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Liberty F. Cagande

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NOTES AND COMMENTS

The "Sudden" Interpretation: *Northville Industries Corp. v. National Union Fire Insurance Co. of Pittsburgh*[1]

LIBERTY F. CAGANDE*

Table of Contents

* The author dedicates this paper to the memory of her brother, Pierre Cagande. The author would like to thank her parents and family for their love and support. Lastly, the author would like to thank Mr. Gene Anderson, Mr. John Nevius, and Mr. John C. Yang for their generous time and guidance while she was writing this note.

1. 636 N.Y.S.2d 359 (N.Y. App. Div. 1995), *aff'd* 679 N.E.2d 1044 (1997).

I. Introduction

The standard Comprehensive General Liability (CGL) policy of the 1970s and early 1980s provided coverage for all bodily or property damage arising from an "occurrence."[2] This type of policy also typically contained an exclusionary clause known as the pollution exclusion clause. A pollution exclusion clause is a disclaimer of coverage for damages resulting from the "discharge, dispersal, release, or escape" of pollutants.[3] However, the pollution exclusion disclaimer is nullified if such discharge of pollutants is "sudden and accidental."[4] In other words, a sudden and accidental occurrence would be covered under a CGL policy.

The 1970s and early 1980s brought the enactment of federal environmental liability statutes such as the Comprehensive Environmental Response Compensation and Liability Act (CERCLA),[5] the Clean Air Act (CAA),[6] and the Clean Water Act (CWA).[7] These federal statutes were accompanied by a number of coordinating state statutes.[8] These environmental laws created new avenues for environmental liability

2. *See* New Castle County v. Hartford Accident and Indem. Co., 933 F.2d 1162, 1165 (3d Cir. 1991).
3. *Id.*
4. *Id.*
5. 42 U.S.C. §§ 9601-9675 (1994).
6. 42 U.S.C. §§ 7401-7671q (1994).
7. 33 U.S.C. §§ 1251-1387 (1994).
8. *See* John C. Yang, *The Battle Continues: Decisions Concerning Pollution Exclusions Remain in the Forefront,* 9 ENVTL. CLAIMS J. 119 (Spring 1997).

and thus, environmental litigation. Amidst this litigation was the dispute interpreting the pollution exclusion clause of the 1970s and early 1980s; the focus of the debate was the definition of "sudden and accidental."[9]

Northville Industries Corp. v. National Union Fire Insurance Co. of Pittsburgh,[10] decided on March 25, 1997, was the New York Court of Appeals' first attempt to settle the dispute and to define the meaning of "sudden" in standard CGL policies.[11] The New York Court had defined "accidental" in prior holdings and found it unnecessary to determine the meaning of the term "sudden" in its decisions.[12] In the *Northville* case, the New York Court of Appeals found that it was time to expressly interpret and determine the meaning of the word "sudden." In this case of first impression, the court reasoned that the term "sudden" was unambiguous and defined it as having a temporal aspect meaning "abrupt."[13]

Part II of this Case Note provides a general background on the CGL insurance policy, the pollution exclusion clause and the "sudden and accidental" exception. It also discusses the history and the application of the clause in New York. Part III presents the split of authority in various jurisdictions regarding upholding the pollution exclusion clause and the interpretation of the term "sudden" in the exception. Part IV discusses the facts, procedural history, and the analysis of the New York Court of Appeals in *Northville*. Part V contains a critical analysis of the case, presents an analysis revealing its inadequacies, and presents a proposal for future litigation. Lastly, Part VI concludes that the New York Court of Appeals, in interpreting the term "sudden" as having a temporal aspect, provides little guidance for settling the divergent judicial interpretations of the clause.

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9. *See id.*

10. 636 N.Y.S.2d 359 (N.Y. App. Div. 1995), *aff'd*, 679 N.E.2d 1044 (1997).

11. *See* Madelaine R. Berg, *Court of Appeals Interprets 'Suddenness' Requirement*, 218 N.Y. L.J. 9 (1997).

12. *See id.*

13. *See id.*

II. The Backgound of The Pollution Exclusion Clause and "Sudden and Accidental"

A. General History: The Early Years

Conventional liability insurance is a form of indemnity contract under which the insurer agrees to cover the insured for up to the maximum amount of the policy, if the insured is deemed liable to a third party for any injury covered by the insured's policy.[14] Businesses will usually purchase a comprehensive general liability insurance policy[15] to cover liabilities that arise in relation to the day to day functions of the business and its property.[16] CGL coverage requires that an insurer both defend and indemnify the insured in any litigation and for any payment made as a result of or arising from a loss.[17] These policies are standardized and thus are attractive to insurance companies because they are theoretically easy to interpret and efficient to use.[18] However, with the pollution exclusion clause, this is not the case.

The CGL policy in 1966 read:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as

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14. *See* ZYGMUNT J. B. PLATER, ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY § 6, at 295-296 (1992).

15. "Standardized CGL policies are generally drafted by committees of insurance representatives sponsored by the Insurance Service Office (ISO) and its predecessor organizations, the Insurance Rating Board (IRB) and the National Bureau of Casualty Underwriters (NBCU). The ISO is a trade association that provides rating, statistical, actuarial and policy drafting services to about 3,000 insurers. Policy forms developed by the ISO are approved by its constituent insurance carriers and then submitted to state agencies for review. In many states . . . standardized ISO insurance forms cannot be marketed to consumers until they obtain regulatory approval." *New Castle County,* 933 F.2d at 1180. Once the provision is approved by the regulatory board, the details are final and nonnegotiable by those covered by the CGL policy. See Morton Int'l, Inc. v. Gen. Accident Ins. Co. of America, 629 A.2d 831, 851 (N.J. 1993).

16. *See* PLATER, ET AL., *supra* note 14, at 295-96.

17. *See* Sharon M. Murphy, *The "Sudden and Accidental" Exception to The Pollution Exclusion Clause In Comprehensive General Liability Insurance Policies: The Gordian Knot of Environmental Liability,* 45 VAND. L. REV. 161, 163 (1992).

18. *See id.* at 164.

> damages because of bodily injury or property damage *caused by accident*.[19]

The "caused by accident" phrase was intended to limit insurance liability by exempting coverage "where the insured intentionally or recklessly caused injury to persons or damage to property."[20] However, a plethora of definitions for "accident" arose as courts interpreted the language of the policy.[21] Although a minority of courts defined "accident" as having a sudden element, the majority of courts ignored a sudden requirement and defined accidental as an unexpected and unintentional event.[22] Therefore, "[f]aced with customers' demands for greater coverage, the uncertainty of judicial interpretations, and the general trend toward judicially expanded coverage, the insurance industry universally switched to an 'occurrence-based' coverage in 1966."[23]

The new CGL policy stated:

> The company will pay on behalf of the insured all sums which the insured shall become legally liable to pay as damages because of bodily injury or property damage to which this insurance applies caused by an occurrence. . ..[24]

An "occurrence" was, and still is, defined as "an accident, including continuous or repeated exposure to conditions which results in bodily injury or property damage neither expected

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19. S. Hollis M. Greenlaw, *The CGL Policy and The Pollution Exclusion Clause: Using the Drafting History to Raise The Interpretation Out of The Quagmire,* 23 COLUM. J. L. & SOC. PROBS. 233, 235 (1990) (emphasis added).

20. *Id.*

21. *See* E. Joshua Rosenkranz, *The Pollution Exclusion Clause Through The Looking Glass,* 74 GEO. L.J. 1237, 1245 (1986).

22. *See* Scott D. Marrs, *Pollution Exclusion Clauses: Validity and Applicability*, 26 TORT & INS. L.J. 662 (1991).

23. Rosenkranz, *supra* note 21, at 1246.

24. Greenlaw, *supra* note 19, at 238. "Insurance policy language is typically decided by an industry-wide organization rather than by individual insurance companies. Thus, changes in policy language usually go into effect for all insurance companies at about the same time. . . . In each specific case, the actual language of the particular insurance policy involved must be examined, not the year of the policy." Robert E. Henke, *Ohio's View of the Pollution Exclusion Clause: Is there Still Ambiguity?,* 50 OHIO ST. L.J. 983, 983 n.1 (1989).

nor intended from the standpoint of the insured."[25] The insurance industry intended to remove the suddenness requirement and to allow for coverage of gradual, unintended, and unexpected events.[26] There was no intent, under the 1966 policies, to cover commercial clients who knowingly and deliberately committed polluting acts.[27] However, courts were still divided in interpreting the 1966 policy language, with many courts continuing to rule in favor of those who knowingly and intentionally polluted.[28]

After much uncertainty concerning the liability of the insurance industry under the CGL policy, in 1969 the insurance industry attempted to clarify the issue by drafting the pollution exclusion clause.[29] On March 17, 1970, the Insurance Rating Board (IRB) adopted the clause.[30] In 1973, the pollution exclusion clause became a standard part of CGL policies.[31] A typical pollution exclusion clause found in all CGL policies from 1970 to 1986 read:

> [T]he insurance coverage 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 the land, the atmosphere or any water course or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.[32]

The pollution exclusion clause was drafted to clarify liability, yet differing theories developed regarding its meaning. The most common question arising in the courts has been whether the interpretation of the exclusion clause allows coverage for liability resulting from gradual property damage, or

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25. Marrs, *supra* note 22, at 663.
26. *See id.*
27. *See* Rosenkranz, *supra* note 21, at 1248.
28. *See* Marrs, *supra* note 22, at 663.
29. *See generally* Greenlaw, *supra* note 19, at 243-44.
30. *See id.* at 244.
31. *See* Robert E. Henke, *Ohio's View of the Pollution Exclusion Clause: Is There Still Ambiguity?* 50 OHIO ST. L.J. 983 (1989).
32. *Id.*

whether the "sudden and accidental" phrase restricts coverage to instances in which the damage is instantaneous or abrupt.[33] A number of courts have held that coverage is barred only if the pollution is expected or intended, and that unintentional and gradual discharges are covered.[34] However, a larger number of courts have claimed that any gradual intentional or unintentional pollution discharge is barred from coverage.[35] A universal interpretation of the clause has yet to be achieved.

B. New York's Pollution Exclusion Clause History and Its Liability Coverage

In the early 1970s, New York insurance regulators approved the insurance industry organizations' submissions for a pollution exclusion clause in CGL policies.[36] This approval was based upon the understanding that coverage would be barred for gradual pollution.[37] In 1971, New York legislators mandated that the pollution exclusion clause be included in all liability policies.[38] The law stated that insurance coverage was prohibited unless the discharge was "sudden and accidental."[39] Governor Rockefeller, in 1971, stated that the law's purpose was "[t]o prohibit commercial or industrial enterprises from buying insurance to protect themselves against liabilities arising out of their pollution of the environment."[40] The Governor also stated that forcing companies to

33. *See* 2 EUGENE R. ANDERSON, ET AL., INSURANCE COVERAGE LITIGATION 275 (1997).

34. *See id.* at 305.

35. *See id.*

36. *See* Brief of *Amicus Curiae* by Insurance Environmental Litigation Association at 2, Northville Industries Corp. v. National Union Fire Insurance Company 679 N.E. 2d 1044 (N.Y. 1997) (No. 95-00905) [hereinafter IELA].

37. *See id.*

38. *See id.* at 3. The New York Supreme Court, Appellate Division, has also described its pollution exclusion history in the case, *Technicon Electronics Corp. v. American Home Assurance Co.*, 533 N.Y.S.2d 91 (N.Y. App. Div. 1988), aff'd, 542 N.E.2d 1048 (N.Y. 1989). During the periods that Technicon acquired its CGL policies, New York mandated that liability carriers include a "pollution exclusion" clause the phrase "sudden and accidental." *Id.* at 102.

39. *See id.* at 8 (citing N.Y. Law § 765 (1971)).

40. *Id.* at 8 (quoting N.Y. Legis. Annual 353, 354 (1971)).

bear full cost would encourage complete compliance with New York's environmental laws.[41] Furthermore, the State of New York, in issuing this bill, took a strict stand to protect the environment and to prevent the discharge of noxious substances into the water and air.[42] The Governor stated that even though the laws were stringent, the polluter would be protected from high fines and other environmental liabilities if they were able to purchase a CGL policy with the pollution exclusion clause.[43]

In 1982, the insurance companies successfully lobbied for the repeal of the 1971 law and began to offer Environmental Impairment Liability (EIL) policies specifically covering gradual pollution in other markets.[44] The New York State Legislature then decided to enact a bill[45] which allowed the insurers to decide and negotiate the extent to which pollution liability would be excluded.[46] Yet, the legislative history of the 1982 bill[47] reflected an understanding among the government and insurance industry that the 1971 law precluded coverage for gradual pollution.[48] Additionally, the New York

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41. *See supra*, note 36, IELA at 8-9.

42. *See Technicon*, 533 N.Y.S.2d at 102 (quoting the memorandum of Governor Rockefeller).

43. *See id.*

44. *See id.*

45. *See* N.Y. Legis. Annual at 271 (1982).

46. *See Technicon*, 533 N.Y.S.2d at 102.

47. *See* N.Y. Legis. Annual at 271 (1982).

48. *See* IELA, *supra* note 36, at 10. The *amicus curiae* brief relays the history of New York's legislative intent regarding the 1970s pollution exclusion clause:

- The chairman, Senator John R. Dunne, "of the 1982 State Senate committee on Conservation and Recreation who introduced the bill, wrote that '[t]he purpose of this bill is to authorize the sale of 'gradual' or 'nonsudden' pollution liability insurance in New York. In 1971, then Governor Rockefeller, signed a bill into law that *prevented the writing of gradual pollution liability insurance*. . . . At present, New York is alone in the country in its restriction of permitting insurance to be issued to cover gradual or non-sudden pollution.'" IELA, supra note 36, at 10 (quoting memorandum of Senator John R. Dunne in N.Y. Legis. Annual at 271) (emphasis added).
- The Governor's Approval Memorandum also explained that the 1982 legislation "authorize[d] the writing of insurance policies to

State Legislature, which adopted the bill mandating the pollution exclusion clause, seemed to have decided that "sudden" meant abrupt or instantaneous.[49]

The 1982 New York bill[50] repealed the requirement that the pollution exclusion clause be included in CGL policies.[51] Therefore, the liability carriers were not required to cover liability resulting from intentional, continuous discharges of pollutants.[52] Although the requirement was no longer present after 1982, the State of New York did not abandon its intent to protect the environment from intentional polluters.[53] Therefore, even though the pollution exclusion clause was not mandatory, it was and still is upheld in the New York courts.

III. Split in Authority in Interpreting the Pollution Exclusion Clause

In recent years, there has been a dispute over the interpretation and meaning of the pollution exclusion clause found in the insurance policies of the 1970s and the 1980s. The insurers argue that the pollution exclusion clause has both a temporal element as well as an element of unexpectedness.[54] Thus, the exclusion clause does not cover gradual pollution claims but does cover "boom"-type accidents.[55] The insured argue that the word "sudden" is unambiguous and means

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cover liabilities arising from the *gradual release or discharge of pollution and contaminants.*" Id. at 10-11 (quoting Governor's Approval Memorandum) (emphasis added).

- The State Department of Commerce wrote that it had "no objection to this bill which would amend the Insurance Law to repeal the prohibition against the sale of 'gradual' or 'non-sudden' pollution liability insurance." 1982 N.Y. Laws, ch. 856 (Bill Jacket) (Memorandum of John J. Kelliher to John G. McGoldrick of July 28, 1982) (emphasis added) *quoted in* Brief of *Amicus Curiae* by IELA *supra* note 36, at 11.

49. *See* IELA, *supra* note 36, at 11.
50. N.Y. Legis. Annual at 271 (1982).
51. *See Technicon,* 533 N.Y.S.2d at 102-103.
52. *See id.*
53. *See id.* at 103.
54. *See* Yang, *supra* note 8, at 119.
55. *See id.*

only "unexpected."[56] As a result, policyholders maintain that coverage exists as long as the policyholder did not "expect or intend" the pollution-related injury.[57] Some courts have followed the insurers' interpretation, while other courts have ruled in favor of the policyholders' interpretation of the clause.[58] Case law from various jurisdictions, including New York, illustrates this split.

A. Upholding the Pollution Exclusion Clause — "Sudden" Means Abrupt

In 1996 and 1997, a number of states' highest courts upheld the pollution exclusion clause as unambiguous with respect to the definition of the phrase "sudden and accidental."[59] These courts have also defined "sudden" as having a temporal aspect meaning abrupt.[60] This issue has been litigated for a number of years prior to the most recent wave of litigation.[61]

Iowa Comprehensive Petroleum Underground Storage Tank Fund Board v. Farmland Mutual Insurance Co.[62] is one

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56. *See id.*

57. *See id.*

58. *See infra* Part III A-B.

59. *See* Iowa Comprehensive Petroleum Underground Storage Tank Fund Board v. Farmland Mutual Ins. Co., 568 N.W. 2d 815 (Iowa 1997); Northville Indus. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 679 N.E.2d 1044 (N.Y. 1997); E.I. du Pont de Nemours & Co. v. Allstate Ins. Co., 693 A.2d 1059 (Del. 1997); North Pacific Ins. Co. v. Mai, 939 P.2d 570 (Idaho 1997); Highlands Ins. Co. v. Aerovox Inc., 676 N.E.2d 801 (Mass. 1997); Sharon Steel Corp. v. Aetna Casualty and Surety Co., 931 P.2d 127 (Utah 1997); Drexel Chemical Co. v. Bituminous Ins. Co., 933 S.W.2d 471 (Tenn. 1996); Sinclair Oil Corp. v. Republic Ins. Co. et al., 929 P.2d 535 (Wyo. 1996).

60. *See id.*

61. The following cases have also upheld the pollution exclusion clause and/or defined sudden as having a temporal aspect meaning abrupt. *See, e.g.,* Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700 (Fla. 1993); Lumbermens Mutual Casualty v. Belleville, 555 N.E.2d 568 (Mass. 1990); Upjohn v. New Hampshire Ins. Co., 476 N.W.2d 392 (Mich. 1991); Shell Oil Co. v. Winterthur Swiss Ins. Co., 15 Cal. Rptr. 2d 815 (Cal. 1993); Ogden Corp. v. Travelers Indem. Co., 924 F.2d 39 (2d Cir. 1991); Auto Owners Ins. Co. v. City of Clare, 521 N.W.2d 480 (Mich. 1994); Powers Chemco, Inc. v. Federal Ins. Co., 548 N.E.2d 1301 (N.Y. 1989); Technicon Electronics Corp. v. American Home Assurance Co., 542 N.E.2d 1048 (N.Y. 1989).

62. 568 N.W. 2d 815 (Iowa 1997).

of the most recent cases which has determined that the pollution exclusion clause is unambiguous and that "sudden" means abrupt.[63] In *Iowa Comprehensive,* as in the *Northville* case, the issue was whether "sudden" was to be interpreted as requiring that the pollution occur abruptly, as a "boom event," or whether it required an unforeseen or unexpected dispersal.[64] *Iowa Comprehensive* involved a gasoline storage tank leakage that allegedly occurred over a ten year period prior to the tank removal in 1988.[65] The Farmland Mutual Insurance Company's CGL policy contained a pollution exclusion clause.[66] Based upon this clause, Farmland Mutual claimed that insurance coverage was barred.

In its analysis, the Iowa Supreme Court reviewed previous court decisions on the principles for the construction and interpretation of insurance policies.[67] In interpreting the term "sudden," the court noted that even the dictionary had more than one definition; one having a temporal aspect and the other focusing on whether the event was unexpected or unforeseen.[68] The Iowa court recognized and rejected the Wisconsin court's interpretation of "sudden" in *Just v. Land Reclamation Ltd.*,[69] which stated that "[t]he very fact that recognized dictionaries differ on the primary definition of 'sudden' is evidence in and of itself that the term is ambiguous."[70] Instead, the Iowa Supreme Court relied on *New Castle County v. Hartford Accident & Indemnity Co.*,[71] and adopted the view that "the existence of more than one dictionary definition is not the *sine qua non* of ambiguity. If it were, few words would be unambiguous."[72] Moreover, the court re-

63. *See Insurance: Pollution Exclusion Clause Unambiguous; 'Sudden' Means Abrupt, High Court Finds,* DAILY ENVTL. REP., Sept. 22, 1997, at A-1.
64. *See Iowa Comprehensive*, 568 N.W.2d at 816.
65. *See id.*
66. *See id.*
67. *See id.* at *3.
68. *See id.*
69. 456 N.W.2d 570 (Wis. 1990).
70. *Id.* at 573, *cited in Iowa Petroleum*, 568 N.W.2d at 818.
71. 933 F.2d 1162 (3d Cir. 1991).
72. *Id.* at 1193. The *New Castle* court found, however, under this test, that the term "sudden" was ambiguous according to Delaware law. *See infra* Part III B(2).

iterated that the term "accidental" had been defined as an "unexpected" and "unintended" event.[73] Therefore, since "accidental" was already defined as "unexpected" and "unintended," to interpret the term "sudden" as having the same meaning would render it redundant and useless.[74] Thus, the court held there was no ambiguity in the term "sudden" and that the term had a "temporal aspect requiring an abrupt event."[75]

Ohio's case history is illustrative of the differing views regarding the pollution exclusion clause and the recent trend of defining "sudden" as having a temporal aspect.[76] In 1984, in *Buckeye Union Insurance Co. v. Liberty Solvents and Chemical Co.*,[77] the court found that the clause was ambiguous and defined "sudden" as not having a temporal aspect.[78] Although the *Buckeye* decision was cited with approval by various other state courts, the Ohio courts, in more recent decisions, have taken a different view.[79] Two cases, *Borden, Inc. v. Affiliated FM Insurance Co.*[80] and *Hybud Equipment Corp. v. Sphere Drake Insurance*,[81] are recent examples of the Ohio courts' rejection of the *Buckeye* court's analysis. These courts found that the terms were unambiguous,[82] with "sudden" having a temporal aspect and meaning "happening quickly, abruptly or without prior notice."[83] Whereas "accidental means unexpected as well as unintended."[84] Lastly, the *Hybud* court held that the pollution exclusion clause covered only those damages caused by an abrupt release, not gradual and abrupt releases.[85]

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73. *See Iowa Petroleum,* 568 N.W.2d at 818.
74. *See id.*
75. *Id.* at 816.
76. *See* Hencke, *supra* note 31, at 983.
77. 477 N.E.2d 1227 (Ohio Ct. App. 1984).
78. *See id.* at 1233.
79. *See generally Buckeye Union Insurance Co.,* 477 N.E.2d 1227.
80. 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir. 1989), *cert. denied*, 493 U.S. 817 (1989).
81. 597 N.E.2d 1096 (Ohio 1992).
82. *See* Hencke, *supra* note 31, at 995.
83. *Hybud*, 597 N.E.2d at 1101.
84. *Id.* at 1102.
85. *See id.* at 1103.

B. Pollution Exclusion Clause is Ambiguous

1. State Court Holdings

Hecla Mining Co. v. New Hampshire Insurance Co.[86] and *Claussen v. Etna Casualty & Surety Co.*[87] both held that the term "sudden" is capable of more than one meaning and is therefore ambiguous.[88] *Claussen* looked at the construction of the contract and upheld Georgia law that "words in a contract generally bear their usual and common meaning."[89] Yet, also according to Georgia law, if there is doubt as to the interpretation of the words, then the meaning most strongly adverse to the writers of the policy, the insurers, is preferred.[90] The court recognized that a common meaning for "sudden" is the word "abrupt," but also noted:

> [I]t is, indeed, difficult to think of "sudden" without a temporal connotation: a sudden flash, a sudden burst of speed. . . . But, on reflection one realizes that, even in its popular usage, "sudden" does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death.[91]

Therefore, since sudden has more than one meaning, the court found the phrase ambiguous, construed it in favor of the insured, and applied the "unexpected" meaning.[92]

In *Hecla Mining Co.*, a CERCLA complaint was filed after the removal of timber and debris caused a discharge of sedimentary sludge which contaminated the water and turned the Arkansas River orange.[93] The CGL policy at issue

86. 811 P.2d 1083 (Colo. 1991). *See also* St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co., 923 P.2d 1200 (Or. 1996); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204 (Ill. 1992); American States Ins. Co. v. Kiger 662 N.E.2d 945 (Ind. 1996); Joy Technologies, Inc. v. Liberty Mut. Ins. Co. 421 S.E.2d 493 (W. Va. 1992); Greenville County v. Ins. Reserve Fund, 443 S.E.2d 552 (S.C. 1994).

87. 380 S.E.2d 686 (Ga. 1989).

88. *See generally supra,* notes 81 and 82.

89. *Claussen,* 380 S.E.2d at 687-88.

90. *See id.* at 688.

91. *Id.* at 688.

92. *See id.* at 689.

93. *See Hecla Mining Co.,* 811 P.2d at 1085.

in the case included a pollution exclusion clause. It also provided defense and liability coverage for damage that resulted from unexpected and unintended occurrences, but not for damages caused by the discharge of pollution unless it was "sudden and accidental."[94] Hecla argued that the phrase "sudden and accidental" was ambiguous since Hecla's CGL insurance policies did not define the meaning of the phrase.[95] Therefore, Hecla concluded, the language must be construed in favor of the insured to mean unexpected and unintended and against the insurers who drafted the policy.[96]

The court in *Hecla* looked at the definitions of "sudden" in a number of dictionaries, including Webster's Third New International Dictionary,[97] Random House Dictionary,[98] and Black's Law Dictionary.[99] It found that "sudden" had a variety of meanings and could reasonably be defined to mean "abrupt," but could also reasonably be defined to mean "unexpected."[100] The court noted that in the portion of the CGL policies which define occurrence:

> [A]ccident 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 dis-

94. *See id.* at 1087.

95. *See id.* at 1088, 1090.

96. *See id.* at 1090.

97. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2284 (1986) (defining "sudden" as "happening without previous notice . . . occurring unexpectedly . . . not foreseen").

98. THE RANDOM HOUSE DICTIONARY 1900 (2d ed. 1987) (defining "sudden" as "happening, coming, made, or done quickly").

99. *See Hecla Mining Co.*, 811 P.2d at 1091. The court noted that BLACK'S LAW DICTIONARY 1284 (5th ed. 1979) defined sudden as "[h]appening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen; unprepared for."

100. *See Hecla Mining Co.*, 811 P.2d at 1091.

> charge. The phrase "sudden and accidental" thus becomes inherently contradictory and meaningless.[101]

Therefore, finding that the term sudden could have a number of meanings, one being "unexpected," the court held the clause to be ambiguous and found in favor of the insured.[102]

2. *New Castle County v. Hartford Accident and Indemnity Company*:[103] The Significance of Multiple Dictionary Definitions

In *New Castle*, decided after the *Claussen* and *Hecla* decisions, the Court of Appeals noted that the district court found considerable significance in the dictionary meaning of the term "sudden."[104] Relying on Webster's Third New International Dictionary, defining "sudden" as "happening without previous notice" or "occurring unexpectedly,"[105] the plaintiffs argued that there are also other definitions with connotations of brevity and thus the word has more than just one reasonable definition.[106] Therefore, the term is ambiguous and should be interpreted in favor of the insured.[107]

However, the court recognized the problem of relying solely on dictionaries to determine whether or not a word is ambiguous. "Although dictionaries are helpful insofar as they set forth the ordinary, usual meaning of words, they are imperfect yardsticks of ambiguity. By their very nature, dictionaries define words in the abstract. . .."[108] The court noted that any person could have looked up the word "sudden" in the dictionary and discovered that there were several definitions of the word, and thus have rationally concluded that there was more than one reasonable definition.[109] This

101. City of Northglenn v. Chevron, USA, Inc., 634 F. Supp. 217, 222 (D. Colo. 1986), *quoted in Hecla Mining Co.*, 811 P.2d at 1092.

102. *See generally Hecla Mining Co.*, 811 P.2d 1083.

103. 933 F.2d 1162 (3d Cir.1991).

104. *See id.* at 1193.

105. *See id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2284 (1971)).

106. *See New Castle County*, 933 F.2d at 1193.

107. *See id.*

108. *Id.* at 1193-94.

109. *See id.* at 1194.

would, therefore, cause the word "sudden," as used in insurance policies, to be ambiguous.[110]

The court in *New Castle* found this to be a reasonable approach, but also reiterated the "basic principle of insurance law that all words in a policy should be given effect."[111]

> The very use of the words "sudden and accidental" reveal[s] a clear intent to define the words differently, stating two separate requirements. Reading "sudden" in its context, i.e. joined by the word "and" to the word "accident," the inescapable conclusion is that "sudden," even if including the concept of unexpectedness, also adds an additional element because "unexpectedness" is already expressed by "accident." This additional element is the temporal meaning of sudden, i.e. abruptness or brevity. To define sudden as meaning only unexpected or unintended, and therefore as a mere restatement of accidental, would render the suddenness requirement mere surplusage.[112]

Under this basic principle, the *New Castle* court further reasoned that even if the word "sudden" was defined as "unexpected," this would not make it completely synonymous with the word "accidental."[113] The court recognized that as a standard practice, the insurance policies used words that were synonymous but not absolutely repetitive and redundant.[114] In conclusion, the court determined that adding the word "sudden" to the word "accidental" with the word "and" does not necessarily create a temporal element meaning "brevity" or "abruptness."[115] Therefore, the term "sudden" was ambiguous under Delaware law, for it could have more than one meaning, including "unexpected."[116]

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110. *See id.*

111. *Id.*

112. Lower Paxton Township v. United States Fidelity & Guaranty Co., 557 A.2d 393, 402 (1989), *quoted in New Castle County,* 933 F.2d. at 1194.

113. *See New Castle,* 933 F.2d at 1194.

114. *See id.*

115. *See id.* at 1194-95.

116. *See id.* at 1198.

C. Missouri's Anti-Redundancy Canon

The D.C. Circuit Court, in *Charter Oil Company v. American Employers' Ins.*,[117] applied an "anti-redundancy canon" in determining the meaning of the word "sudden" within the pollution exclusion clause.[118] Pursuant to this "anti-redundancy canon" and Missouri law, "all words in an insurance contract [must] be given meaning"[119] and the term "sudden" must be "defined to eliminate [any] redundancy."[120] The court found that the anti-redundancy canon would be violated if "sudden" was defined as meaning "unexpected" because the term "accidental" was already defined and accepted as having that exact meaning.[121] Both words would have the same meaning.[122] Therefore, to avoid such redundancy, the term "sudden" must mean abrupt.[123]

Furthermore, the court in *Charter Oil Co.* distinguished this case from other cases by holding that "sudden" meant "unexpected."[124] Specifically, the court distinguished itself from *Claussen v. Aetna Casualty & Surety Co.*[125] The court recognized that, "a sudden bend in the road is still 'sudden' for a driver on a familiar road, that a 'sudden' storm is not really sudden, but also abrupt, and that a 'sudden' death usually does not describe a lingering death, but one that happens abruptly in time."[126] Therefore "sudden," in having a temporal aspect, could only mean "abrupt."[127]

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117. 69 F.3d 1160 (D.C. Cir. 1995). *Charter Oil* involved the wrongful disposal of hazardous waste, a mixture of dioxin and waste oil, used as a dust suppressant spray at various Missouri sites, resulting in ground contamination. *See id.*

118. *See id.* at 1163.

119. Kevin Murphy, *Hurry Up and Have an Accident: Comprehensive General Liability Contract Standard Pollution Exclusion Clause Includes a Temporal Element,* Charter Oil Co. v. American Employers' Insurance, 3 MO. ENVTL. L. & POL'Y REV. 222, 227 (1996).

120. *Id.*

121. *Charter Oil*, 69 F.3d at 1164.

122. *See id.*

123. *See id.*

124. *Id.* at 1165.

125. 380 S.E.2d 686 (Ga. 1989). *See supra* Part III B.

126. Kevin Murphy, *supra* note 119, at 228.

127. *Charter Oil*, 69 F.3d at 1165-66.

D. New Jersey's Interpretation of the Clause

In *Morton International Inc. v. General Accident Insurance Co. of America,*[128] the New Jersey Supreme Court recognized that "sudden" had a temporal aspect in the "sudden and accidental" exception to the pollution exclusion clause.[129] However, the court did not stop at defining and applying the term "sudden" to the facts of the case, but also considered the regulatory history of the pollution exclusion clause in its holding.[130] The court found that the insurance industry had made it clear that no damages resulting from expected and intended pollution would be covered, but that the industry had not represented that they intended to exclude any other types of polluting acts such as gradual pollution.[131] Moreover, the court recognized that the insurance industry, by excluding acts other than expected and intended ones, was creating a reduction in coverage.[132] The court found the regulators' representations not only misleading, but also deceptive.[133] In general, a number of other states, including West Virginia, Kansas, and the territory of Puerto Rico, found that the IRB and the Mutual Insurance Rating Board[134] never attempted to explain or disclose the full impact and operation of the clause as a reduction in coverage that had previously been provided.[135] In view of the false representations allegedly found in the regulatory history, the court construed the pollution exclusion clause broadly to permit coverage even where the discharge was gradual and did not occur abruptly.[136]

The court applied regulatory estoppel by virtue of the fact that the insurance industry had represented, to New Jersey's regulatory agencies, that the pollution exclusion

128. 629 A.2d 831 (N.J. 1993), *cert. denied*, 512 U.S. 1245 (1994).
129. *See generally id.*
130. *See Morton Int'l Inc.*, 629 A.2d at 848.
131. *See id.* at 870.
132. *See id.* at 852-53.
133. *See id.*
134. *See id.* at 868. The Mutual Insurance Rating Board is an insurance industry trade association. *Id.*
135. *See Morton Int'l Inc.*, 629 A.2d at 853-54.
136. *See id.* at 872-73.

clause was merely intended to clarify the scope of coverage for pollution damages and would not significantly limit the coverage already available.[137] After determining that "sudden" may have more than one meaning, whether it had a temporal aspect meaning "abrupt" or whether it meant "unexpected," the court found the issue of the "sudden" definition less important in understanding the pollution exclusion clause.[138] Instead, the court found the focus of the analysis to be on:

> whether the courts of this state should give effect to the literal meaning of an exclusionary clause that materially and dramatically reduces the coverage previously available for property damage caused by pollution, under circumstances in which the approval of the exclusionary clause by state regulatory authorities was induced by the insurance industry's representation that the clause merely "clarified" the scope of prior coverage.[139]

In further analyzing the *Morton Int'l Inc.* case, the court recognized that, in a non-regulatory context, if there are any false representations concerning the coverage of or the exclusions from an insurance policy which result in a detriment to the insured, such as a reduction in previously provided coverage, then the insurer is estopped from denying coverage.[140] The *Morton* court expanded this non-regulatory estoppel doctrine to be used in a regulatory context.[141] The court stated that the "basic role of the Commissioner of Insurance is 'to protect the interests of policy holders' and to assure that in-

137. Permacel v. American Insurance Company and Insurance Company of North America, 691 A.2d 383, 386 (N.J. 1997) (discussing *Morton Int'l Inc.* 629 A.2d at 874). The Superior Court of New Jersey relied on the *Morton* case in its holding, but also notes that New York, along with Connecticut and Maryland, have not extended the definition of "sudden" beyond the temporal element it ordinarily connotes.

138. *See Morton Int'l, Inc.*, 629 A.2d at 872.

139. *Id.*

140. *See id.* at 873.

141. *See id.* at 874.

surance companies provide reasonable, equitable and fair treatment to the insuring public."[142]

The New Jersey court also found that there were misrepresentations made by the IRB in order to gain approval by the state insurance regulatory authority. Therefore, the court concluded that an equitable and reasonable solution would be to bind the insurance industry by the representations presented at the time of state approval.[143] In conclusion, the court stated that the pollution exclusion clause would have automatically been enforced had the IRB simply informed the state insurance regulatory authority of the coverage to be provided.[144] This would have lessened the amount of litigation surrounding the issue.[145]

The court further stated that the insurance industry failed to disclose the insurance effect on the policy for the insureds. In doing so, the court found they had knowingly given false information regarding the effect on the policy to the state Department of Insurance at the clause's submission for approval.[146] Therefore, the court held that because the industry profited from their "nondisclosure by maintaining pre-existing rates for substantially-reduced coverage,"[147] the just judgment was to require the industry to bear the burden and provide the coverage it had represented at the time of the clause's approval.[148]

Similarly, the Supreme Court of Alabama, in *Alabama Plating Co. v. U.S. Fidelity and Guar. Co.*,[149] found the representations made by the insurance industry, to gain state insurance agency approval, misleading.[150] The court also found that the term "sudden" was ambiguous and that the policies

142. *Id.* (citations omitted).
143. *See Morton Int'l, Inc.*, 629 A.2d at 874.
144. *See id.* at 876.
145. *See id.*
146. *See id.*
147. *Id.*
148. *See Morton Int'l, Inc.*, 629 A.2d at 874.
149. 690 So. 2d 331 (Ala. 1997).
150. *See* Thomas R. Head, *Insurers Suffer Defeat in Environmental Claims: Alabama Rejects Pro-Insurer Interpretation of Pollution Exclusion Clause*, 20 AM. J. TRIAL ADVOC. 673 (1997).

covered gradual discharges of pollution.[151] To determine the regulatory representations of the insurance industry regulators, the court looked at evidence of the drafters' intent.[152]

Upon examination, the court found that when the clause was created and added to the "occurrence" based CGL policies, the intent was not to reduce coverage, but merely to clarify that the policies did not cover intentional acts by polluters.[153] The court relied on statements by insurance representatives and letters sent to state insurance departments.[154] These statements included one submitted by the Travelers Indemnity Company, which stated that only expected or intended pollution would be precluded from coverage.[155] In a letter to the insurance commissioner, Richard Reeves of the Travelers' Government Affairs Division stated that The Travelers believed that the results of the two exclusions, "occurrence" based and "sudden and accidental," were the same. Reeves further stated that the new wording was clearer in meaning than the previous "occurrence" based clause.[156] Another example, a contemporary issue of The Fire, Casualty & Surety Bulletin,[157] which is published by the insurance industry to assist insurance agents and brokers, stated that:

> In one important respect, the [pollution] exclusion simply reinforces the definition of occurrence. That is, the policy states that it will not cover claims where the "damage was expected or intended" by the insured and the exclusion states, in effect that the policy will cover incidents which are sudden and accidental — unexpected and not intended.[158]

151. *See id.*
152. *See Alabama Plating Co.*, 690 So. 2d at 335.
153. *See id.*
154. *See id.*
155. *See Alabama Plating Co.*, 690 So. 2d at 335, n.5.
156. *See id.*
157. *See id.*
158. *Id.*

Therefore, based upon this evidence, the Alabama court found that the insurers were estopped from denying coverage to the insured.

E. Conspiracy Theory

As a result of the *Morton* decision, a different view has arisen regarding the interpretation of the pollution exclusion clause. This view is that the insurance regulators conspired to fraudulently misrepresent their intentions of coverage and the meanings of the terms within the clause to the insured.[159] According to this theory, the "sudden and accidental" term had always been boilerplate language used in machinery policies since the 1950s. It has been repeatedly construed to define unexpected and not instantaneous occurrences.[160] Since the boilerplate meaning of "sudden and accidental" had already been litigated, and uniformly interpreted as meaning "unexpected and unintended," by the time the term was included in the CGL pollution exclusion clauses, it was only rational to believe that the insurance industry intended the same meaning for the 1970 clause.[161]

In 1970, the industry submitted a standard-form memorandum explaining to state insurance commissioners that the pollution exclusion was "intended to be merely a clarification of the 'occurrence' definition and, therefore, that pollution insurance coverage was to be denied only in cases of intentional pollution."[162] This, however, was not the case. Instead, coverage has not only been denied to intentional polluters, but also to the unintentional polluter who relied on the expressed intent of the insurance industry only to find that the coverage they thought they were paying for over the years was in fact reduced.[163]

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159. *See generally* John G. Nevius and Steven J. Dolmanish, *The Pollution-Exclusion Conspiracy: A Newly Recognized Basis for Recovery,* 13 PACE ENVTL. L. REV. 1103 (1996).

160. *See id.* at 1111.

161. *See id.* at 1112.

162. *Id.* at 1114.

163. *See* Nevius, *supra* note 159.

The insurance industry drafters of the clause deny there was a conspiracy to reduce coverage.[164] However, the industry had the opportunity to inform the state insurance commissioners of the intended restriction on "occurrence" coverage.[165] They did not do this but instead reiterated that it "merely clarified 'existing coverage as defined and limited by the definition of the term 'occurrence.'"[166] In fact, the term "clarification" "was intentional and meant to inform the regulators that the exclusion was not a further restriction in coverage."[167] Therefore, courts, as in *Morton* and *Alabama Plating*,[168] agree that misrepresentations had occurred regardless of whether there was in fact a conspiracy. These courts have concluded that the industry should be estopped from denying coverage to the insured when the drafters of the clause falsely state the coverage of the pollution exclusion clause.[169]

IV. The Case: *Northville Industries Corporation v. National Union Fire Insurance Company of Pittsburgh, PA*[170]

A. Facts and Procedural History

Plaintiff, Northville Industries Corporation owns and operates two facilities on Long Island where it stores, distributes, and sells gasoline and other petroleum products in terminals.[171] The facilities are located in Holtsville and East Setauket, New York.[172] The terminals have storage tanks and "extensive networks of above-ground and underground pipelines and pumps"[173] which carry the gasoline and other liquid petroleum products.

164. *See* Nevius, *supra* note 159.
165. *See* Nevius, *supra* note 159, at 1117.
166. Nevius, *supra* note 159, at 1117.
167. Nevius, *supra* note 159, at 1118.
168. *See supra* Part III D.
169. *See* Nevius, *supra* note 159.
170. 636 N.Y.S.2d 359 (N.Y. App. Div. 1995), *aff'd* 679 N.E.2d 1044 (1997).
171. *See id.* at 361.
172. *See id.*
173. *Id.*

Defendants, National Union Fire Insurance Company of Pittsburgh, PA, along with a number of other defendant insurers[174] provided primary and excess CGL policies to Northville Industries. All of the policies contained a pollution exclusion clause and a "sudden and accidental" exception to the clause. The policies stated that coverage was barred:

> (f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but *this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*[175]

In October, 1986, in compliance with the New York State Department of Environmental Conservation (NYDEC) licensing requirements, plaintiff installed monitoring wells at its facilities.[176] While doing so they discovered that gasoline had leaked from the pipes beneath the Holtsville terminal.[177] Environmental engineers determined that approximately 750,000 gallons of gasoline had leaked through an improperly installed elbow and malfunctioning check valves in the underground piping.[178] The gasoline at the Holtsville facility had been seeping into the groundwater and neighboring properties possibly since the pipe's installation in 1976.[179]

Leakage and groundwater contamination on neighboring property was also discovered at the East Setauket site when, in November, 1987, plaintiff was complying with DEC licensing requirements.[180] At this site, "the source of the contami-

174. National Union Fire Insurance Co. and Hartford Accidental & Indemnity Company provided primary comprehensive general liability insurance policies. Continental Insurance Company and Pacific Insurance Company provided excess general liability policies. *See Northville*, 679 N.E.2d at 1046.

175. *Northville Indus. Co.*, 636 N.Y.S.2d at 361 (emphasis added).

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. *See Northville Indus. Co.*, 636 N.Y.S.2d at 361-62.

nation was traced to a small 'pinhole' leak which was caused by internal corrosion in a pipe."[181] The pipe was reportedly installed in 1968, and an estimated 1.2 million gallons of petroleum products and gasoline had been released through the small hole.[182] An official for Northville reported that at the East Setauket site "the loss 'occurred slowly enough and over a sufficiently long period of time to be undetectable by Northville's inventory control system.'"[183]

The neighboring property owners brought several suits against Northville Industries.[184] The defendant insurers refused to defend and/or indemnify Northville Industries, claiming coverage was barred pursuant to the pollution exclusion clause in each defendant's respective policy.[185] In response, Northville Industries commenced an action for declaratory judgment regarding the insurers' duties to defend and indemnify it.[186] The insurers cross-moved for summary judgment and to dismiss the complaint as it pertained to them.[187]

The Supreme Court of Suffolk County held that a question of fact existed as to whether the gasoline leakage occurred suddenly[188] and granted the insurers' cross motions, but only for claims concerning the East Setauket site.[189] The court found that the "sudden and accidental" exception did not apply to the East Setauket site because the leak was due to corrosion of the pipe.[190] Corrosion is a "gradual natural process occurring over a long period of time."[191]

The cross motions regarding the Holtsville contamination were denied.[192] Regarding the Holtsville site, the court

181. *Id.* at 362.
182. *See id.*
183. *Id.*
184. *See id.*
185. *See Northville Indus. Co.*, 636 N.Y.S.2d at 362.
186. *See id.*
187. *See id.*
188. *See id.*
189. *See id.*
190. *See Northville Indus. Co.*, 636 N.Y.S.2d at 362.
191. *Id.*
192. *See id.*

found a genuine issue of fact as to whether the leak was "sudden."[193] The supreme court granted Northville Industries' motion and the insurers, National Union and Hartford, were required to pay all costs for investigation and defense regarding the two site claims and to defend Northville.[194]

The appellate division modified and affirmed the Suffolk County Supreme Court's holding.[195] It held that there was no obligation to defend or indemnify Northville with respect to either site's contamination.[196] The court stated that Northville had the burden of proving that the "sudden and accidental" exclusion applied.[197] According to the appellate division, Northville failed to sustain its burden of raising a genuine issue as to the applicability of the "sudden and accidental" exception to the pollution exclusion clause.[198] Moreover, the court held that: 1) the definition of the term "sudden" included a temporal element,[199] and 2) Northville was precluded from raising the regulatory estoppel issue.[200] The New York Court of Appeals granted plaintiff leave to appeal and affirmed the appellate division's holding.[201]

B. The New York Court of Appeals Holding and Analysis

The court of appeals, in affirming the lower court's holding, also affirmed the lower court's decision that the term "sudden" in the "sudden and accidental" exception to the pollution exclusion clause has a temporal element.[202] Thus, the court rejected the insured's argument that the term "sudden" was ambiguous.[203]

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193. *See id.*
194. *See id.*
195. *See Northville Indus. Co.*, 636 N.Y.S.2d at 359.
196. *See id.* at 362.
197. *See id.* at 363.
198. *See id.* at 369.
199. *See id.* at 359.
200. *See Northville Indus. Co.* 636 N.Y.S.2d at 359.
201. *See* Northville Ind. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 679 N.E.2d 1044, 1046 (N.Y. 1997).
202. *See generally id.*
203. *See id.*

The court in its analysis relied upon two prior Court of Appeals cases involving the pollution exclusion clause and the "sudden and accidental" exception. Out of the two cases, the court mainly relied upon the 1989 case, *Technicon Electronics Corp. v. American Home Assuance. Co.*[204] In *Technicon*, the court of appeals held that the sudden and accidental discharge exception did not apply because the occurrence was not accidental.[205] The court defined "accidental" as having a separate meaning from "sudden" based upon the juxtaposition of the words.[206] Thus, both must be established in order to qualify for the exception to the pollution exclusion clause.[207] Furthermore, the court held that "accidental" excludes from coverage "liability based on all intentional discharges of waste whether consequential damages were intended or unintended."[208]

The *Technicon* court found that, since Technicon alleged a knowing discharge, there was no accidental discharge.[209] In *Northville*, unlike in *Technicon*, there were no allegations, nor was there any evidence that the discharges were not unintentional or unknown.[210] Therefore, the *Northville* court and both parties agreed that the discharges were accidental.[211] However, still at issue was whether the releases of the petroleum into the groundwater and neighboring property were "sudden."[212]

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204. 542 N.E.2d 1048 (N.Y. 1989). The other New York Court of Appeals case concerning the pollution exclusion clause and the sudden and accidental exception was Powers Chemco, Inc. v. Federal Ins. Co., 548 N.E.2d 1301 (N.Y. 1989) (determining that "accidental" has a separate meaning from "sudden").

205. *See Technicon*, 542 N.E.2d at 1049. The Technicon case involved intentional discharges of waste materials from Technicon Electronic Corp.'s plant into waterways over a course of many years. *See Technicon,* 533 N.Y.S.2d at 91. The pollution exclusion clause in the *Technicon* case was similar to the one in *Northville Indus. Co.* case. *Compare generally Technicon,* 533 N.Y.S.2d at 94 *and Northville,* 636 N.Y.S.2d at 361.

206. *See Technicon,* 542 N.E.2d at 1050.

207. *See id.*

208. *Id.* at 1050.

209. *See id.* at 1050.

210. *See Northville Indus. Co.*, 679 N.E.2d at 1047.

211. *See id.*

212. *See id.*

The *Northville* court rejected the plaintiff's arguments that the term "sudden is ambiguous, which under familiar insurance law doctrine requires resolution of this issue against the insurers and in favor of plaintiff insured, construing the sudden and accidental discharge exception to apply."[213] Northville, relying on the Webster's 9th New Collegiate Dictionary,[214] argued that the one common definition of sudden is "happening . . . unexpectedly."[215] Northville did concede "that the meaning of sudden may also have a temporal element manifesting abruptness . . . [or] brought about in a short time,"[216] but continued to argue either that the definition of sudden as "unexpected" governed or that the word was ambiguous.[217] However, this theory was rejected because the court, adhering to *Technicon,* held that the two words have separate meanings and both terms must be met before the exception to the pollution exclusion clause may be triggered.[218]

Not only did the court of appeals reject Northville's argument regarding the definition of "sudden" and the ambiguity of the clause, but it also set forth the definition and interpretation of "sudden."[219] The court held that the word was unambiguous, and that "sudden" had a temporal aspect causing it to mean abruptly, precipitantly, or brought about in a short amount of time.[220] The court's definition avoided the redundancy brought about by accidental meaning "unexpected."[221]

In determining whether the temporal aspect of "sudden" was met for the purposes of nullifying the pollution exclusion

213. *Id.*
214. *See id.*
215. *See Northville Indus. Co.* 679 N.E.2d at 1047.
216. *Id.*
217. *See id.*
218. *See id.*
219. *See generally Northville Indus. Co.,* 679 N.E.2d 1044.
220. *See id.* at 1048. The Northville court also noted the observance of other courts that: "[w]e cannot reasonably call 'sudden' a process that occurs slowly and incrementally over a relatively long time, no matter how unexpected or unintended the process . . . nor wrench the words 'sudden and accidental' to mean 'gradual and accidental,' which must be done in order to provide coverage in this case." *Northville Indus. Co.*, 679 N.E.2d at 1048 (citations omitted).
221. *See Northville Indus. Co.,* 679 N.E.2d at 1048.

clause, the focus was "on the initial release of the pollutant, not on the length of time the discharge remains undiscovered, nor the length of time that damage to the environment continued as a result of the discharge, nor on the timespan of the eventual dispersal of the discharged pollutant in the environment."[222] Yet, the court also held that more was required than merely showing that the release of pollutants began abruptly.[223] The temporal aspect of a "sudden discharge [would] only be met by the discharge, abruptly or within a short timespan, of a significant quantity of the pollutant sufficient to have some potentially damaging environmental effect."[224] When a discharge is unintended and unexpected, the "sudden and accidental" exception is satisfied.[225]

In conclusion, once the insurer set forth reasons for denying coverage due to the pollution exclusion clause, the insured then had the burden of showing that the discharge was "sudden and accidental" so as to nullify the clause.[226] Northville failed to sustain its burden of showing that the exception to the pollution exclusion clause applied.[227] Furthermore, the discharges occurred continuously over a period of many years, not abruptly.[228] This was confirmed by affidavits presented by plaintiff stating that the source of the East Setauket contamination was the corrosion-based "pinhole" and that the Holtsville release of petroleum was caused by a failed underground elbow joint installed in 1976.[229] Therefore, the court found that the contamination of the two sites

222. *Northville Indus. Co.*, 679 N.E.2d at 1048. (citing Hartford Acc. & Indem. Co. v. U.S. Fid. & Guar. Co., 962 F.2d 1484 (10th Cir. 1992); A. Johnson & Co. v. Aetna Casualty & Surety Co., 933 F.2d 66,72 (1st Cir. 1991); Lumbermens Mutual Casualty Co. v. Belleville Indus., 555 N.E.2d 568, 572 (Mass. 1990)).

223. *See Northville Indus. Co.*, 679 N.E.2d at 1048.

224. *Id.*

225. *See id.*

226. *See id.* The court reiterated other courts' views that this shift "provides the insured with an incentive to strive for early detection that it is releasing pollutants into the environment." *Id.* at 1049 (citing Borg-Warner Corp. v. Insurance Co., 174 A.D.2d 24 (N.Y. App. Div. 1992)).

227. *See Northville Indus. Co.*, 679 N.E.2d at 1049.

228. *See id.*

229. *See id.*

did not occur suddenly.[230] Thus, the "sudden and accidental" exception to the pollution exclusion clause did not apply.[231] The court affirmed the appellate court's decision that insurers were not obligated to defend or indemnify Northville Industries Corporation.[232]

V. Critical Analysis

A. Inadequacies of the Holding

The New York Court of Appeals was correct in determining that Northville did not meet its burden of showing that the discharge was "sudden and accidental" so as to nullify the pollution exclusion clause in its CGL insurance policy. In this case of first impression, concerning the definition and coverage of the term "sudden" in the pollution exclusion, the court did not fully explain its holding and thus, the definition of "sudden" has not been settled.

In 1997, the highest state courts in five states held that the pollution exclusion clause was unambiguous and that "sudden" had a temporal element meaning abrupt.[233] During 1997, "no state high courts have reached a different conclusion."[234] This seems to indicate that New York simply followed the majority trend and did not attempt to fully analyze the meaning of "sudden and accidental."

This Note argues that although the term "sudden" should have a temporal aspect, meaning "abrupt," to avoid redundancy and surplusage in the clause, the *Northville* case does not sufficiently analyze the dispute to have a meaningful effect on future litigation. Unlike a number of other state court decisions on this issue, the New York court did not review the case in depth. In *Iowa Petroleum, Borden Inc., Hybud Equipment Corp., New Castle County,* and most especially, the *Morton* case, the courts provided a full analysis regarding the

230. *See id.*
231. *See id.*
232. *See id.*
233. *See Iowa: Pollution Exclusion Clause Unambigous; 'Sudden' Means Abrupt, High Court Finds*, State Environment Daily (BNA) (Sept. 22, 1997).
234. *Id.*

clear meaning of the word "sudden." The courts also addressed the redundancy issue in the term "sudden and accidental" in their holdings. The Missouri court in *Charter Oil Co. v. American Employers' Ins.* at least utilized state insurance and contract law to arrive at the holding of the case.[235] The *Northville* court did not engage in similar analysis and therefore did not provide guidance for subsequent litigation. Instead, it addressed this highly litigated issue briefly, as if it did not want to go through the trouble of a full analysis. A full analysis would have given guidance, and saved time and money in future litigation. Understanding that the case was one of first impression, as well as a case involving an unresolved dispute among the states, the court should have set a clearer standard in determining the definition of the word "sudden."

Additionally, the lack of guidance provided by the court "leaves open the possibility that a different case could result in a substantially different conclusion."[236] Thus the holding goes against the very purpose of the clause: limiting environmental liability. First, the *Northville* case leaves open the possibility of a different conclusion because the New York Court of Appeals provides little guidance as to the degree of "suddenness" that the clause requires.[237] The meaning of sudden has been found, in New York and in the majority of the states, to mean "abrupt," "quick," or "occurring over a short period of time." Yet, what is the necessary time period for an event to be deemed "sudden?"

The *Northville* court does give some guidance in its holding by stating that the focus would be on:

> [T]he initial release of the pollutant, not on the length of time the discharge remains undiscovered, nor the length of time that damage to the environment continued as a result

235. *See generally* Charter Oil Co. v. American Employers' Ins. Co., 69 F.3d 1160 (D.D.C. 1995).

236. Berg, *supra* note 11, at 9.

237. *See id.*

> of the discharge, nor on the timespan of the eventual dispersal of the discharged pollutant in the environment.[238]

In the *Northville* case, however, it seemed easy for the court to find that the initial release of the discharge of petroleum was not "sudden" and that Northville failed in its burden of proof because the initial releases at the two sites came from the corrosion of one pipe and the "pinhole" size hole in another pipe. Furthermore, although the court held that time was not to be the focus of the analysis for finding whether the discharge was "sudden." The fact that the discharges occurred undetected over a period of ten years was a factor used to imply that the leakage was not sudden. This vague analysis will result in much future litigation to determine what length of time constitutes a "sudden" discharge.

The court also focused on the corrosion and the "pinhole" size leak which gave every indication that the discharge was slow and gradual at the initial release as required by the *Northville* holding.[239] Yet, by this holding it seems that the case would either be won or lost depending upon the size of the hole or the reason for the discharge. The initial release could occur in a variety of ways and thus courts will have to determine each specific according to the facts. Courts would just compare the measurements of the hole sizes or the types of corrosion. The *Northville* case becomes useless in providing a precedent for future litigation and just becomes one case amidst the many litigating this issue.

Secondly, this case has been embraced by the insurance industry as creating an end to future responsibility of insurance companies in New York when dispersals and discharges are discovered many years after their initial release.[240] However, there will still be significant litigation in lower courts to determine what the court meant when it stated that "a discharge could be considered sudden if it occurred for a 'short timespan' and involved a 'significant quantity of pollutants

238. *Northville Indus. Co.*, 679 N.E.2d at 1048. *See also supra* Part IV.B.

239. *See generally Northville Indus. Co.*, 679 N.E.2d at 1048.

240. *See* Alan J. Pierce, *1996 - 97 Survey of New York Law*, 48 SYRACUSE L. REV. 723, 728 (1998).

sufficient to have potentially damaging environmental effect.'"[241] Thus, the purpose of the clause, to limit environmental litigation, has not been achieved and has only created the potential for further law suits.

The *Northville* case also leaves open the possibility of a different conclusion regarding the theory of regulatory estoppel, as seen in the *Morton* case. In *Morton,* New Jersey's highest court found that regardless of "sudden" having a temporal aspect meaning "abrupt," the court's focus should be based upon a regulatory estoppel theory. New York has not decided any case thus far on the regulatory estoppel theory, but it has defined what "sudden" means. The Court of Appeals in *Northville* dismissed the contentions of *amicus curiae*[242] that the insurers should be "estopped from denying coverage because the insurance industry allegedly previously made false and misleading representations to regulatory officials in New York and elsewhere regarding the true meaning of the phrase "sudden and accidental."[243] The court stated that Northville never advanced this theory at trial when it had ample time to do so. Yet, the court does not give any indication as to whether it would have entertained, reviewed, or analyzed such a contention if it was properly brought before the court. Although it would have been dicta, the court should have taken this opportunity to clarify its stance on the issue.

The *amicus curiae* briefs on behalf of the insurers stated that the regulatory history of New York's approval of the pollution exclusion clause indicates that there were no misrepresentations regarding whether there would be coverage for gradual discharges.[244] The *amicus curiae* briefs stated that Governor Rockefeller's memorandum and the legislative hearings concerning the enactment of the bill mandating the addition of the pollution exclusion clause supported the holding that gradual dispersals were to be excluded. However,

241. *Id.* (citing *Northville Indus. Co.*, 679 N.E.2d at 1049).

242. *See* IELA at 12.

243. *Insurance Law 'Sudden and Accidental' Discharge Clause*, 215 N.Y. L.J. 4 (1996).

244. *See supra* Part II.B.

the *amicus curiae* briefs and the legislative hearings are meaningless since they were not adopted by the court for use as precedent in future litigation. Furthermore, various cases in other jurisdictions have held that misrepresentations occurred,[245] but the *Northville* court did not recognize this. Therefore, since the term "sudden" was being defined by the court for the first time, after it had defined "accidental" in prior cases,[246] the court had the obligation to provide insight into this issue to save time and money in future litigation when the regulatory estoppel theory may be properly presented to the court.

Had the court taken a stand on the issue of regulatory estoppel, the New York position on the pollution exclusion clause would have been clear. The court took the stand that "sudden" had a temporal aspect meaning "abrupt." A number of other courts have found that "sudden" meant "unexpected." Under this regulatory estoppel theory, it does not matter which states upheld which definition until the regulatory intent is determined. In New York, it seems to be easier than in other states because the pollution exclusion addition was mandated by law. Through legislative hearing records of New York, one can find the legislative intent regarding the meaning and interpretation of the clause. This court, like the court in *Technicon Electronics,* should have analyzed this intent in determining the meaning of the term "sudden" for the first time in the New York Court of Appeals.

B. Sudden Proposal

Should another case come before the New York Court of Appeals to determine the pollution exclusion clause, New York should follow the lead of its sister state, New Jersey, and a number of other states, and determine that the meaning of the terms "sudden" and "accidental" are not alone sufficient, but should look to the representations presented to the

245. *See supra Morton* Part III.D.

246. *See, e.g., Ogden Corporation v. Travelers Indem. Co.,* 924 F.2d 39, 42 (2d Cir. 1991); *Nallan v. Union Labor Life Ins. Co.,* 366 N.E.2d 874, 875 (N.Y. 1977); *Arthur A. Johnson Co. v. Indem. Ins. Co. of North America,* 164 N.E.2d 704 (N.Y. 1959).

New York Commissioner and determine whether the industry should be estopped from reducing or denying coverage to the insured. Only then can the question of the ambiguity and the split of authority concerning the clause be resolved.

By determining the representations made by the insurance industry and the legislative intent when the 1982 Bill was mandated, then the coverage allowed to unintentional polluters can be defined. Coverage for intentional polluters has been and always will be denied. Therefore, the basic concepts of preventing pollution dispersals and preventing further litigation are still the primary purpose of the clause.

Lastly, by taking on the regulatory estoppel theory, the question of what is "sudden" in the pollution exclusion clause need not be litigated further.

VI. Conclusion

The Court of Appeals in *Northville* correctly determined that Northville failed to satisfy its burden of showing that the discharge was "sudden and accidental" so as to nullify the pollution exclusion clause in its CGL insurance policy. However, in this case of first impression determining the definition and coverage of the term "sudden" in the pollution exclusion clause, the court's guidance was insufficient as it did not fully explain its holding. Based upon the facts of this case alone, it was easy for the court to decide that the discharge was not sudden. Furthermore, the regulatory estoppel theory should have been discussed by this court to limit further environmental litigation on this issue. Lastly, future litigation should determine coverage by adopting the estoppel theory.