).

31. *See supra* notes 28-29 and accompanying text.

pollution exclusion are construed in favor of coverage. This Article will then review and analyze court decisions that discuss these ambiguities. Finally, by combining the above analyses, this Article will propose a clear interpretation of the pollution exclusion clause that is capable of performing the clause's function of delineating which environmental claims are covered and which are not.

III. ANALYSIS

The 1970 pollution exclusion contains three major ambiguities. The first is whether the exclusion applies to defeat a policyholder's coverage for the polluting acts of third parties, or whether the exclusion is limited to defeating coverage only for the insured's polluting acts. The second ambiguity involves the meaning of accidental discharge. The third, and most complicated ambiguity, concerns the meaning of sudden discharge.

A. The 1970 Pollution Exclusion Is Ambiguous as to Whether it Applies Only to the Insured's Polluting Acts or to the Polluting Acts of Others as Well

The 1970 pollution exclusion consists of two parts. The first part describes the scope of coverage generally taken away by the exclusion; namely, that the coverage does not apply "to bodily injury or property damage arising out of the discharge, dispersal, release or escape of [pollutants]."³² The second part places a limitation on the scope of the exclusion; namely, that the exclusion does not apply "if such discharge, dispersal, release or escape is sudden and accidental."³³ The first part, therefore, concerns whether the exclusion applies at all, and the second part limits the scope of the exclusion once it is determined to apply.

The first part of the exclusion contains an important ambiguity in the form of an omission. It merely states that coverage does not apply to bodily injury or property damage "arising out of the discharge, . . . [of pollutants]." The exclusion does not specify whether it only applies to "the discharge, dispersal, release or escape [caused by the policyholder]" or whether it also applies to "the discharge, dispersal, release or escape [caused by anyone]." The reader must choose only one construction when interpreting this language because, for a pollution claim to be brought against a policyholder, someone must have proximately caused the discharge

32. See *supra* text accompanying note 24.

33. See *supra* text accompanying note 24.

of pollutants.³⁴

The First District of the Illinois Appellate Court, in *United States Fidelity and Guaranty Co. v. Specialty Coatings Co. of Illinois*,³⁵ recently recognized this ambiguity when deciding whether such policy language applies only to the insured's polluting acts or whether it also includes the polluting acts of third parties.³⁶ After reviewing the history of the pollution exclusion, the court found it unclear whether the policy was to apply only to an insured who actively pollutes.³⁷ Accordingly, the court construed the ambiguities against the insurer in favor of coverage for the insured.³⁸ The *Specialty Coatings* court was correct to recognize this ambiguity.

Courts have consistently found that a "failure to specify" in contract language constitutes an ambiguity.³⁹ The 1970 pollution ex-

34. See *supra* note 2 and accompanying text.

35. 535 N.E.2d 1071 (Ill. App. Ct.), *appeal denied*, 545 N.E.2d 133 (Ill. 1989).

36. *Id.* at 1075-76. The *Specialty Coatings* court stated:

Defendants contend that the policy language does not make the exclusion applicable to them since the exclusion language does not specify whether it applies only when the insured actively discharges, dispenses [sic], releases or causes to escape pollutants, which defendants are not charged with, or that the exclusion was intended to apply even when the polluting acts were performed by a third party, as here. . . .

It is not clear from the circumstances of this case, and from the underwriting history of the exclusionary clause to which we will later refer, that the parties intended the exclusionary clause to apply whether the insured was an active polluter or not.

. . . .
 . . . This ambiguity must be resolved against [the insurer] in consonance with the authorities previously cited.

Id.

37. *Id.*

38. *Id.*

39. See, e.g., *De Kalb Bank v. Purdy*, 520 N.E.2d 957, 963 (Ill. App. Ct.), *appeal denied*, 530 N.E.2d 243 (Ill. 1988). In *De Kalb Bank*, the parties disputed the meaning of a farm lease. The lease required the lessee to pay rent as follows: "The sum of \$25,000.00 on or before the date hereof [and] 35 bushels of corn per tillable acre." *Id.* At the appropriate time, the lessee provided the landlord with 35 bushels of "wet corn." *Id.* The landlord maintained that he should have been paid with "Number 2 corn." *Id.* The difference is that wet corn has not gone through a drying process and Number 2 corn has. Thus, a bushel of Number 2 corn holds more than a bushel of wet corn. The lessee argued that the lease did not specify whether the rent was to be paid in wet corn or in Number 2 corn, and since wet corn was in fact "corn," he had fulfilled his part of the bargain. *Id.* at 964. The court rejected this argument, holding that the lack of specificity in the lease constituted an ambiguity. *Id.*

Discussion of other ambiguous terms occurs in *Stamatakis Indus., Inc. v. King*, 520 N.E.2d 770 (Ill. App. Ct. 1987) (covenant not to compete against employer did not specify which of numerous businesses of employer could not be engaged in by former employee), and *American Nat'l Bank v. Olympic Sav. & Loan Ass'n*, 377 N.E.2d 255 (Ill. App. Ct. 1978) (lease termination provision did not specify when limited six-month termination period began).

clusion fails to specify whether it applies only with respect to discharges caused by the policyholder or to discharges caused by third persons as well. This failure to specify is an ambiguity. Under the guiding principles of construction, this ambiguity must be construed in favor of coverage. This ambiguity, therefore, should be construed narrowly so that the exclusion only applies in situations where the policyholder proximately caused the discharges of pollutants.

Numerous other courts have also recognized this particular ambiguity.⁴⁰ For example, in *Covington Township v. Pacific Employers Insurance Co.*,⁴¹ the court determined that the pollution exclusion was ambiguous as to whether it applies only when the named insured discharges waste material.⁴² Citing the accepted principle that "ambiguities in an insurance policy are to be strictly construed against the insurer," the court resolved the ambiguity in favor of the insured.⁴³

In addition, a review of the nature of environmental liability ex-

40. See *Centennial Ins. Co. v. R.R. Donnelley & Sons Co.*, No. M89-410, slip op. (N.D. Ind., January 7, 1991); *Covington Township v. Pacific Employers Ins. Co.*, 639 F. Supp. 793, 799-800 (M.D. Pa. 1986); *Payne v. United States Fidelity & Guar. Co.*, 625 F. Supp. 1189 (S.D. Fla. 1985); *Safe Harbor Enter., Inc. v. United States Fidelity & Guar. Co.*, No. 90-1099-CA-03, slip op. (Fla. Cir. Ct., May 13, 1991); *Thompson v. Temple*, 580 So. 2d 1133 (La. Ct. App. 1991); *Autotronic Sys., Inc. v. Aetna Life & Casualty*, 456 N.Y.S.2d. 504 (App. Div. 1982); *Niagara County v. Utica Mut. Ins. Co.*, 439 N.Y.S.2d 538 (App. Div. 1981).

41. 639 F. Supp. 793 (M.D. Pa. 1986).

42. *Id.* at 799-800. The court reasoned:

Assuming *arguendo* that the contamination of the water supply was not sudden or accidental, the theories of liability contained in the eight (8) lawsuits are not predicated solely on plaintiff's discharge, etc. of waste material into the water supply.

While damages resulting from a failure to monitor, etc., arguably still could be said to arise from a discharge of waste material, the seventh exclusion apparently applies only when a named insured discharges etc., waste material. At best, the seventh exclusion is ambiguous. . . .

. . . Again, ambiguities in an insurance policy are to be strictly construed against the insurer. Concededly, the discharge of waste material into the water supply is the immediate cause of the injuries alleged in the third-party complaints. The damages sought from plaintiff, however, are based on plaintiff's acts or omissions in discharging its public entity duties, *i.e.*, monitoring the water supply and issuing sewage permits. While both readings of the seventh exclusion may be plausible, any ambiguity must be resolved in favor of plaintiff. Accordingly, considering the allegations of the eight (8) third-party complaints, the court finds that the seventh exclusion does not relieve defendant of its duty to defend claims based on the discharge, etc., of waste material by those other than the named insured.

Id. (citations omitted).

43. *Id.*

isting at the time the pollution exclusion was drafted also sheds light on this ambiguity. As the Illinois Supreme Court stated in *Glidden v. Farmers Automobile Insurance Ass'n*:⁴⁴ "An insurance policy is not to be interpreted in a factual vacuum; it is issued under given factual circumstances. What at first blush might appear unambiguous in the insurance contract might not be such in the particular factual setting in which the contract was issued."⁴⁵ Hence, to determine the scope of coverage, it is appropriate to review the legal theories under which policyholders were held liable at the time the pollution exclusion was drafted.

This review demonstrates that the pollution exclusion could not have been intended to apply to policyholders when third parties proximately caused discharges of pollutants. The pollution exclusion was drafted and submitted to state regulatory authorities for approval in May of 1970.⁴⁶ As will be demonstrated below, in 1970, a policyholder could not be held liable in a pollution case where the discharge of pollutants was proximately caused by the acts of a third party.

In 1970, relatively few legal theories were available to impose liability on policyholders for environmental contamination. The only available theories were negligence, public and private nuisance, trespass, strict liability, and violation of riparian rights.⁴⁷ These various theories imposed liability on defendants for intentional acts, negligent acts, and sometimes even for innocent acts.⁴⁸ All of these theories, however, retained the requirement that a defendant must have proximately caused the pollution to be held liable.⁴⁹ In 1970, therefore, a plaintiff's failure to establish proximate cause was a complete defense to any environmental claim.

Further, in 1970, a defendant had a complete defense to any tort claim if it could show that the damage complained of was proximately caused solely by the acts of a third party. This was true

44. 312 N.E.2d 247 (Ill. 1974).

45. *Id.* at 250.

46. *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 575 (Wis. 1990).

47. See Patrick E. Murphy, *Environmental Law: New Legal Concepts in the Antipollution Fight*, 36 MO. L. REV. 78 (1971). Our research has not revealed any state or federal statutes in effect prior to 1970 that imposed liability on defendants for environmental contamination caused by third parties.

48. See Murphy, *supra* note 47, at 79.

49. See, e.g., *Olympia Oyster Co. v. Rayonier, Inc.*, 229 F. Supp. 855 (W.D. Wash. 1964) (trespass and nuisance); *City of Henryetta v. Runyan*, 249 P.2d 425 (Okla. 1952) (negligence); *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959), *cert. denied*, 362 U.S. 918 (1960) (strict liability).

whether the tort claim sounded in negligence⁵⁰ or in strict liability.⁵¹ This "third party intervenor" defense prevented plaintiffs from imposing liability on defendants for polluting acts caused solely by third parties.⁵²

In summary, the 1970 pollution exclusion was not meant to exclude coverage for liability imposed on policyholders for the polluting acts of third parties because, in 1970, when the exclusion was drafted, liability was not imposed on policyholders for the polluting acts of third parties. The 1970 pollution exclusion simply does not apply to defeat coverage for defendant-policyholders who did not proximately cause the polluting discharges. We shall refer to these defendant-policyholders as "uninvolved liable parties."⁵³

B. The 1970 Pollution Exclusion Is Ambiguous with Respect to What Constitutes an Accidental Discharge of Pollutants

The above discussion demonstrates that the 1970 pollution exclusion does not apply to an uninvolved liable party. The converse is that the exclusion does apply to defeat coverage in situations where the policyholder proximately caused the polluting discharge. The question then becomes whether the policyholder's polluting activities come within the terms of the limitation on the scope of the exclusion; that is, whether the "discharge, dispersal, release or escape [was] sudden and accidental"⁵⁴ ("the exclusion limitation"). When a court is interpreting the exclusion limitation, therefore, it should always have before it a policyholder who has proximately caused the pollution for which it is potentially being held liable.

In this context, it makes sense first to determine whether the policyholder's discharge of pollutants was accidental. If the exclusion limitation only applies when the discharge is both sudden *and* accidental, then a determination as to whether the policyholder's

50. *Anderson v. Jones*, 213 N.E.2d 627, 631 (Ill. App. Ct. 1966) (holding the defendant not liable because a third party's negligence caused the injury).

51. *Santiago v. Package Mach. Co.*, 260 N.E.2d 89 (Ill. App. Ct. 1970) (finding that the defendant manufacturer could avoid all liability by proving another was the sole proximate cause).

52. See *Afran Transp. Co. v. United States*, 435 F.2d 213 (2d Cir. 1970), *cert. denied*, 404 U.S. 872 (1971); *Kennecott Copper Corp. v. McDowell*, 413 P.2d 749 (Ariz. 1966); *Pickens v. Harrison*, 252 S.W.2d 575 (Tex. 1952).

53. Uninvolved liable parties can now be held liable for the polluting acts of third parties because of the advent of modern environmental statutes such as CERCLA. Such statutes, none of which were in effect prior to 1970, impose "absolute" liability; that is, liability that is not only strict but which also removes traditional requirements of proximate causation. CERCLA was not passed until 1980.

54. See *supra* text accompanying note 24.

discharge of pollutants was intentional potentially ends the inquiry.⁵⁵

Determining whether the policyholder's discharge of pollutants was an accidental discharge presents an especially difficult policy construction matter because both the terms "accidental" and "discharge" are ambiguous. "Accidental" is ambiguous because the exclusion does not specify whether the discharge must be accidental from the policyholder's, or from someone else's, point of view. "Discharge" is ambiguous because it could refer either to any discharge of pollutants by the policyholder or only to discharges that result in damage or injury.

1. Whether a Discharge Is Accidental Must Be Determined from the Policyholder's Point of View

If otherwise undefined in the policy, the term "accidental" as used in the 1970 pollution exclusion is ambiguous because the policy does not specify from whose point of view the discharge must be accidental. The policy merely states that the exclusion does not apply if the "discharge, dispersal, release or escape is sudden and accidental."

This ambiguity could render the pollution exclusion wholly ineffective. If, for example, the limitation is construed to mean that there is coverage whenever a discharge of pollutants is accidental from anyone's point of view, then even when the policyholder intentionally discharges pollutants, the discharge ostensibly could be considered accidental from the point of view of the injured or damaged party.

Courts have long held that the term "accidental" in an insurance policy, if undefined, is ambiguous as to point of view.⁵⁶ For example, the Supreme Court of Washington in *Federated American In-*

55. This same reasoning would, of course, apply to a determination of whether the discharge of pollutants was sudden. However, the decision to analyze "accidental" first is not arbitrary. As will be discussed later, the determination of whether a discharge is sudden turns on the expectations of the policyholder, whereas the determination of whether a discharge is accidental depends on the policyholder's intent. The former inquiry is thus the more difficult one because it involves determining whether there was a substantial probability from the policyholder's point of view that the polluting discharges were occurring. The latter inquiry is simpler because it only involves determining whether the policyholder specifically desired to cause the polluting discharges, or alternatively, whether the policyholder specifically knew that the discharges were occurring and did nothing to stop them. Since the latter inquiry is easier and potentially dispositive, it makes sense to conduct it first.

56. *Federated Am. Ins. Co. v. Strong*, 689 P.2d 68, 74 (Wash. 1984) (granting coverage for damage to husband's car where wife had intentionally caused the damage); see also *Freeman v. Commonwealth Life Ins. Co.*, 271 N.E.2d 177 (Ind. Ct. App. 1971);

urance Co. v. Strong recognized that: "As used in [the insurance company's] policy, the term 'accidental' is ambiguous, since the policy does not specify from whose standpoint the presence or lack of intent is to be assessed."⁵⁷ For that reason, the court construed the ambiguity against the insurance company.⁵⁸

With respect to the standard-form CGL policy, some courts have determined that the term "accidental" as employed in the 1970 pollution exclusion is further defined by the definition of "occurrence."⁵⁹ The standard-form comprehensive liability policy defines "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended *from the standpoint of the insured*."⁶⁰ In *International Minerals and Chemical Corp. v. Liberty Mutual Insurance Co.*,⁶¹ the court construed the above terms to determine that an accidental discharge must be viewed from the policyholder's perspective. The *International Minerals* court reasoned as follows:

Considering first whether the events here constituted an "accidental" event, we return to the "occurrence" definition where the term accident is first used in the policy. That definition speaks of an accident in terms of the intentions and expectations of *the insured*. Thus, we interpret the exception to provide that if the discharge, dispersal, release or escape of pollutants is unintended and unexpected *from the standpoint of the insured*, it has met one of the two prerequisites for reinstatement of coverage.⁶²

Therefore, in a standard-form liability policy, courts must determine whether the discharge is accidental from the point of view of the policyholder.

2. The Phrase "Discharge, Dispersal, Release or Escape" Is Ambiguous

The task of deciding whether a particular discharge of pollutants is an accidental discharge is made difficult not only by the ambiguity of the term "accidental" but also by the ambiguity of the phrase

Pleasant v. Motors Ins. Co., 185 S.E.2d 164 (N.C. 1971); *Bone v. Charlotte Liberty Mut. Ins. Co.*, 179 S.E.2d 171 (N.C. Ct. App. 1971).

57. *Federated Am. Ins.*, 689 P.2d at 74.

58. *Id.*

59. See, e.g., *International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co.*, 522 N.E.2d 758 (Ill. App. Ct.), *appeal denied*, 530 N.E.2d 246 (Ill. 1988).

60. *Id.* at 763 (emphasis added).

61. *International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co.*, 522 N.E.2d 758 (Ill. App. Ct.), *appeal denied*, 530 N.E.2d 246 (Ill. 1988).

62. *Id.* at 768 (emphasis added).

“the discharge, dispersal, release or escape.” One reasonable interpretation of the phrase “the discharge, . . . or escape” is that it refers to any activity involving the discharge of pollutants: “This insurance does not apply to bodily injury or property damage arising out of [any activity involving] the discharge, dispersal, release or escape of [pollutants].” Under this interpretation, all discharges of pollutants made by the policyholder would defeat coverage, regardless of whether the policyholder’s activity consisted of harmless discharges as well as damage-causing discharges. For example, if an exterminator lawfully discharged pesticides and unintentionally discharged some of those pesticides to a part of the customer’s house causing damage or injury, there would be no coverage under this interpretation because the policyholder was intentionally discharging pollutants.

Another reasonable interpretation of the phrase “the discharge, . . . escape” is that it refers only to the particular discharges of pollutants that result in injury or damage: “This insurance does not apply to bodily injury or property damage arising out of the [damage-causing] discharge, dispersal, release or escape of [pollutants].” Under this interpretation, the discharge at issue would only include those particular discharges made by the policyholder that resulted in injury or damage and would not include harmless discharges of pollutants.

Under this second interpretation, the exterminator example comes out differently. If an exterminator lawfully discharged pesticides and unintentionally discharged some of those pesticides to a part of the customer’s house where they caused damage or injury, this time there would be coverage because the policyholder did not intend to make the particular discharges that resulted in the injury or damage.

The ambiguity of the phrase “the discharge, . . . escape” is thus demonstrated by the above example. Where a policyholder permits both harmless and damage-causing discharges of pollutants and intends the harmless discharges, but not the damage-causing discharges, cases involving identical facts come out differently depending on which of the two available interpretations of “the discharge, . . . escape” the court employs.⁶³

Again, as with the “accident” ambiguity, following the guiding principles of construction, courts should construe this discharge ambiguity in favor of coverage. Specifically, the ambiguity should

63. See *supra* notes 56-62 and accompanying text.

be resolved in favor of the relevant discharges being the damage-causing discharges. This narrower construction restricts the number of situations in which the pollution exclusion bars coverage. Moreover, the Maryland Appellate Court, in addressing the exterminator fact situation, construed the ambiguity of the phrase "the discharge, . . . escape" to mean only the damage-causing discharges.⁶⁴

Two Illinois cases, *Reliance Insurance Co. of Illinois v. Martin*⁶⁵ and *Barmet of Indiana v. Security Insurance Group*,⁶⁶ illustrate the care required when navigating this particular ambiguity. These cases have nearly identical fact situations.

In *Reliance*, the policyholder operated a parking garage.⁶⁷ In the underlying action, the plaintiffs alleged that, over a period of time, carbon monoxide and black soot regularly escaped from the garage and entered their nearby condominium unit.⁶⁸ The policyholder's insurer refused to defend and indemnify, arguing that the policyholder knew that pollutants generally escaped from its garage and that the policyholder therefore intended the discharges.⁶⁹

The *Reliance* court nevertheless rejected the insurer's contention and construed the ambiguity of the phrase "the discharge, . . . escape" in favor of coverage.⁷⁰ The court stated that while the parking garage operator "must expect to release fumes and soot into the facility itself, as well as into the air and streets, it is not equally clear that he should expect to release soot and fumes into adjacent residential structures."⁷¹ The court held that this was a question of fact.⁷² The *Reliance* court resolved the ambiguity by holding that the relevant discharges were the damage-causing discharges.

In *Barmet*, the policyholder operated an aluminum recycling plant.⁷³ Although the plant had an air pollution control system, clouds of gases frequently escaped into the atmosphere without be-

64. *Bentz v. Mutual Fire, Marine & Inland Ins. Co.*, 575 A.2d 795, 803 (Md. 1990) ("To the extent that toxic chemicals thus landed where they were not supposed to land, the discharge was both accidental and sudden. It was accidental in that it was unintended . . ."). *But see* *Protective Nat'l Ins. Co. of Omaha v. City of Woodhaven*, No. 85180, 1991 Mich LEXIS 1812 (Mich. Aug. 26, 1991).

65. *Reliance Ins. Co. of Ill. v. Martin*, 467 N.E.2d 287 (Ill. App. Ct. 1984).

66. *Barmet of Ind. v. Security Ins. Group*, 425 N.E.2d 201 (Ind. Ct. App. 1981).

67. *Reliance*, 467 N.E.2d at 288.

68. *Id.*

69. *Id.* at 289.

70. *Id.* at 290.

71. *Id.*

72. *Id.*

73. *Barmet of Ind. v. Security Ins. Group*, 425 N.E.2d 201, 202 (Ind. Ct. App. 1981).

ing filtered.⁷⁴ These gases would travel some two or three miles and obscure visibility on the nearby highway.⁷⁵ The policyholder was sued when a driver was killed in an automobile accident proximately caused by the policyholder's visibility-reducing gases.⁷⁶

As in *Reliance*, the insurer in *Barmet* argued that the policyholder knew that its plant emitted gases and thus that its discharges were intended.⁷⁷ The *Barmet* court construed the ambiguity of the phrase "the discharge, . . . escape" the same way as the *Reliance* court. The *Barmet* court, however, denied coverage because it found, as a factual matter, that the policyholder did indeed intend the injury-causing discharges because it knew that its gases were being discharged onto the highway.⁷⁸

The difference between *Reliance* and *Barmet* is one of fact, not one of law. The *Reliance* court could not affirm a summary judgment based upon a finding of fact that the damage-causing emissions were intended because it believed that there was conflicting evidence or inferences with respect to a material issue of fact.⁷⁹ The *Reliance* court, therefore, remanded the case for a trial with respect to whether the policyholder knew that its emissions would enter the condominium.⁸⁰

In contrast, the *Barmet* court reviewed the record of a full trial on the merits.⁸¹ Factual findings were made at trial that Barmet knew the injury-causing emissions were occurring.⁸² Hence, the *Barmet* court affirmed the trial court's denial of coverage.⁸³ The correct resolution of the ambiguity of the phrase "the discharge, dispersal, release or escape" is, therefore, that it refers to only dam-

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 203. The *Barmet* court stated:

Barmet argues that they had no knowledge that the emissions would travel two or three miles from their plant. The facts do not support Barmet's argument that the emissions were unforeseeable or unpredictable because Barmet had been emitting gases regularly and frequently since beginning its operations. Although Barmet may not have intended for the emissions to obstruct the visibility and thus, perhaps, contribute to the accident, this problem was certainly foreseeable because Barmet had received numerous complaints regarding their emissions.

Id.

79. *Reliance*, 467 N.E.2d at 290.

80. *Id.*

81. *Barmet*, 425 N.E.2d at 202.

82. *Id.* at 203.

83. *Id.*

age-causing discharges, not to any activity involving a combination of harmless as well as damage-causing discharges.

In short, to determine whether there has been an accidental discharge of pollutants, a court should determine whether the damage-causing discharges were accidental from the policyholder's point of view. If the defendant-policyholder does not meet this test, in other words, if the damage-causing discharges were not accidental from the policyholder's viewpoint, then the policyholder is what we shall hereinafter refer to as an "intentional polluter." However, if the damage-causing discharges were accidental, then the defendant-policyholder meets this test and shall be referred to as an "unintentional polluter."

C. The 1970 Pollution Exclusion Is Ambiguous with Respect to What Constitutes a Sudden Discharge of Pollutants

Once a court establishes that a policyholder proximately caused a discharge of pollutants, and that the discharge was accidental, the final step of the analysis is to determine whether the discharge was "sudden." The starting point for this inquiry, however, is the darkest recess of the 1970 pollution exclusion labyrinth. The analysis of whether there has been a sudden discharge is complicated because the term "sudden" is ambiguous both as to its substantive meaning and as to its point of view. By far, this area of inquiry has generated the most confusion in the courts.

1. The Term "Sudden" Is Ambiguous with Respect to Whether it Means Unexpected or Temporally Quick

The term "sudden" is not defined in standard-form CGL insurance policies. An undefined term in an insurance policy is to be understood in its plain, ordinary, and popular sense.⁸⁴ Consequently, courts often look to standard non-legal dictionaries for guidance as to the plain, ordinary, and popular meaning of otherwise undefined insurance policy terms.⁸⁵

The reasonable substantive meanings of the term "sudden," therefore, can be determined by reference to a standard dictionary. Webster's dictionary defines "sudden" as: (1) "happening without previous notice or with very brief notice; coming or occurring un-

84. *Canadian Radium & Uranium Corp. v. Indemnity Ins. Co. of N. Am.*, 104 N.E.2d 250, 254 (Ill. 1952).

85. *See id.* at 254; *United States Fidelity & Guar. Co. v. Specialty Coatings Co. of Ill.*, 535 N.E.2d 1071, 1080 (Ill. App. Ct.), *appeal denied*, 545 N.E.2d 133 (Ill. 1989); *Marsh v. Metropolitan Life Ins. Co.*, 388 N.E.2d 1121, 1126 (Ill. App. Ct. 1979).

expectedly; not foreseen or prepared for"; (2) "characterized by or manifesting hastiness."⁸⁶ The first entry defines the term "sudden" essentially as unexpected, and the second entry defines it with reference to temporal quickness. Clearly, "sudden" has two distinct, reasonable meanings. Moreover, several state courts of last resort have found guidance from dictionaries as to the substantive meaning of the term "sudden."⁸⁷ For example, the Supreme Court of Georgia recognized both distinct reasonable meanings of the term "sudden" as defined in the above dictionary.⁸⁸ Because standard dictionaries define the term "sudden" as: (1) unexpected; and (2) temporally quick; the term "sudden" is ambiguous in the pollution exclusion as between these two reasonable meanings.⁸⁹

If the term "sudden" is given the meaning of unexpected, there is still ambiguity as to whether the discharge must be unexpected from the policyholder's point of view, or from someone else's point of view. There is no definition of the term "sudden" elsewhere in the policy to help resolve this ambiguity. Thus, the same analysis of the ambiguity of the phrase "the discharge, . . . escape," which was discussed in the previous section,⁹⁰ applies in determining whether a sudden discharge has occurred.

Alternatively, if a court determines the term "sudden" means temporally quick, there remains further ambiguity as to whether the term "sudden" refers to an absolute measure of time, such as "instantaneous" or "one second," or whether it is a relative measure of time. If the term "sudden" refers to a relative measure of time, then its ambiguity with respect to point of view arises because the same event might be described as sudden from one point of view and yet gradual from another.

Additionally, if the temporal meaning of the term "sudden" is

86. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2284 (1981).

87. *Claussen v. Aetna Casualty & Sur. Co.*, 380 S.E.2d 686, 688 (Ga. 1989); *see also Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1091 (Colo. 1991) ("When determining the plain and ordinary meaning of words, definitions in a recognized dictionary may be considered. In doing so, we find that a number of recognized dictionaries differ on the meaning of the term 'sudden.'") (citation omitted); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 573 (Wis. 1990) ("The very fact that recognized dictionaries differ on the primary definition of 'sudden' is evidence in and of itself that the term is ambiguous.").

88. *Claussen*, 380 S.E.2d at 688. In addition, the *Claussen* court observed: "The definition of the word 'sudden' as 'abrupt' is also recognized in several dictionaries and is common in the vernacular." *Id.*

89. *United States Fidelity & Guar. Co. v. Wilkin Insulation Co.*, Nos. 70029, 70030, 70032, 70036, 1991 WL 80942 (Ill. May 20, 1991); *see infra* notes 95-110 and accompanying text.

90. *See supra* part III.B.1.

chosen, a new ambiguity of the phrase "the discharge, . . . escape" enters the analysis. Many fact situations involve a number of discrete discharges which take place over a period of time. An example is a pollution control device that periodically, but unexpectedly, malfunctions. The determination of whether "the discharge, . . . escape" is temporally sudden can be based on either of two questions: (1) whether the entire set of discharges happened quickly; or (2) whether each discrete discharge happened quickly.

With so many wrong turns to take, it is not surprising that courts have had trouble arriving at a consistent analysis regarding whether a sudden discharge has occurred. Again, the confusion is caused because some courts have failed to recognize the ambiguities and therefore have chosen coverage-defeating interpretations.⁹¹

The Supreme Court of Georgia stated that the word "sudden" often occurs in everyday life with its sole meaning being its sense of unexpected, without any temporal connotation.⁹² The court recognized that "sudden" often describes the unexpectedness of an event and gave examples of this popular usage including "a sudden storm, a sudden turn in the road, sudden death."⁹³ The court further quoted dictionary examples of usage that dated back to 1340 including: "She heard a sudden step behind her"; and, "A sudden little river crossed my path as unexpected as a serpent comes."⁹⁴

In addition, looking beyond the dictionary, one can imagine numerous examples where the term "sudden" is properly used in a sentence to mean solely "unexpected," without any temporal connotation:

She walked slowly toward the sudden bend in the road.

The tree was perfect except for the sudden knot near the top.

The sudden rise in slope made our hike difficult.

The bricks in the wall showed a sudden change in color between the third floor and the fourth floor.

The green carpet of grass was interrupted by the sudden patches of yellow dandelions.

While walking on the plateau, we came to a sudden drop.

Max stopped reading the book after the sudden twist in the plot.

Unexpected is clearly a reasonable meaning of the word "sudden."

The reasonable meaning of the term "sudden" as unexpected generally has not been disputed. In Illinois, for example, there are five appellate court cases construing the term "sudden" in the con-

91. See *infra* note 110 and accompanying text.

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

93. *Id.*

94. *Id.* (quoting OXFORD ENGLISH DICTIONARY 96 (1933)).

text of the 1970 pollution exclusion.⁹⁵ All agree that "sudden" can reasonably mean unexpected, but two of the five cases have found that "sudden" means temporally quick.⁹⁶ The other three cases, *Wilkin*,⁹⁷ *Reliance*,⁹⁸ and *Specialty Coatings*,⁹⁹ have found the term "sudden" to mean unexpected in the context of the 1970 pollution exclusion.

In *Reliance*, the court first considered the term "sudden" in the context of the 1970 pollution exclusion.¹⁰⁰ The damage-causing discharges of carbon monoxide and soot were alleged to have occurred regularly over a period of time.¹⁰¹ The *Reliance* court found that the substantive meaning of the term "sudden" was ambiguous and held that "the relevant question is not the time frame involved but whether . . . the insured could have intended or expected carbon monoxide and soot to enter the [plaintiff's] condominium unit."¹⁰²

Similarly, in *Specialty Coatings*, the court considered whether the long-continued polluting acts of third persons could be considered "sudden."¹⁰³ In reaching its decision, the *Specialty Coatings* court reviewed, *inter alia*, documentation of the drafting history of the 1970 pollution exclusion, including representations made by the insurance industry to state insurance commissioners.¹⁰⁴ Based on its review of this material, the court noted that before the insurance industry added the pollution exclusion, occurrence-based coverage embraced exposure to conditions continuing over an unmeasured time period.¹⁰⁵ Further, members of the insurance in-

95. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 570 N.E.2d 1154, 1162-63 (Ill. App. Ct.), *appeal granted*, 575 N.E.2d 917 (Ill. 1991); *United States Fidelity & Guar. Co. v. Wilkin Insulation Co.*, 550 N.E.2d 1032, 1039 (Ill. App. Ct. 1989), *aff'd on other grounds*, 578 N.E.2d 926 (Ill. 1991); *United States Fidelity & Guar. Co. v. Specialty Coatings Co. of Ill.*, 535 N.E.2d 1071, 1076-77 (Ill. App. Ct.) *appeal denied*, 545 N.E.2d 133 (Ill. 1989); *International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co.*, 522 N.E.2d 758, 767-69 (Ill. App. Ct.), *appeal denied*, 530 N.E.2d 246 (Ill. 1988); *Reliance Ins. Co. of Ill. v. Martin*, 467 N.E.2d 287, 290 (Ill. App. Ct. 1984).

96. *Outboard Marine*, 570 N.E.2d at 1163; *International Minerals*, 522 N.E.2d at 769.

97. *Wilkin*, 550 N.E.2d at 1039.

98. *Reliance*, 467 N.E.2d at 290.

99. *Specialty Coatings*, 467 N.E.2d at 1077.

100. *Reliance*, 467 N.E.2d at 290.

101. *Id.* at 288; *see supra* notes 67-80 and accompanying text.

102. *Reliance*, 467 N.E.2d at 290.

103. *Specialty Coatings*, 535 N.E.2d at 1077-78.

104. *Id.* at 1077.

105. *Id.* The *Specialty Coatings* court noted:

The expressed intent underpinning the insertion of the pollution exclusion clause was submitted for approval to various state insurance commissioners by representatives of the insurance industry, such as the Mutual Insurance Rating

dustry, upon submitting the pollution exclusion to state commissioners, explained that the pollution exclusion was intended to clarify that "the definition of occurrence excludes damages that can be said to be *expected or intended*."¹⁰⁶ Consequently, the *Specialty Coatings* court concluded that any ambiguities must be construed against the insurer given the alleged facts, the policy language, and its drafting history described above.¹⁰⁷

The Illinois Appellate Court reaffirmed the reasoning of *Specialty Coatings* in *United States Fidelity and Guaranty Co. v. Wilkin Insulation Co.*¹⁰⁸ *Wilkin* involved a coverage suit in which the underlying complaint alleged property damage because of the gradual release of asbestos fibers.¹⁰⁹

The two Illinois decisions that found "sudden" to mean temporally quick, *International Minerals and Chemical Corp. v. Liberty Mutual Insurance Co.* and *Outboard Marine v. Liberty Mutual Insurance Co.*, admit that "sudden" can reasonably mean both unexpected and temporally quick.¹¹⁰ These decisions do not deny that the term "sudden" often means unexpected, but rather, rest their result on a rule of contract construction. The court in *Outboard Marine* relied on the presumption that a contract's words are never intended to be meaningless, and therefore, interpretations rendering contractual words "mere surplusage" are improper.¹¹¹ Specifi-

Bureau ("MIRB"), an association serving the insurance industry. For example, MIRB, which assisted in the draft of the exclusion endorsement, in a submission to the West Virginia Commissioner of Insurance, explained that the intent of the clause was to clarify "that the definition of occurrence excludes damages that can be said to be *expected or intended*." . . .

. . . .
 We are persuaded that, under the facts alleged in the underlying actions, the policy language, and the historical background of the exclusionary clause, the ambiguities [of the word "sudden"] identified by defendants must be construed against [the insurer].

Id. at 1077-78.

106. *Id.* at 1077.

107. *Id.* at 1078.

108. *United States Fidelity & Guar. Co. v. Wilkin Insulation Co.*, 550 N.E.2d 1032, 1039-40 (Ill. App. Ct. 1989).

109. *Id.* at 1036.

110. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 570 N.E.2d 1154, 1163 (Ill. App. Ct.), *appeal granted*, 575 N.E.2d 917 (Ill. 1991); *International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co.*, 522 N.E.2d 758, 769 (Ill. App. Ct.), *appeal denied*, 530 N.E.2d 246 (Ill. 1988) ("[W]e decline to ignore these temporal-focused definitions or hold that, *because the word might also have other contextual uses*, it is ambiguous . . .") (emphasis added).

111. *Outboard Marine*, 570 N.E.2d at 1163. The court stated:

It is presumed that words and phrases inserted into contracts were not intended to be meaningless; therefore, an interpretation which renders a contrac-

cally, the court said that when interpreting the pollution exclusion, if the word "sudden" is found to mean unintended or unexpected, then it becomes useless surplusage because it is synonymous with the word "accidental."¹¹² The court, therefore, avoided this excess by construing the term "sudden" to mean temporally quick.¹¹³

This "surplusage" argument, however, is flawed for a number of reasons. First, the "surplusage" argument is result-oriented. All of the Illinois courts that have considered the question agree that the term "sudden" can mean both unexpected and temporally quick.¹¹⁴ While the courts in *Reliance*, *Specialty Coatings*, and *Wilkin* followed the guiding principles of insurance policy construction and interpreted that ambiguity in favor of coverage, the courts in *International Minerals* and *Outboard Marine* followed a general rule of contract construction and interpreted the ambiguity against finding coverage.¹¹⁵ Neither the *International Minerals* court nor the *Outboard Marine* court gave any reason for choosing a general "surplusage" rule of contract construction over a rule crafted specifically for interpreting insurance policies.

In fact, there is reason to reject the "surplusage" rule of construction in the context of interpreting insurance policies because insurance policies often combine several words of similar meaning to communicate a single concept. This point was recognized by the United States Court of Appeals for the Third Circuit in addressing an argument identical to the surplusage argument found

tual word or phrase mere surplusage should be avoided if possible. As the court pointed out in *International Minerals*, if the term "sudden" is interpreted as meaning "unintended and unexpected," it becomes synonymous with the word "accidental," making one of the words nothing more than redundant surplusage. According to OMC, the word "sudden" means unexpected and "accidental" means unintended; therefore, the two words as employed in the pollution exclusion clause are not redundant surplusage if "sudden" does not include a temporal element. We agree, however, with those authorities that define "accidental" as meaning unintended *and* unexpected. If a party expects an event to occur, the event cannot reasonably be considered accidental with reference to that party. Therefore, if "sudden" is construed as meaning unexpected and having no temporal connotation, the word is reduced to mere surplusage.

Id. (citations omitted).

112. *Id.*; see *International Minerals*, 522 N.E.2d at 769.

113. *Outboard Marine*, 570 N.E.2d at 1163; see *International Minerals*, 522 N.E.2d at 769.

114. *Outboard Marine*, 570 N.E.2d at 1162; *United States Fidelity & Guar. Co. v. Wilkin Insulation Co.*, 550 N.E.2d 1032, 1039 (Ill. App. Ct. 1989); *United States Fidelity & Guar. Co. v. Specialty Coatings Co. of Ill.*, 535 N.E.2d 1071, 1077-78 (Ill. App. Ct. 1989); *International Minerals*, 522 N.E.2d at 768; *Reliance Ins. Co. of Ill. v. Martin*, 467 N.E.2d 287, 290 (Ill. App. Ct. 1984).

115. *International Minerals*, 522 N.E.2d at 769; *Outboard Marine*, 570 N.E.2d at 1163.

in *International Minerals and Outboard Marine*.¹¹⁶ In *New Castle County v. Hartford Accident & Indemnity Co.*, the Third Circuit refuted the “surplusage” argument by recognizing that insurance policies often use words that are “somewhat synonymous.”¹¹⁷ Specifically, the court noted that the exception to the pollution exclusion clause uses the words “discharge, dispersal, release or escape,” which each generally mean “fortuity,” with little variation.¹¹⁸ Therefore, the court stated that it would be ridiculous to conclude that “annexing the word ‘sudden’ to the word ‘accidental’ with the conjunctive ‘and’ necessarily injects a temporal element, such as brevity or abruptness, into the exception to the pollution exclusion clause.”¹¹⁹ Hence, the surplusage rule has little or no value in the context of interpreting insurance policies, and, in any event, it should not take precedence over the guiding principle that ambiguities in an insurance policy should be interpreted in favor of coverage.

Even if the “surplusage” rule were the correct rule of construction, the premise of the argument in this context is incorrect. The premise of the “surplusage” argument is that “accidental” *always* means both unintended *and* unexpected. This proposition, however, cannot be true. The entire area of negligence law was created to assign responsibility for accidental events that were foreseeable

116. *New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1194-95 (3d Cir. 1991). The court observed:

Because the word “accidental” already encompasses notions of unexpectedness, CNA contends that the district court, in interpreting “sudden” also to mean “unexpected,” failed to appreciate the significance of the conjunctive in the phrase “sudden *and* accidental.” In so doing, CNA asserts, the district court violated the basic principle of insurance law that all words in a policy should be given effect. . . .

We believe that the word “sudden,” even if defined to mean “unexpected,” is not completely synonymous with the word “accidental.” Simply put, sudden means unexpected and accidental means unintended. To the extent that the meanings of these words overlap, we do not think that this precluded the district court from defining sudden as unexpected. Insurance policies routinely use words that, while not strictly redundant, are somewhat synonymous. For example, the exception to the pollution exclusion clause also uses the words “discharge, dispersal, release or escape”: . . . they each connote the same general concept — namely, fortuity — with small variation. Neither do we think that annexing the word “sudden” to the word “accidental” with the conjunctive “and” necessarily injects a temporal element, such as brevity or abruptness, into the exception to the pollution exclusion clause.

Id.

117. *Id.* at 1194.

118. *Id.*

119. *Id.* at 1194-95.

or expected. Just because an accidental happening is determined to have been foreseeable, and hence preventable, does not mean that it cannot be an accident.

Moreover, there are numerous examples of the term "accidental" properly used solely to mean unintended:

Every time he stepped into his race car, the driver rubbed his lucky rabbit's foot, hoping that he would avoid any accidental pile-ups.

Even though football players wear a great deal of safety equipment, they are fully aware that they will still have accidental injuries.

No pollution control system is perfect; there will always be some accidental discharges of pollutants into the environment.

In each of these instances, while the damage-causing or injury-causing event is not intended, it is nevertheless foreseen or expected. Thus, "accidental" is often used to refer only to the unintentional aspect of an event, and that event may be either expected or unexpected from the point of view of the party who physically causes the accident.

Adding the term "sudden," in its sense of unexpected, to the term "accidental" clarifies that, for the limitation of the 1970 pollution exclusion to apply, a damage-causing discharge must be both unintended *and* unexpected. Construing the term "sudden" in its admitted sense of unexpected adds an important qualification to the applicability of the pollution exclusion and therefore does not result in surplusage.

Finally, the *International Minerals* and *Outboard Marine* decisions failed to recognize that construing the term "sudden" in its sense of temporally quick creates an absurdity in the pollution exclusion. The Supreme Court of Colorado recently recognized this problem.¹²⁰ The absurdity results because, as noted above, the term "accidental" is further defined by the definition of the term

120. *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1092 (Colo. 1991). The *Hecla* court noted:

If we were to construe "sudden and accidental" to have a solely temporal connotation, the result would be inconsistent definitions within the CGL policies. In the portion of the policies defining occurrence, accident is defined to include "continuous or repeated exposure to conditions, which result in bodily injury or property damage, neither expected nor intended from the standpoint of the insured." If "sudden" were to be given a temporal connotation of abrupt or immediate, then the phrase "sudden and accidental discharge" would mean: an abrupt or immediate, and continuous or repeated discharge. The phrase "sudden and accidental" thus becomes inherently contradictory and meaningless.

Id. (citations omitted).

“occurrence.”¹²¹ In the definition of “occurrence,” the concept of an accidental event specifically includes “continuous or repeated exposure to conditions.”¹²² The term “accidental,” therefore, is defined to include gradual events. If, however, the term “sudden” is construed to mean temporally quick, in cases involving continuous or repeated exposure to conditions, the limitation to the pollution exclusion will be defined to apply when “the discharge, . . . escape” is temporally quick *and* gradual—an absurdity.¹²³

Far from being surplusage, an interpretation of the term “sudden” in its sense of unexpected actually saves the pollution exclusion from being “inherently contradictory and meaningless.”¹²⁴ With respect to its substantive ambiguity, the term “sudden,” therefore, should be construed to refer to the unexpectedness of a discharge, dispersal, release or escape.

2. Whether a Discharge Is Sudden Must be Determined from the Policyholder's Point of View

As with “accidental,” the limitation to the 1970 pollution exclusion does not specify from whose point of view “the discharge, . . . escape” is to be considered sudden or not sudden.¹²⁵ Hence, to determine whether a sudden discharge has occurred, it is necessary to decide whether the suddenness of a discharge is to be determined from the policyholder's point of view or from someone else's point of view.

The term “sudden” is not defined in standard CGL policies. Thus, under the guiding principle of construction, this ambiguity should be construed in favor of coverage.

The coverage-favoring construction is that the suddenness, or unexpectedness, of a discharge should be determined from the point of view of the policyholder. This construction favors coverage because if the suddenness of the discharge is determined from someone else's point of view, it is more likely that a discharge will

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*; see also *City of Northglenn v. Chevron, U.S.A., Inc.*, 634 F. Supp. 217, 222 (D. Colo. 1986); *United States v. Conservation Chemical Co.*, 653 F. Supp. 152, 203-04, (W.D. Mo. 1986); *United Pac. Ins. Co. v. Van's Westlake Union, Inc.*, 664 P.2d 1262, 1265-66 (Wash. Ct. App. 1983).

125. Having construed “sudden” in its sense of unexpected, there is no need to consider whether in its temporal sense “sudden” should be construed as an absolute measure of time (needing no point of view) or a relative measure of time. Nor is there the need to consider the host of other ambiguities, noted above, that are raised when “sudden” is construed in its temporal sense.

be considered not sudden.¹²⁶ As a consequence, coverage will be blocked in a greater number of circumstances. Thus, whether “a discharge, dispersal, release or escape” is sudden should be determined from the viewpoint of the policyholder.

3. The Phrase “Discharge, Dispersal, Release or Escape” Is Ambiguous

When interpreting whether a discharge was sudden, it is important to recognize that the phrase “the discharge, dispersal, release or escape” is ambiguous. This ambiguity is the same one discussed above in connection with interpreting the term “accidental”; namely, that the phrase “the discharge, . . . escape” can either refer to: (1) any activity involving discharges; or (2) particular damage-causing discharges.¹²⁷

As before, this ambiguity should be construed in favor of coverage. That is, the question should be whether the particular damage-causing discharges of pollutants were expected from the point of view of the policyholder, not whether any discharges of pollutants were expected from the point of view of the policyholder.

4. The Term “Sudden” Is Ambiguous as to How Probable the Discharge Must Be to Be Considered Not Sudden

Since the suddenness of a discharge depends on the expectations of the insured, the question arises as to how probable a discharge must be to be considered expected, as opposed to sudden. One possibility is that a discharge should be considered expected when it is “foreseeable,” and hence preventable. Tort law imposes this level of probability on careless or “negligent” defendants. This is an objective test and does not take into account what the policyholder actually knew, only what it should have known.

Another possibility is that a discharge should be considered expected when there is a “substantial probability” from the policyholder’s point of view that the discharge will happen and yet the policyholder nevertheless fails to prevent it. Tort law imposes this level of probability on “reckless” defendants. This test is subjective and depends on what the policyholder actually knew with respect to the probability of the occurrence of the discharge.

Once again, under the guiding principle of construction, this ambiguity should be construed in favor of coverage. Thus, the “sub-

126. *See* *Claussen v. Aetna Casualty & Sur. Co.*, 754 F. Supp. 1576, 1582 (S.D. Ga. 1990).

127. *See supra* part III.B.2.

stantial probability” test should be used rather than the “foreseeability” test because discharges will be foreseeable more often than they will be substantially probable.¹²⁸ Consequently, to determine whether there has been a sudden discharge of pollutants, a court should determine whether the defendant-policyholder believed it was substantially probable that the damage-causing discharges would occur.

IV. PROPOSAL

A. Once the Numerous Ambiguities of the 1970 Pollution Exclusion Are Correctly Resolved, Clear Rules Emerge to Determine Whether Coverage Should Be Granted

Combining the conclusions from the above analysis, we propose that the relevant inquiry for determining the applicability of the 1970 pollution exclusion should be as summarized below. This method will avoid the confusion that is apparent in many court decisions.

First, a court should determine whether the policyholder proximately caused the discharges of pollution for which it is being held liable. If the policyholder did not cause the discharges, it is an “uninvolved liable party”¹²⁹ and the pollution exclusion does not apply. However, if the policyholder did proximately cause the discharges of pollutants, the exclusion applies and the limitation to the exclusion then must be analyzed.

Second, in situations where the policyholder proximately caused the discharges of pollutants, the court first should determine whether the damage-causing discharges were intended from the policyholder’s point of view. If the policyholder did intend the damage-causing discharges, it is an “intentional polluter,”¹³⁰ and such discharges cannot be considered accidental discharges. In these instances, the exclusion thus defeats coverage because the exclusion limitation does not apply.

Third, if the policyholder did not intend the damage-causing discharges, it is an “unintentional polluter,”¹³¹ and it is then necessary

128. This conclusion is further supported by the analysis of the identical question by courts concerning the “expected or intended” phrase in the definition of “occurrence.” See *United States Fidelity & Guar. Co. v. Armstrong*, 479 So. 2d 1164 (Ala. 1985); *James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 90-SC-242-DG, 1991 WL 117506 (Ky. 1991).

129. See *infra* part IV.B.1.

130. See *infra* part IV.B.2.

131. See *infra* part IV.B.3.

to determine whether the discharges were sudden discharges. If it is determined that the discharges were not sudden, then coverage will be defeated. However, if it is decided that the discharges were sudden, then the policyholder is entitled to coverage.

To determine whether a discharge is sudden, the court should decide whether the damage-causing discharges were expected (in the sense of substantially probable to occur) from the policyholder's point of view. If the policyholder did not expect the damage-causing discharges to occur, the exclusion limitation applies and the exclusion does not defeat coverage. If the policyholder did expect the damage-causing discharges to occur, the exclusion limitation does not apply and the exclusion defeats coverage.

B. The Results of Reported State Court Decisions Are Consistent with the Above-Described Analysis

The results of reported state court decisions support the analysis described above.¹³² Although the reasoning of the various courts strongly conflict, the remarkably consistent results from these decisions indicate the accuracy of our proposed analysis as outlined above.

1. Uninvolved Liable Parties

These cases all involve policyholders who did not proximately cause the polluting discharges. Several involve a policyholder who merely delivered its waste to a third party. In each of these cases, the third party then caused the polluting discharges.¹³³ The re-

132. Notes 133, 134, 137, and 139-44 contain factual summaries of reported state cases that address the application of the pollution exclusion. Cases that do not explicitly analyze the application of the pollution exclusion to a particular set of facts are not included. Thus, *Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc.*, 555 N.E.2d 568 (Mass. 1990), is not included because that case was decided without any facts before the court.

133. In *United States Fidelity & Guar. Co. v. Specialty Coatings Co. of Ill.*, 535 N.E.2d 1071, 1079 (Ill. App. Ct.), *appeal denied*, 545 N.E.2d 133 (Ill. 1989), the policyholder contracted with a waste hauling company to pick up waste at the policyholder's facility and properly dispose of the waste. The waste hauler did not properly dispose of the policyholder's waste, but instead dumped the waste openly on its own property, creating the environmental hazard for which the policyholder was held responsible. *Id.* at 1073. There were no allegations that the policyholder had knowledge of the illegal dumping by the waste hauler. *Id.*

In *Du-Wel Prod., Inc. v. United States Fire Ins. Co.*, 565 A.2d 1113, 1115 (N.J. Super. Ct. App. Div. 1989), *appeal denied*, 583 A.2d 316 (N.J. 1990), the policyholder generated toxic sludge as a by-product of its electroplating process, and contracted with an independent state-licensed waste hauler to dispose of the sludge at a disposal site approved by the Michigan Department of Natural Resources. The policyholder was sued when the independent waste hauler improperly maintained the landfill and caused the pollution.

maining cases in this grouping are logically similar in that, for one reason or another, the policyholder was not involved with the activity resulting in the discharges.¹³⁴ Of the twelve cases falling

Id. at 1118. The policyholder had complied with all of the applicable regulations, and did not expect or intend that its wastes would be improperly discharged. *Id.* at 1117, 1119.

In *CPS Chem. Co. v. Continental Ins. Co.*, 489 A.2d 1265, 1267 (N.J. Super. Ct. Law Div. 1984), *rev'd on other grounds*, 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985), the policyholder contracted with an independent waste hauling company for the proper removal and disposal of waste generated at its premises. The City of Philadelphia sued the policyholder for environmental damage caused when the waste hauler illegally deposited the waste at the city dump site. *Id.* The policyholder had no knowledge of the improper actions of the waste disposal company. *Id.*

In *Kipin Indus., Inc. v. American Universal Ins. Co.*, 535 N.E.2d 334, 336 (Ohio Ct. App. 1987), the policyholder was engaged in the business of removing chemicals from barges. The policyholder contracted with a waste hauling company to dispose of the waste waters generated from the barge clean-ups, but the waste hauling company improperly disposed of the waste. *Id.*

In *Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co.*, 477 N.E.2d 1227, 1229 (Ohio Ct. App. 1984), the policyholders generated hazardous wastes in the course of their business. They contracted with the owner and operator of a hazardous waste site to dispose of their waste, but this operator did so improperly. *Id.* There were no allegations in the underlying complaint that the policyholders expected or intended the releases by the waste disposal company. *Id.*

134. In *Claussen v. Aetna Casualty & Sur. Co.*, 380 S.E.2d 686, 687 (Ga. 1989), the policyholder leased a site to the City of Jacksonville. The city dumped hazardous wastes at the site and the policyholder was later held responsible for the clean-up of the site. *Id.* The city had dumped the wastes at the site without the knowledge of the policyholder, and then returned the site to the policyholder completely filled, graded, and seeded. *Id.*

In *Thompson v. Temple*, 580 So. 2d 1133, 1134 (La. Ct. App. 1991), the policyholder rented a house to the plaintiffs. A heater in the house leaked carbon monoxide and injured the inhabitants of the house. *Id.* The policyholder did not have any knowledge of the leak. *Id.*

In *Summit Assoc., Inc. v. Liberty Mut. Fire Ins. Co.*, 550 A.2d 1235, 1236 (N.J. Super. Ct. 1988), the policyholder bought real estate which the previous owner had used to dispose of hazardous wastes. When the policyholder began to develop the newly acquired piece of real estate, it uncovered a large, underground sludge pit, and was subsequently held responsible for its clean-up. *Id.* at 1237. The policyholder had developed land surrounding the site without encountering any underground sewer structures, and had no knowledge of the previous owner's disposal activities. *Id.* at 1238.

In *Lansco, Inc. v. Department of Env'tl. Protection*, 350 A.2d 520, 521 (N.J. Super. Ct. 1975), *aff'd*, 368 A.2d 363 (N.J. Super. Ct. App. Div. 1976), *appeal denied*, 372 A.2d 322 (N.J. 1977), the policyholder maintained tanks for the storage of asphaltic oil on a parcel of land which it leased. Sometime during the night, third parties (suspected vandals) entered the land without the policyholder's permission or knowledge and opened the valves on the storage tanks. *Id.* Fourteen thousand gallons of oil leaked onto the property and into a river. *Id.*

In *Autotronic Sys., Inc. v. Aetna Life & Casualty*, 456 N.Y.S.2d 504, 505 (App. Div. 1982), the policyholder designed, manufactured, constructed, and installed a self-service gasoline filling station. The underlying complaint alleged that faulty construction of the station caused an employee to be injured by the contact with lead in the gasoline. *Id.* The court recognized that the policyholder was uninvolved with the operation of the service station, and thus uninvolved in the polluting activity. *Id.* at 506.

In *Niagara County v. Utica Mut. Ins. Co.*, 439 N.Y.S.2d 538, 539 (App. Div. 1981),

within this category, eleven hold that the 1970 pollution exclusion does not defeat coverage.¹³⁵ In the only case holding that the pollution exclusion barred coverage, the court was incorrect in its analysis.¹³⁶

2. Intentional Polluters

These cases all involve polluters who proximately caused the polluting discharges and were found to have done so intentionally. In each of these cases, the policyholder either intentionally discharged the damage-causing pollutants or specifically knew the damage-causing discharges were occurring and failed to stop them.¹³⁷ The pollution exclusion was found to defeat coverage in all seven of the cases falling within this category.

the policyholder, Niagara County, was a defendant in the "Love Canal" litigation, in which the defendants were charged with recklessly dumping hazardous chemicals. The policyholder, however, was charged with negligently failing to warn and protect its citizens, failing to remove chemicals from Love Canal, and wrongfully conveying property without notice of the pollution on the property. *Id.* The court held that the pollution exclusion was inapplicable to allegations in which the policyholder was not charged with any involvement in the hazardous discharges. *Id.* at 542.

135. *See supra* notes 133-34 and accompanying text.

136. In *Powers Chemco, Inc. v. Federal Ins. Co.*, 548 N.E.2d 1301, 1302 (N.Y. 1989), the policyholder bought land that had been contaminated by the previous owner, and was then charged with responsibility for its clean-up. Although the policyholder had no knowledge of the previous owner's polluting activities, the court rejected the argument that the pollution exclusion was inapplicable because the policyholder was not involved with the discharge, and applied the pollution exclusion as a bar to coverage. *Id.* The court based its decision on the fact that the discharges by *the previous owner* were intentional. *Id.*

The proper analysis, however, determines whether the discharge was accidental from the standpoint of the insured policyholder. *See supra* part III.B.1. The fact that a third party intended the discharge is irrelevant to this analysis because the policyholder in this case was completely uninvolved in and unaware of the pollution. *See Summit Assoc. Inc. v. Liberty Mut. Fire Ins. Co.*, 550 A.2d 1235 (N.J. Super. Ct. App. Div. 1988) (analyzing a similar fact situation to *Powers Chemco* and holding that coverage was not barred).

137. In *Barnet of Ind., Inc. v. Security Ins. Group.*, 425 N.E.2d 201, 202 (Ind. Ct. App. 1981), the policyholder owned and operated an aluminum recycling plant, which produced gases as a by-product of its recycling processes. The policyholder's pollution control system frequently broke down, sometimes twice a week. *Id.* Each time it broke down, it released the gases. *Id.* The releases prompted numerous complaints about visibility problems on a nearby highway. *Id.* On one occasion, the escaped gases obscured visibility on the highway and an individual was killed in a car accident as a result. *Id.* Although the policyholder may not have intended the car accident, the court found that the policyholder intended the injury-causing plant emissions. *Id.*

In *Weber v. IMT Ins. Co.*, 462 N.W.2d 283, 284 (Iowa 1990), the policyholder, a farm operator, used hog manure to fertilize crops on the farm. Frequently, the policyholder transported the hog manure over a public road and often spilled and tracked the manure onto this road. *Id.* The underlying complaint alleged that the odor from the hog manure on the road contaminated another farmer's sweet corn crop. *Id.* The court found that

3. Unintentional Polluters

These cases involve policyholders who proximately caused the polluting discharges, but did so unintentionally. In these cases, the facts suggest either that the policyholder did not expect the polluting discharges to occur, or that the court found the issue of whether the policyholder expected the polluting discharges to occur was a question of fact. Of the twenty-three cases falling within this category, the pollution exclusion was found not to defeat coverage in nineteen cases, and to defeat coverage in four.¹³⁸

Of the nineteen cases in which coverage was found, eight involved policyholders who owned underground storage tanks that leaked their contents into the ground unbeknownst to the policyholder.¹³⁹ Six of the nineteen cases finding coverage involved a va-

the spillage of the manure was intended and that the pollution exclusion barred coverage. *Id.* at 287-89.

In *Technicon Elec. Corp. v. American Home Assurance Co.*, 542 N.E.2d 1048, 1050 (N.Y. 1989), the policyholder manufactured blood sample machines. As a regular part of its business, the policyholder discharged production wastes from the manufacture of its blood sample machines into a nearby creek. *Id.* The underlying complaint alleged, and the policyholder admitted, that the discharging of the wastes was knowing and intentional. *Id.*

In *Town of Moreau v. Orkin Exterminating Co.*, 568 N.Y.S.2d 466, 467 (App. Div. 1991), the policyholder operated a pesticide company. The underlying complaint alleged that the policyholder knowingly and intentionally buried large quantities of hazardous chemicals. *Id.* The policyholder had prior criminal convictions for knowingly dumping hazardous wastes. *Id.* at 468.

In *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374, 376 (N.C. 1986), the policyholder owned and operated a waste hauling business. As part of this business, the policyholder hauled and disposed of hazardous wastes at a landfill. *Id.* The underlying complaint alleged that the policyholder intentionally delivered the hazardous wastes to the landfill, claiming that the waste was not hazardous or contaminated. *Id.* The underlying complaint also alleged that the policyholder negligently disposed of wastes at the landfill. *Id.*

In *Mays v. Transamerica Ins. Co.*, 799 P.2d 653, 655 (Or. Ct. App. 1990), the policyholder owned and operated a paint manufacturing company which generated waste consisting of paint sludge, solvents, and waste water. The policyholder intentionally discharged these wastes into unlined pits on its property. *Id.*

In *Transamerica Ins. Co. v. Sunnes*, 711 P.2d 212, 213 (Or. Ct. App. 1985), the policyholder operated a water deionization and softening business. In the course of its business, the policyholder accumulated acids and caustics in a 1200-gallon tank. *Id.* Each time the tank reached capacity, the policyholder intentionally discharged the wastes into the city's sewer system. *Id.*

138. For cases holding that the pollution exclusion did not defeat coverage, see *infra* notes 139-43. For cases holding that the pollution exclusion defeated coverage see *infra* notes 144-45.

139. In *Shapiro v. Public Serv. Mut. Ins. Co.*, 477 N.E.2d 146, 148 (Mass. App. Ct. 1985), the policyholder owned an underground fuel tank, which leaked into surrounding waterways. Approximately six months prior to being informed that his tank was leaking, the policyholder had the tank cleaned. *Id.* at 150 n.2. He was told at that time that the tank was in good condition. *Id.* The court distinguished this case from *Barnet* because

riety of fact situations which are logically similar to the underground storage tank cases: two involved landfills that were designed to contain pollutants but leaked their contents into the ground contrary to the expectations of the site owner or operator;¹⁴⁰ two involved building materials that unexpectedly emitted

the policyholder in *Barnet* had knowledge of the pollution control system's frequent malfunctions, whereas in *Shapiro*, the policyholder had no knowledge of the leak or of the defective condition of his underground fuel tank. *Id.*

In *General Ins. Co. of Am. v. Town Pump*, 692 P.2d 427, 428-29 (Mont. 1984), the policyholder owned underground gasoline storage tanks. Leaks from those tanks contaminated underwater wells of adjoining landowners. *Id.* at 428. The insurance companies conceded, and the court agreed, that the leaks were not intended. *Id.* at 429-30.

In *Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co. of N.Y.*, 528 A.2d 76, 77 (N.J. Super. Ct. App. Div. 1987), the policyholder owned property with an underground gasoline storage tank located on it. The tank leaked gasoline through the soil onto adjacent property. *Id.* The pollution exclusion was no bar to coverage because substantial fact questions still existed at the summary judgment stage as to whether the leaks were unexpected and unintended. *Id.* at 86.

In *New York v. Aetna Casualty & Sur. Co.*, 547 N.Y.S.2d 452, 452 (App. Div. 1989), the policyholder owned an underground gasoline storage tank in which there was a very small leak that continued for a number of years. No evidence existed to suggest the policyholder was aware of the leak before an investigation by the state Department of Transportation. *Id.* at 453.

In *Colonie Motors v. Hartford Accident & Indem.*, 538 N.Y.S.2d 630, 632 (App. Div. 1989), the policyholder installed an underground containment unit for the purpose of preventing any discharge of waste oil into the environment. One of the underground pipes broke, but there was nothing in the record to indicate that the policyholder was aware of any discharge before the waste oil was found on a neighbor's property. *Id.*

In *Allstate Ins. Co. v. Klock Oil Co.*, 426 N.Y.S.2d 603, 604 (App. Div. 1980), the policyholder installed, maintained, and used an underground gasoline storage tank at an automobile dealership. Three years after installation, an adjoining landowner complained that his property was damaged by a leak in the tank. *Id.* The court found that the negligent installation and maintenance of the storage tank could result in an unexpected and unintended discharge which remained undetected for a period of time. *Id.*

In *United Pac. Ins. Co. v. Van's Westlake Union, Inc.*, 664 P.2d 1262, 1264 (Wash. Ct. App. 1983), the policyholder owned a gasoline service station and leased it to another individual. Eighty thousand gallons of gasoline leaked out of a hole in an underground pipe, and continued undetected for a period of several months. *Id.* The policyholder knew nothing of the leak. *Id.*

In *Wagner v. Milwaukee Mut. Ins. Co.*, 427 N.W.2d 854, 855 (Wis. Ct. App. 1988), the policyholder owned a gasoline service station. A third party installed a canopy at the station, and in the process, cracked one of the underground pipes. *Id.* The cracked pipe caused a gasoline leak, but it was not discovered for three years. *Id.* The policyholder had no knowledge of the leak. *Id.*

140. In *Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem.*, 451 A.2d 990, 991 (N.J. Super. Ct. Law Div. 1982), the policyholder, a municipal utilities authority, collected liquid wastes from its system and hauled the wastes to designated, authorized landfills, where it deposited the wastes. The wastes leaked into the groundwater. *Id.* While the policyholder intended to deposit the wastes at the designated landfill, as with the underground storage tank cases, the policyholder never intended the damage-causing discharges to occur. *Id.* at 994.

In *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 572 (Wis. 1990), the policyholder operated a waste disposal site. The underlying complaint alleged that the disposal site

pollutants;¹⁴¹ and two involved policyholders who knew their activities resulted in the discharge of pollutants but who did not expect the damage-causing pollutants to be discharged.¹⁴² In the remaining five of the nineteen cases in which coverage was found, the court focused on whether the insurance companies had a duty to defend.¹⁴³ In each of these five cases, the court could not deter-

was not operated properly and that this led to environmental damage. *Id.* While the underlying complaint alleged that the waste disposal site was operated negligently and in violation of applicable laws and regulations, it did not allege any particular releases, how the releases allegedly occurred, or the policyholder's involvement in the allegedly damage-causing release. *Id.*

141. In *Grinnell Mut. Reinsurance Co. v. Wasmuth*, 432 N.W.2d 495, 497 (Minn. Ct. App. 1988), the policyholder improperly placed a formaldehyde insulation in a home. The improper installation of the insulation caused formaldehyde to escape into the home. *Id.* Although the installation of the formaldehyde insulation was intended, the actual release of formaldehyde into the home was not intended by the policyholder. *Id.* at 499.

In *Leverence v. United States Fidelity & Guar. Co.*, 462 N.W.2d 218, 222 (Wis. Ct. App. 1990), the policyholder manufactured prefabricated homes. According to the underlying complaint, defective design of the walls and roofs and use of improper material caused the houses to retain excessive moisture. *Id.* This moisture led to the formation of mold, which in turn led to the release of airborne contaminants. *Id.* The growth of mold in the houses was unexpected and unintended by the policyholder. *Id.* at 232.

142. In *Reliance Ins. Co. of Ill. v. Martin*, 467 N.E.2d 287, 288 (Ill. App. Ct. 1984), the policyholder operated a parking garage adjacent to a condominium complex. The underlying complaint alleged that carbon monoxide and black soot regularly escaped from the policyholder's garage into the condominium and damaged the condominium. *Id.* Although the policyholder likely expected the release of carbon monoxide and soot into the garage and the surrounding streets, the court recognized that those releases were to be distinguished from the release into the condominium structure itself (or into other residential structures). *Id.* at 290. The releases into the condominium unit could have been "sudden and accidental," but this was a question of fact. *Id.*

In *Bentz v. Mut. Fire, Marine & Inland Ins. Co.*, 575 A.2d 795, 796 (Md. Ct. Spec. App. 1990), the policyholder was engaged in the business of pesticide spraying, and was sued for damage caused by negligent application of the pesticide. Specifically, the underlying complaint alleged that the pesticides were openly sprayed on interior and exterior surfaces in violation of applicable laws. *Id.* While the policyholder intended to release some of the pesticides, the releases which caused the damage were unintended. *Id.* at 803.

143. In *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1086 (Colo. 1991), the policyholder owned stock in a mining company. Two of the mine shafts drained into a river and caused an accumulation of sedimentary sludge. *Id.* The underlying complaints charged the policyholder with responsibility for the pollution of the river, but did not allege that the policyholder expected or intended the damage-causing discharges into the river. *Id.* at 1088.

In *Willett Truck Leasing Co. v. Liberty Mut. Ins. Co.*, 410 N.E.2d 376, 377 (Ill. App. Ct. 1980), the policyholder was engaged in the business of leasing trucks. The underlying complaint alleged that fumes entered the cab of a truck leased by the policyholder due to the negligent acts or omissions of the policyholder in failing to inspect the truck and failing to warn the injured party. *Id.* at 378. The court found that a duty to defend existed under the general allegations of this complaint because there was a possibility that the pollution exclusion did not bar coverage. *Id.* at 381.

In *Travelers Indem. Co. v. Dingwell*, 414 A.2d 220, 224 (Me. 1980), the underlying

mine from the allegations of the underlying complaint(s) whether the discharges had been expected or intended from the point of view of the policyholder.

Only four cases of the twenty-three cases in this category held that the 1970 pollution exclusion blocked coverage.¹⁴⁴ In one additional unintentional polluter case, the court determined that although the policyholder did not intend to cause the polluting dis-

complaint sought damages for contamination of well water allegedly resulting from the policyholder's operation of an industrial waste facility. The broad and conclusory allegation in the underlying complaint that the pollution was "a result of negligence" did not describe how the alleged pollution occurred. *Id.* Thus, it was possible that the releases fell within the exception to the pollution exclusion clause, and the insurance companies were under a duty to defend the policyholder in the underlying case. *Id.*

In *Jonesville Prod., Inc. v. Transamerica Ins. Group*, 402 N.W.2d 46, 47 (Mich. Ct. App. 1987), the policyholder was charged in the underlying complaint with discharging hazardous chemicals on its property as a regular and ongoing business practice. The underlying complaint did not specify how the toxic wastes entered the ground. *Id.* at 48. The court found that a duty to defend the policyholder existed because the underlying complaint could be read to include intentional or unintentional dumping. *Id.*

In *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, No. 14597, 1991 WL 11403 *1 (Ohio Ct. App. January 30, 1991), the policyholder was sued in an underlying case for damage caused by pollutants released at a landfill. The alleged events leading to the pollution of the landfill could have been considered unexpected and unintended as phrased in the underlying complaint. *Id.* at *3.

144. In *International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co.*, 522 N.E.2d 758, 762 (Ill. App. Ct.), *appeal denied*, 530 N.E.2d 246 (Ill. 1988), the policyholder operated a barrel reconditioning business. As part of its business, the policyholder discharged waste residues onto the ground. *Id.* The underlying complaint did not allege whether the plaintiff intended or expected that waste residues from the barrel processing would leak into the soil or groundwater. *Id.* at 766. The court, however, barred coverage based upon the time period of the discharges, construing "sudden" to mean abrupt. *Id.* at 769.

In *Protective Nat'l Ins. Co. of Omaha v. City of Woodhaven*, No. 85180, 1991 Mich. LEXIS 1812, *1 (Mich. Aug. 26, 1991), the policyholder-city was engaged in spraying pesticides to control insects and other pests. Some of the spray injured a resident of the city, and the resident sued. *Id.* Although the allegations of the complaint were consistent with the discharge of pesticide coming into contact with the plaintiff unintentionally—because of a gust of wind, for example—the court held that because the city intentionally engaged in an activity involving the discharge of pollutants, the discharge could not be considered "accidental." *Id.* at *11. The court's analysis overlooks the ambiguity of the phrase "the discharge, . . . escape." See *supra* parts III.B.2., III.C.3.

In *Lower Paxton Township v. United States Fidelity & Guar. Co.*, 557 A.2d 393, 393 (Pa. Super. Ct. 1989), the policyholder operated a landfill. The underlying complaint alleged that methane gas was produced by the landfill and gradually leaked into a basement. *Id.* at 403. Despite the fact that the policyholder did not intend the damage-causing discharge, the court focused on the "non-abrupt" nature of the discharge and held that the pollution exclusion barred coverage. *Id.* at 403-04.

In *State v. Mauthe*, 419 N.W.2d 279, 280 (Wis. Ct. App. 1987), the policyholder was engaged in the business of chromium plating. Periodically, the policyholder's pollution control techniques developed cracks and broke down, resulting in accidental dispersals. *Id.* Noting that the dispersals were gradual, the court denied coverage under the pollution exclusion because it interpreted "sudden" to mean abrupt or temporally quick. *Id.*

charges, it expected those discharges to occur.¹⁴⁵

The results of reported state court decisions, therefore, suggest that the analysis described in the previous section is correct.

V. CONCLUSION

The insurance industry's 1970 standard form pollution exclusion is possibly the most ambiguity-ridden example of English prose ever composed. To navigate this maze of ambiguity successfully, courts should carefully identify the relevant ambiguities and follow the guiding principle of construction—that ambiguities in an insurance policy are to be interpreted in favor of coverage.

If the steps outlined in our proposal are consistently followed by courts, the 1970 pollution exclusion will finally begin to serve the purpose for which it was drafted; namely, to delineate clearly those environmental claims that are covered by standard-form CGL policies from those that are not. Specifically, uninvolved liable parties are covered; intentional polluters are not covered; and unintentional polluters are covered, except when they have ignored a substantial probability that their activities were causing the discharge of damage-causing pollutants.

145. In *Upjohn Co. v. New Hampshire Ins. Co.*, Nos. 86906, 86907, 86908, 1991 Mich. LEXIS 1811 (Mich. Aug. 26, 1991), the policyholder manufactured an antibiotic, a byproduct of which was a toxic chemical waste. The policyholder pumped this toxic waste into an underground tank for storage. *Id.* An audit of daily volume readings revealed that the tank had been leaking for three weeks. *Id.* The court found that the policyholder expected the leaks to occur shortly after it began pumping. *Id.*

