Modern Environmental Insurance Law: "Sudden and Accidental"

Seth A. Ribner
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I. INTRODUCTION

Although the state of the environment has been a pressing national concern for many years, we are just now making a start toward actually cleaning up the hazardous waste mess. Billions of dollars in federal funds have been expended under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), which established Superfund for the cleanup of toxic waste sites. As of September 1988, however, only thirty-four of the 1,175 toxic waste sites then on the proposed or final National Priorities List ("NPL") had been cleaned. On average, over eight years pass between the time the Environmental Protection Agency ("EPA") first becomes aware of a hazardous waste site and the time cleanup actually starts.

The rationale underlying CERCLA is that the polluter should pay for the costs of cleanup. It provides two mechanisms to ac-

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3 The NPL is a prioritized list of sites of known or threatened release of hazardous substances established by the EPA in conjunction with the states. See 42 U.S.C. § 9605(a)(8)(B) (1982 & Supp. V 1987); 40 C.F.R. § 300.66 (1989). The NPL serves as a basis to guide the allocation of Superfund resources. See id. § 300.66(c)(2) (1989).

4 Acton, Understanding Superfund, A Progress Report, Inst. Civ. Just. 48-49 (1989). This study performed by the Rand Corporation places total outlays by the EPA under Superfund through fiscal year 1988 at nearly $2.6 billion. Id. at 30-31. Once a site has been remediated it is deleted from the NPL. See 40 C.F.R. § 300.66(c)(7) (1989). Only 26 sites had been dropped from the NPL through March 1989. Acton, supra, at 61.

5 Acton, supra note 4, at 16-17.

6 See Brett, Insuring Against the Innovative Liabilities and Remedies Created by Superfund, 6 J. Envr't. L. 1, 10 (1981); Acton, supra note 4, at 4, 9. In this vein, Congress initially financed Superfund from a tax on crude oil, petroleum products and chemicals, 26 U.S.C. §§ 4611, 4661 (1982); 42 U.S.C. § 9631 (1982), reasoning that the oil and chemical
complish this goal. The government may perform cleanup work itself and then recover its Superfund outlays from those private parties responsible for the pollution. Under this procedure Superfund serves as a revolving fund that is replenished through EPA enforcement proceedings. The statute also authorizes the EPA to enter settlements with responsible parties in advance of cleanup, permitting the polluters to undertake site study and cleanup work under EPA supervision. This latter authority is crucial because now that more sites are advancing to the actual remediation stage, the drain upon Superfund will compel the EPA to turn to private parties to fund cleanup work in the first instance.

American industry and its insurers have asked the courts to determine whether there is insurance coverage for the centibillion dollar liability imposed upon private parties by CERCLA and similar state statutory schemes. To date, the judiciary has been unable to provide meaningful guidance. A decade of lawsuits between insurers and insureds over environmental claims has produced a body of irreconcilable precedents that vary from jurisdiction to jurisdiction, court to court, and judge to judge. A survey of recent decisions reveals a judiciary so divided that it is incapable of producing any law in this area—only an ever increasing mass of cases.

II. THE CONFLICT IN THE COURTS

To date, three issues have predominated in environmental coverage litigation:

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industries provided the inputs to the majority of the substances that contribute hazardous waste. See Acton, supra note 4, at 10. However, Congress broadened the revenue base in SARA when it authorized a substantial increase in the Superfund appropriation. Under SARA, Congress appropriated up to $8.5 billion to the fund for the five-year period which began in October 1986. 42 U.S.C. 9611(a) (Supp. V 1987).


8 See Brett, supra note 6, at 10; Acton, supra note 4, at 8.


10 The Rand study concluded that: the Superfund program is entering a more expensive phase, with planned remedial activities representing a large expected outlay. If this pattern continues as more sites mature to the remedial stage, the EPA will face strong pressure to achieve sharply increased private takeover and financing if it is to meet these obligations within currently forecasted authorization levels.

(i) The scope of the clause in the standard comprehensive general liability ("CGL") policy excluding coverage for pollution unless the discharge of pollutants is "sudden and accidental";

(ii) Whether the costs of environmental cleanup are "damages" within the meaning of the CGL policy;


(iii) Whether letters to potentially responsible persons (PRP's) under federal and state remedial programs constitute "suits" that obligate an insurer to defend under the terms of the CGL insuring agreement.13

Liability insurance for most commercial enterprises is written under a standard form of coverage common throughout the insurance industry, with endorsements to meet the specialized needs of

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Recent cases holding that liability insurers have a duty to defend recipients of PRP letters include: Avondale, 887 F.2d at 1205; Higgins, slip op. at 7; American Motorists, slip op. at 14 n.2; Specialty Coatings, 180 Ill. App. 3d at 388-89, 535 N.E.2d at 1078-79; Polkow, 180 Mich. App. at 654-57, 447 N.W.2d at 855-56; C.D. Spangler, slip op. at 28-31.
The rationale for standardization is that it reduces the cost of insurance by permitting insurers to pool their loss experience, promotes certainty for the insurer and insured and supplies the coverage most businesses require. Standardization also simplifies the purchase of supplementary insurance not included in the customary package but specifically designed to fill gaps in the standard coverage. From their inception in the 1930s, standard liability policy forms and endorsements have been prepared by insurance industry associations. The current rating organization and policy drafting body for the insurance industry is the Insurance Services Office ("ISO").

Although insurance contract interpretation is first and foremost a question of state contract law, the basic principles for interpreting insurance contracts do not vary widely from state to state. Accordingly, since the language of the policy provisions in issue is substantially the same, the courts should reach similar conclusions. But they do not. Moreover, since only six state courts of last resort have touched upon any of the issues actively litigated today, fed-


15 See R. Keeton & A. Widiss, Insurance Law § 2.8(c) (1988); Obrist, supra note 14, at 5.

16 See Obrist, supra note 14, at 5.


eral judges, obligated to decide state law questions as would a state’s highest court, have the license, if they choose, to decide cases virtually unrestricted by precedent.

Adding to the uncertainty is the inconsistent application of choice of law rules in the insurance coverage area. Traditionally, in the absence of an effective choice of law by the parties to a contract, the law of the place of contracting governs. However, as the courts increasingly resort to interest analysis, the subjective nature of the inquiry and the variety of state interests factored into the equation make conflicts of law issues a wild card. At least one court has concluded that a recent New Jersey decision is a bid to


22 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 188 (1979). Comment f to Section 193 of the Restatement Second suggests that courts should treat a multiple risk policy that insures against risks located in several states as separate policies, with the rights and obligations of the parties under the contract determined in accordance with the local law of the principal location of each risk. Id. § 193 comment F.

23 Westinghouse Elec. Corp. v. Liberty Mut. Ins. Co., 233 N.J. Super. 463, 559 A.2d 435 (App. Div. 1989). Westinghouse was an “omnibus” suit against 144 liability insurers in which Westinghouse sought a declaration of coverage for its hazardous waste exposure nationwide. The trial court dismissed all claims pertaining to liability arising outside New Jersey on forum non conveniens grounds. In reversing, the Appellate Division commented:

There can be no doubt that the economic prosperity we enjoy in this State is in large measure attributable to major national corporations which, like Westinghouse, are incorporated elsewhere but engage in substantial business activity here, employ our residents, and contribute to our tax base. There is no question that
attract industry to the state by extending the benefit of local pro-
insured environmental coverage law to national corporations that
do substantial business in New Jersey.24

While more consensus among the state judiciaries would be a
welcome development, the system can ultimately achieve stability
even if the substantive law differs among the states, provided that
the judges apply choice of law principles in a predictable manner.
A far greater concern is that the sharp divisions within the judici-
ary on environmental coverage matters are tearing the institutional
fabric that normally constrains the courts. Judges have demon-
strated a willingness to break conventions of precedent and comity
and the federal bench has increasingly declined to defer to state
tribunals on issues of state law. As a result, the law of a given juris-
diction is always subject to question and those judges who believe
they know better than the last court that decided an issue have set
the tone for the debate that rages in the reporters.

they are entitled, as are all our citizens, to as full an access to our court system as
is consistent with fundamental principles of acquiring and exercising jurisdiction.
_Id._ at 468, 559 A.2d at 437-38. Although choice of law issues were not reached at the trial
level and not briefed by the parties on appeal, the court continued:

While not intending to deprecate the legitimacy of local concern for and control
over its own environmental contamination, we nevertheless cannot conceive that
the operative contract language in a single set of insurance policies issued by a
group of insurers for the purpose of providing integrated comprehensive coverage
for nationwide risks could mean something different in every state of the union.
_Id._ at 476, 559 A.2d at 441-42.

1989). In declining to apply New Jersey law to a coverage action concerning Maryland haz-
ardous waste sites, the court commented:

Acknowledging that the parties had not even briefed the conflicts question in
_Westinghouse_, the Appellate Division reached out to address it in dictum. It
might be inferred that it was motivated to do so, at least in part, by a perception
of an extraneous self-interest: inducing large corporations to do business in the
state by the creation of a body of law favorable to insureds....

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

_Id._ at 1257-58; cf. Cary, _Federalism and Corporate Law: Reflections Upon Delaware_, 83
_Yale L.J._ 663, 670 (1974) (criticizing Delaware whose "courts have undertaken to carry out
the 'public policy' of the state and create a 'favorable climate' for management").
III. THE POLLUTION EXCLUSION

A. THE "OCCURRENCE" DEFINITION AND THE POLLUTION EXCLUSION

1. The development of the "occurrence" policy

Until the mid-1960s, standard form liability policies set the outer parameters of the insurer's risk by limiting coverage to bodily injury or property damage "caused by accident." As conceived, "accident"-based coverage was limited to discrete, sudden events fixed in time and place. The policies, however, did not define the term "accident" and judicial construction broadened the "accident" concept to cover injuries or damage resulting from gradual processes.

In 1966, the insurance industry revised the terms of the standard-form CGL policy. The principal innovation of the new policy was to change the event triggering the insurer's contractual obligations from an "accident" to an "occurrence." Although large commercial insureds had been negotiating for and receiving "occurrence"-based coverage since the 1940's, "occurrence" policies now became the industry standard.

The new CGL policy eliminated suddenness as a requirement when injury occurred, making coverage dependent solely upon the degree of foreseeability of the resulting harm. The 1966 revision defined the term "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended..."

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28 See Obrist, supra note 14; B. OSTRAGER & T. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES, § 7.03[a] (2d ed. 1989).

29 See Obrist, supra note 14, at 6-7; Rosow & Liederman, supra note 25, at 1149.

30 See Bean, supra note 25, at 552; Snow, supra note 26, at 37; Visscher, The Use of "Occurrence" for "Accident" as an Extension of Coverage, 1944 Ins. L.J. 587.

31 See Obrist, supra note 14, at 6.
from the standpoint of the insured. While the new policy expressly afforded coverage for "exposure to conditions," the change in wording only confirmed the then prevailing judicial interpretation of the "caused by accident" language.

2. The origin of provisions excluding coverage for pollution

Despite the shift to "occurrence"-based coverage, the new policy did not change the basic underwriting doctrine that the results of ordinary business operations are costs not covered by insurance. The "occurrence" language reflected this limitation on coverage by requiring that the "exposure to conditions" be "neither expected nor intended from the standpoint of the insured." However, when presented with the potentially catastrophic losses posed by pollution hazards in the late 1960's, the insurance industry sought to reinforce its original intent with a bright-line standard for excluding industrial pollution.

Although some companies developed their own variants, the


33 See Keeton & Widiss, supra note 15 at § 5.3(c); B. Ostrager & T. Newman, supra note 28, at § 7.02; Glad, Heidenreich & Vobornik, Fortuity: A Fundament of Coverage, 11 Ins. Lit. Rptr. 402 (1989); Brett, supra note 6, at 54-55 (1986); Bean, supra note 25, at 556.

34 See B. Ostrager & T. Newman, supra note 28, at § 7.03[a]; Brett, supra note 6, at 55-59.


37 See B. Ostrager & T. Newman, supra note 28, at § 8.02[b]. A significant variant is
salient feature of this first generation of pollution exclusions was their focus upon the discharge of pollutants rather than the resulting harm. The standard pollution exclusion developed by the Insurance Rating Board, Mutual Insurance Rating Bureau and Multi-Line Insurance Rating Bureau provided:

It is agreed that the 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.  

The exclusion excepted from its terms “sudden and accidental” discharges of pollutants because the drafters viewed the harm resulting from such events as neither an ordinary nor expected part of an insured’s business and thus properly covered by the policy.

B. The Pollution Exclusion in the Courts

At first, the courts were not kind to the pollution exclusion, effectively reading the exclusion out of the standard policy by applying the doctrine that ambiguous language in insurance contracts should be construed strictly against the insurer and in favor of coverage. Thus, courts initially held that the term “accident” was

the pollution exclusion used by the Travelers Insurance Company which provides that no coverage is afforded for:

bodily injury or property damage arising out of any emission, discharge, seepage, release or escape of any liquid, solid, gaseous or thermal waste or pollutant if such emission, discharge, seepage, release or escape is either expected or intended from the standpoint of any insured or any person or organization for whose acts or omissions any insured is liable, but this exclusion does not apply to the emission, discharge, seepage, release or escape of petroleum or any petroleum derivative into any body of water.

Id. For applications of the Travelers pollution exclusion, see Travelers Ins. Co. v. Waltham Indus. Laboratories, 883 F.2d 1092 (1st Cir. 1989); Travelers Indem. Co. v. Dingwell, 414 A.2d 220 (Me. 1980).

Id.; see Cox, supra note 36; Ashcraft, supra note 36, at 53-55; Abraham, Environmental Liability and the Limits of Insurance, 88 Colum. L. Rev. 942, 952-53 (1988).

See, e.g., Allstate Ins. Co. v. Klock Oil Co., 73 App. Div. 2d 485, 488, 425 N.Y.S.2d 603, 605 (4th Dep't 1980) (“The term 'sudden and accidental' must be construed in its relevant context. The relevant context to be considered is the fact that it is a term employed by an insurer in the contract and should be given the construction most favorable to the insured”). Recent commentary has questioned the applicability of the contra proferentem
concerned with whether the insured intended the damage as opposed to the discharge of pollutants and that the term “sudden” did not connote brevity but in the context of the exclusion meant only “unexpected.” Under this analysis, the pollution exclusion lost its bright-line quality and its fate became linked to the judicial construction of the subjective intent-based “occurrence” language. One court finding the language ambiguous stated that:

When viewed in light of the case law cited, the clause can be interpreted as simply a restatement of the definition of “occurrence”—that is, that the policy will cover claims where the injury was “neither expected nor intended”. It is a reaffirmation of the principle that coverage will not be provided for intended results of intentional acts but will be provided for the unintended results

doctrine in disputes between insurers and sophisticated insureds. See supra note 19; B. Ostrager & T. Newman, supra note 28, at § 1.03[b]; Note, Insurance As Contract: The Argument for Abandoning the Ambiguity Doctrine, 88 Colum. L. Rev. 1821 (1988); see also First State Underwriters Agency v. Travelers Ins. Co., 803 F.2d 1308, 1314 n.5 (3d Cir. 1986) (principle of strict construction should not apply where sophisticated parties negotiate and execute insurance contract even when they opt to utilize form paper); Schering Corp. v. Home Ins. Co., 712 F.2d 4, 10 n.2 (2d Cir. 1983) (questioning applicability of contra proferentem doctrine in situation involving large, sophisticated, counselled insured).
of an intentional act.\textsuperscript{42}

The precedential effect of the early decisions was substantial.\textsuperscript{43} By the mid-1980's, however, the courts began to approach the exclusion differently, perhaps because the cases did not involve mudslides, leaking oil tanks, crop sprayers and garages but instead concerned the industrial pollution at which the exclusion was clearly directed. The cases that enforced the pollution exclusion in the industrial context created a competing body of case law.\textsuperscript{44}

For example, in \textit{Techalloy Co. v. Reliance Insurance Co.},\textsuperscript{45} the Pennsylvania Superior Court found that the insurer had no duty to defend or indemnify in an action alleging twenty-five years of contamination on a regular basis from trichlorethylene used in the insured's steel cutting and stripping business. Similarly, in \textit{Great Lakes Container Corp. v. National Union Fire Insurance Co.},\textsuperscript{46} an EPA complaint alleged that soil and water contamination had taken place as a concomitant of the insured's barrel reconditioning business. The United States Court of Appeals for the First Circuit, applying New Hampshire law, found that the government's suit did not allege an "occurrence," nor make an allegation of "sudden and accidental" discharge.

In the last several years most courts have adopted the insurance industry's position both with respect to the exclusion's focus on discharges rather than the resulting harm and with respect to the meaning of the term "sudden."\textsuperscript{47} One decision that tipped the scale in this regard was \textit{Claussen v. Aetna Casualty & Surety Co.}\textsuperscript{48} That case concerned an insurer's obligations to the owner of a

\textsuperscript{42} \textit{Jackson Township Mun. Util. Auth.}, 186 N.J. Super. at 164, 451 A.2d at 994.

\textsuperscript{43} See \textit{Shapiro}, 19 Mass. App. at 653, 477 N.E.2d at 149-50 (citing cases); \textit{Buckeye Union Ins. Co.}, 17 Ohio App. 3d at 138, 477 N.E.2d at 1235 (same); \textit{United Pac. Ins. Co.} 34 Wash. App. at 715, 664 P.2d at 1265 (same).


\textsuperscript{46} 727 F.2d 30 (1st Cir. 1984).

\textsuperscript{47} \textit{See supra note 11.}

landfill in connection with an EPA investigation and cleanup. In a
detailed analysis, the United States District Court for the South-
ern District of Georgia found that the pollution exclusion barred
coverage for cleanup costs imposed by the EPA. The court as-
sumed for purposes of its analysis that the insured was unaware of
both the continuous dumping of hazardous wastes at the site and
the potential that the contaminants would leach into the surround-
ing soil and groundwater. The court nevertheless found that the
dumping of waste for a period of years and/or the leaching into the
soil could not be considered "sudden." In a widely quoted pas-

dage the court stated:

"[I]n drafting the pollution exclusion clause the insurance industry

clearly intended to limit coverage for pollution-related damages
to situations where such damages are caused by sudden pollution
incidents involving equipment malfunctions, explosions and the
like. The word sudden was intended by the industry to have its
usual temporal meaning, ... and a reasonable insured with any
degree of common sense would assume the word to have that
usual meaning. ... Only in the minds of hypercreative lawyers
could the word "sudden" be stripped of its essential temporal
attributes."

On appeal, the United States Court of Appeals for the Elev-
enth Circuit certified to the Supreme Court of Georgia the ques-
tion of whether the pollution exclusion precludes coverage "for the
environmental contamination caused by the discharge of pollutants
at the site over an extended period of time." In a four-to-three
decision, a majority of the Georgia Supreme Court found the term
"sudden" ambiguous, construed it against the insurer and ruled
that in the context of the pollution exclusion the term means
"'unexpected and unintended.'" Whether the Georgia Supreme
Court's decision marks a reversal of the trend in the battle over
the pollution exclusion or just a sharp split in one state's supreme
court is unclear.

\[\text{id. at 1573-74.}\]
\[\text{id. at 1573.}\]
\[\text{id. at 1573.}\]
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\[\text{The Claussen decision does not return full because the court did recognize that the pollution exclusion is incongruent with the occurrence definition. Id. at 338, 380 S.E.2d at 688-89. In the words of the court, the exclusion:}\]
IV. THE INSURING AGREEMENT AND COVERAGE FOR CLEANUP COSTS

The provision in a liability insurance policy that sets forth an insurer's twin duties to defend and indemnify the insured is called the insuring agreement. The CGL insuring agreement at issue in most litigated cases provides:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury or . . . property damage to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage . . . .

The duty of the insurer to defend under this clause is said to be "separate from" and "broader than" the duty to indemnify. The distinction arises because an insurer must defend its insured whenever the facts alleged in the underlying complaint fall within the scope of policy coverage. By contrast, the obligation to indemnify is based upon facts actually established at trial.1

A footnote to the law of liability insurance had been that the insuring agreement's grant of coverage for "damages" did not require the insurer to reimburse the insured for the costs of complying with a mandatory injunction or restitutionary claims because

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

Id. (emphasis in original). However, in United States Fidelity & Guar. Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 555 N.E.2d 1071, appeal denied, 127 Ill. 2d 643, 545 N.E.2d 133 (1989), the court found the pollution exclusion ambiguous and held that the wording of the clause demonstrated "that any unintentional or unexpected contamination would still be covered as an 'occurrence' under the policy." Id. at 388, 555 N.E.2d at 1077.


neither injunctive relief nor restitution constituted “damages.”

This issue did not take on great significance because private suits for injunctive relief or restitution typically also alleged that the defendant’s conduct diminished the value of the plaintiff’s property. In such situations, where one or more of the underlying claims against the insured alleged damages in this traditional sense, a liability insurer still had to defend the entire action. However, governmental proceedings to compel a private party to clean a hazardous waste site or to obtain reimbursement of cleanup costs do not seek “damages” in the traditional sense. Accordingly, the question of whether injunctive or equitable monetary relief constitutes “damages” within the meaning of the CGL policy has generated a recent explosion of litigation.

The seminal cases concerning an insurer’s obligation to reimburse the insured for the costs of complying with an injunction arose in the 1950’s. In Desrochers v. New York Casualty Co., the

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59 See, e.g., Desrochers v. New York Casualty Co., 99 N.H. 129, 132, 106 A.2d 196, 198-99 (1954) (insurer had duty to defend entire suit and pay damages awarded in equity action but did not have obligation to comply with mandatory injunction or to pay insured’s expenses in complying with injunction); Doyle v. Allstate Ins. Co., 1 N.Y.2d 439, 441-44, 136 N.E.2d 484, 485-87, 154 N.Y.S.2d 10, 12-14 (1956) (insurer had duty to defend suit for injunction that also alleged diminished value of property because court could have awarded money damages).

60 See Doyle, 1 N.Y.2d at 443-44, 136 N.E.2d at 486-87, 154 N.Y.S.2d at 13-18; B. Osstrager & T. Newmam, supra note 28, § 5.02[a], at 108.


62 See supra note 12.

insureds obstructed a culvert while regrading their property which had the effect of flooding the property of the adjoining landowners. The insurer defended the insureds in the underlying action and paid the damages awarded against them but refused to cover the cost of complying with the court order to remove the obstruction. In refusing the insured's claim for losses due to the injunction, the New Hampshire Supreme Court reasoned that:

The cost of compliance with the mandatory injunction is not reasonably to be regarded as a sum payable "as damages." Damages are recompense for injuries sustained .... They are remedial rather than preventive, and in the usual sense are pecuniary in nature .... The expense of restoring the plaintiff's property to its former state will not remedy the injury previously done, nor will it be paid to the injured parties.

Similarly, in Aetna Casualty & Surety Co. v. Hanna, the United States Court of Appeals for the Fifth Circuit, applying Florida law, held that the insurer had no duty to defend a suit for a mandatory injunction to compel the insureds to remove rocks and fill that encroached upon their neighbor's property and to build a bulkhead to prevent future encroachments. The court held that the costs of repairs and preventative measures were not part of the insurer's obligation to pay "for damages because of injury to or destruction of property."

The leading cases adopting the insurance industry's position in the environmental context have found no coverage based upon a close reading of the insuring agreement and based upon the early precedents holding that liability insurance does not cover the costs of complying with an injunction or the payment of restitutionary awards. In Maryland Casualty Co. v. Armco, Inc., the United States Court of Appeals for the Fourth Circuit, applying Maryland law, relied upon Hanna in holding that the insurer had no duty to defend or indemnify. Armco concerned an underlying litigation where the government sought to receive its costs in implementing a comprehensive remedial action program and also all costs incurred

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64 Id. at 131, 106 A.2d at 197.
65 Id.
66 Id. at 132, 106 A.2d at 198 (citations omitted).
67 224 F.2d 499 (5th Cir. 1955).
68 Id. at 502-03.
69 Id. at 508 (emphasis in original).
70 822 F.2d 1348 (4th Cir. 1987), cert. denied, 484 U.S. 1008 (1988).
in actually remediating a dumpsite.\textsuperscript{71} The court observed that by its terms the CGL policy did not cover equitable relief — otherwise the use of the phrase “to pay as damages” would be superfluous since any obligation to pay would be covered.\textsuperscript{72} The court also set forth its view that liability insurance had been interpreted to cover only traditional “damages” because the cost of remedial measures is not necessarily related to the injury suffered by a third party and because of the incentive to over-utilize precautionary measures when someone else is paying the bill.\textsuperscript{73}

Similarly, in \textit{Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co.}\textsuperscript{74} (“NEPACCO”), a five to three majority of the United States Court of Appeals for the Eighth Circuit, \textit{en banc}, applying Missouri law, held that the insurer had no obligation to defend or indemnify an insured in a governmental suit for cleanup costs.\textsuperscript{75} The court observed that the term “damages” as used in ordinary parlance may be ambiguous and open to different constructions,\textsuperscript{76} but continued: “In the insurance context, however, the term ‘damages’ is not ambiguous, and the plain meaning of the term ‘damages’ as used in the insurance context refers to legal damages and does not include equitable monetary relief.”\textsuperscript{77} The court also analyzed the terms of the insuring agreement, focusing again on the policy’s limiting language. The court found it significant that the CGL insuring agreement does not obligate the insurer simply to pay “\textit{all sums}” that the insured is obli-

\textsuperscript{71} \textit{Id.} at 1350-51.
\textsuperscript{72} \textit{Id.} at 1352 (emphasis added).
\textsuperscript{73} \textit{Id.} at 1353. The court reasoned that:

\textit{Insurance policies, probably for reasons of certainty and economy, traditionally reimburse only damages arising from actual, tangible injury. Insurers are very reluctant to cover what are essentially prophylactic measures, such as safety precautions, for the obvious reason that such expenditures are subject to the discretion of the insured, and are not connected with any harm to specific third parties. . . . The less obvious, but perhaps more telling reason that insurers are reluctant to cover avoidance costs is that insureds are far more likely to overutilize safety measures where another party is paying the bill. Should policies be construed to cover some forms of harm-avoidance measures, courts would be faced with the very difficult problem of separating needed prophylactic measures from unnecessary or inefficient ones.}

\textit{Id.}\textsuperscript{74} 842 F.2d 977 (8th Cir.) (\textit{en banc}), \textit{cert. denied}, 109 S. Ct. 66 (1988).
\textsuperscript{75} \textit{Id.} at 985-87.
\textsuperscript{76} \textit{Id.} at 985.
\textsuperscript{77} \textit{Id.}
gated to pay, but limits the obligation to “all sums which the insured shall become legally obligated to pay as damages.”

The many cases holding that cleanup costs are covered under the terms of the CGL policy point out that whether such costs are technically legal damages or equitable relief makes little difference to the insured who suffers the expense. The courts that deliver these opinions bridle at Armco and NEPACCO which, in their view, employ an arcane distinction to deprive the average commercial insured of coverage for out-of-pocket loss. Moreover, the NEPACCO dissenters and critical courts have complained that the Armco and NEPACCO decisions mistakenly emphasize general insurance law principles rather than applicable state substantive law.

The semantic dispute over the meaning of the term “damages” has acquired a life of its own, and at this juncture the courts would do well to take a step back and consider CERCLA cleanup costs in light of the purposes of liability insurance. Waste disposal is, by any standard, a cost of doing business and for many years the industry enjoyed the benefit of low-cost, ineffective waste disposal because its activities were largely unregulated. The clean up obligation now imposed by the federal and state governments represents a reinternalization of these costs. If waste-handling is an ordinary business operation, it is no less a cost of doing business

78 Id. at 986 (emphasis in original).
79 See supra note 12.
now that the government has compelled clean up after the fact. Although industry may never have anticipated that government would make it foot the cleanup bill, CERCLA is no different from other regulatory measures that impose costs upon business such as zoning regulations, emission control standards and taxes. Certainly there is no suggestion that the tax assessments earmarked for Superfund\(^\text{83}\) are covered by liability insurance.

V. Litigants Caught In The Crossfire

While there will always be litigation at the margins, parties that know their rights can act accordingly and prevent most disputes from ending up in protracted, enormously expensive court battles. Instead, in the environmental coverage area, the prevailing uncertainty compels insurers and insureds to litigate the same basic questions repeatedly. The CERCLA scheme is particularly susceptible to this uncertainty because its success depends upon early, efficient settlements with responsible parties in advance of cleanup rather than after the fact suits by the government to recover costs. Absent authoritative insurance rulings from the courts, CERCLA cleanups will become mired in extensive coverage litigation. Recent examples of judicial discord in litigation centers such as New York, Illinois and California, signify an unfortunate trend for other jurisdictions.\(^\text{84}\)


\(^{84}\) While the remainder of this article addresses the polarized benches in New York, Illinois and California, there are other examples that strike at the legitimacy of judicial decisionmaking in the environmental coverage area:


A. New York

1. Early Precedents

Shortly after the promulgation of the standard pollution exclusion, the New York legislature amended Section 46 of the Insurance Law to require that the pollution exclusion clause be incorporated in all liability policies sold in New York State. The State Executive Department indicated that the purpose of mandating the exclusion for New York policyholders was to promote a clean environment by preventing polluting corporations from shifting the costs of waste disposal onto the insurance system. However,
the first decisions construing the exclusion arose in factual settings that set state jurisprudence off on an aberrant note.

The first New York cases that construed the pollution exclusion, *Farm Family Mutual Insurance Co. v. Bagley*,87 and *Allstate Insurance Co. v. Klock Oil Co.*,88 arose in the Fourth Department. Neither case concerned instances of industrial pollution—Bagley involved a negligent crop sprayer and Klock Oil concerned a leaking gasoline storage tank. Both cases found ambiguity in the "sudden and accidental" exception to the pollution exclusion.

The *Klock Oil* panel was especially hostile to the exclusion. The court dutifully noted the legislature's intent in mandating the "sudden and accidental" pollution exclusion for policies sold in New York,89 but then stated that the public policy reflected in the statute did not forbid the "enforcement" of an insurance contract.90 Despite the fact that the leak from the underground tank was plainly "accidental" within the meaning of the exclusion, the court's broad-brush holding concerned itself not with the accidental nature of the discharge but with the unintended nature of the result.91 On the issue of whether the leak from the gasoline storage tank was "sudden", the court ruled that "the word 'sudden' as used in liability insurance need not be limited to an instantaneous happening."92 In other words, the pollution exclusion was the equivalent of the "occurrence" definition.93

pollution.

The bill would help to assure that corporate polluters bear the full burden of their own actions spoiling the environment, and would preclude any insurance company from undermining public policy by offering this type of insurance protection.

Memorandum of State Executive Department, *Environmental Pollution-Prohibition Against Insurance Coverage*, [1971] N.Y. Laws 2485-86 (McKinney). See Ogden Corp. v. Travelers Indem. Co., No. 88 Civ. 269, slip op. at 6 (S.D.N.Y. Sept. 22, 1989) ("[t]he policy behind § 46, which was in effect during much of the time the policies at issue here were in effect, was to encourage a clean environment by eliminating 'subsidized pollution'") (citing *Allstate Ins. Co. v. Klock Oil Co.*, 73 App. Div. 2d 486, 487-88, 426 N.Y.S.2d 603, 604 (4th Dep’t 1980)).

89 Id. at 487-88, 426 N.Y.S.2d at 604-05. See supra notes 85-86 and accompanying text.
90 73 App. Div. 2d at 488, 426 N.Y.S.2d at 604-05.
91 Id.
92 Id.
93 The court's opinion concluded:

Thus, regardless of the initial intent or lack thereof as it relates to causation, or the period of time involved, if the resulting damage could be viewed as unintended by the factfinder, the total situation could be found to constitute an accl-
Two other early cases in New York presented unusual factual situations where insurers invoking the pollution exclusion received adverse rulings that further limited the exclusion's effectiveness. In *Niagara County v. Utica Mutual Insurance Co.*, a coverage action arising from lawsuits brought by victims of the pollution at Love Canal, the court mused that the pollution exclusion probably did not apply even if the pollution damage in issue was intentional because the County, although a party to the lawsuits, was not actually involved in waste disposal activities. The court stated in dicta that while there is no language in the exclusion limiting the exclusion to the insured's acts or the insured's state of mind, the legislative history of former Section 46 of the Insurance Law indicated that the exclusion was intended to apply only to "actual polluters." One year later, in *Autotronic Systems, Inc. v. Aetna Life & Casualty*, the Third Department squarely faced the "actual polluter" question in a coverage dispute arising from an action brought by an employee of a self-service gasoline filling station. In the underlying lawsuit, the claimant alleged that due to the improper design and construction of the filling station, she had sustained serious physical injuries arising from exposure to toxic substances in leaded gasoline. While the court could have employed the *Klock* analysis to find coverage, it held the exclusion inapplicable because the insured was not responsible for discharging the waste. By testing the limits of the pollution exclusion in a case that was little more than an ordinary products liability suit, the insurer received a decision that became a precedent relied upon by generators of hazardous waste that contracted for off-site waste disposal.

2. The Response of the Federal Courts

By 1982, four appellate precedents in New York had construed the pollution exclusion out of existence, yet not one of these cases...
concerned an industrial polluter. The first case involving an industrial polluter, *National Grange Mutual Insurance Co. v. Continental Casualty Co.*, 101 arose in federal district court in 1986. This coverage action derived from a CERCLA proceeding commenced in federal court by the State of New York against two related scrap metal reclamation companies and their principal shareholders and officers. 102 Although by this time there had been a number of cases from other jurisdictions supporting the insurance industry’s construction of the pollution exclusion, the court easily found for the insureds based upon the construction of the pollution exclusion in *Klock Oil* and *Bagley*. 103 In response to the insurer’s argument that *Klock Oil* and *Bagley* confused the pollution exclusion with the “occurrence” definition, the court noted that the rulings of the Appellate Division were entitled to deference, 104 and stated that there was no “other persuasive data” 105 that led the court to believe that the Court of Appeals, New York’s highest court, would hold differently. 106

In 1988, two New York federal courts responded to the trend in the case law in other jurisdictions toward the insurance industry position and broke ranks with the intermediate appellate decisions. In *EAD Metallurgical, Inc. v. Aetna Casualty & Surety Co.*, 107 the underlying complaint alleged that ongoing disposal of radioactive Americium-241 into a public sewer system resulted in the contamination of the sewer system as well as the sewage treatment plant and town landfill. 108 The court distinguished the facts of the prior New York decisions, but noted that to find coverage in these circumstances would render the pollution exclusion “almost entirely meaningless” 109 and, citing *Commissioner v. Estate of*

102 Id. at 1406.
103 Id. at 1410.
104 Id. at 1412.
105 Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967). The *Estate of Bosch* case stands for the proposition that the ruling of “an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.” Id. (quoting *West v. A.T.& T. Co.*, 311 U.S. 223, 237 (1940). This wonderfully flexible standard is available when federal courts wish to adhere to or depart from the rulings of intermediate state appellate courts.
108 Id. at 400.
109 Id. at 402.
Bosch,\textsuperscript{110} stated that "New York's Court of Appeals would either refuse to adopt them or decline to extend their holdings to a case with a factual presentation substantially identical to the one before the Court."\textsuperscript{111}

Shortly thereafter, another federal district court refused to follow Klock Oil and Bagley. In \textit{New York v. Amro Realty Corp.},\textsuperscript{112} the court reviewed all the New York cases and flatly stated that it could not accept their premise that the pollution exclusion was ambiguous.\textsuperscript{113} The court expressed its view that the New York Court of Appeals would follow the logic of other courts that have held that "allegations of continued industrial pollution are clearly outside of the 'sudden and accidental' exception to the pollution exclusion clause."\textsuperscript{114}

3. The Technicon—Avondale Waltz

The first New York intermediate appellate decision construing the pollution exclusion in a case of industrial pollution arose just as the federal district courts began to distance themselves from the earlier New York precedents. \textit{Technicon Electronics Corp. v. American Home Assurance Co.},\textsuperscript{115} a Second Department decision, subsequently affirmed by the Court of Appeals,\textsuperscript{116} concerned a New York-based company that manufactured machines to analyze blood samples in Puerto Rico.\textsuperscript{117} In the underlying actions, local residents claimed that they had suffered personal injury as a result of exposure to toxic waste that Technicon had discharged into a creek over a period of several years.\textsuperscript{118} In addition, the EPA notified Technicon in a PRP letter of the manufacturer's potential lia-

\textsuperscript{110} 387 U.S. 456, 465 (1965); see supra note 105.
\textsuperscript{111} EAD, 701 F. Supp. at 408.
\textsuperscript{112} 697 F. Supp. 99 (N.D.N.Y. 1988).
\textsuperscript{113} Id. at 109-10. The lawsuits underlying the Amro Realty dispute alleged that the site-owners had engaged in polluting activities from the early 1950's through 1981. Id. at 101. The court commented that "[e]ven if the term accidental is determined from the insured's point of view there is no use of the word 'sudden' which is consistent with events transpiring over a twenty year period." Id. at 110.
\textsuperscript{114} Id. at 110.
\textsuperscript{117} Technicon, 141 App. Div. 2d at 126, 533 N.Y.S.2d at 92.
\textsuperscript{118} Id.
In its answer to the complaint in the private action, Technicon admitted discharging industrial waste but stated that the discharges were lawful and "made pursuant to applicable permit applications." The Appellate Division held that Technicon's primary insurers had no duty to defend or indemnify Technicon in the private action or in connection with the EPA PRP letter.

The Appellate Division first noted that neither the complaint nor Technicon's answer made reference to any "sudden" or "accidental" discharges. The court thus stated that there was no duty to defend since "the factual allegations in the underlying complaint clearly fall within the terms of the pollution exclusion and cannot be interpreted to be within the 'sudden and accidental' exception to this exclusion." The court reviewed the case law from around the country concerning the pollution exclusion and noted that the growing consensus was to define a "sudden and accidental" event as one that "is unexpected, unintended and occurs over a short period of time."

The Appellate Division also ruled that since the basis of the EPA notice was essentially the same as the basis for the private

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119 Id., 533 N.Y.S.2d at 92-93.
120 Id. at 127, 533 N.Y.S.2d at 93.
121 Id. at 146, 533 N.Y.S.2d at 105.
122 Id. at 131, 533 N.Y.S.2d at 95.
123 Id. at 137, 533 N.Y.S.2d at 99. The Appellate Division, Third Department, declined to adopt the Second Department's bright-line standard and instead, in Colonie Motors, Inc. v. Hartford Accident & Indem. Co., 145 App. Div. 2d 180, 538 N.Y.S.2d 630 (3d Dep't 1989), opted for a "fact-based test" which essentially focuses on whether the insured intended the discharge of pollutants. In that case, the court held that the insurer had an obligation to reimburse the insured for clean-up costs incurred due to leaking waste-oil containment system, stating: "The fact that the discharge was not readily discoverable and, thus, continued for a period of time, through no fault of the insured, should not move an otherwise covered occurrence within the rather shadowy perimeter of the exclusion." Id. at 183, 538 N.Y.S.2d at 632. See Munzer v. St. Paul Fire & Marine Ins. Co., 145 App. Div. 2d 193, 201-02, 538 N.Y.S.2d 633, 638 (3d Dep't 1989) (insurer had duty to defend several matters arising from operations of insured's mercury thermometer plant between 1971 and 1984 because additional information needed to determine whether plaintiffs intended to discharge pollutants).

The Third Department adhered to its standard after the Court of Appeals' affirmation in Technicon. See State v. Aetna Casualty & Sur. Co., 547 N.Y.S.2d 452, 453 (3d Dep't 1989). However, the Court of Appeals' decision in Powers Chemco, Inc. v. Federal Ins. Co., 74 N.Y.2d 910, 548 N.E.2d 1301, 549 N.Y.S.2d 650 (1989), discussed infra at notes 159-64 and accompanying text, will require the Third Department either to modify its approach so that the focus is no longer on the insured's intentions or to scrap its "fact-based test" in favor of the bright-line standard.
action, the pollution exclusion also applied to the EPA matter. While noting that it was an unsettled question whether the costs sought by the EPA were "damages," the court ruled that, in any event, there was no duty to "defend" the PRP letter because the letter did not constitute a "suit" within the meaning of the policies.

An immediate reaction to the Technicon decision came from the federal district court for the Southern District of New York. In Avondale Industries, Inc. v. Travelers Indemnity Co., residents of Denham Springs, Louisiana, brought a series of lawsuits alleging bodily injury and property damage against the operators of a local waste oil recycling facility and dumpsite and against Avondale and others that shipped or transported waste to the site. In addition, the Louisiana Department of Environmental Quality ("DEQ") sent Avondale a form PRP letter notifying Avondale that it was a potentially responsible party under the Louisiana Liability for Hazardous Substance Remedial Action Statute. Technicon's two-week-old pollution exclusion ruling and the Appellate Division's underlying reasoning should have received serious consideration from the Avondale court. Instead, the district court relegated its discussion of this aspect of the Technicon opinion to one sentence in a footnote, distinguishing the Second Department's decision on the ground that the insured in Technicon had conceded that it had intentionally discharged industrial waste.

Having thus dispensed with the New York state court's last ruling on the pollution exclusion, the district court found that the insurer had a duty to defend the private actions. It recognized that although the underlying complaints alleged that discharges of toxic

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124 Technicon, 141 App. Div. 2d at 145, 533 N.Y.S.2d at 104.
125 Id.
126 Id. at 146, 533 N.Y.S.2d at 105. The court stated:
The EPA letter at issue merely informed Technicon of its potential liability under CERCLA and that the EPA was interested in discussing Technicon's voluntary participation in remedial measures. The letter was an invitation to voluntary action on Technicon's part and is not the equivalent of the commencement of a formal proceeding within the meaning of the subject comprehensive general liability policies.

Id.
129 Avondale, 697 F. Supp. at 1317 n.4.
waste occurred over the course of twenty years and each complaint named Avondale as a source of the waste, absent were “allegations as to how the waste escaped or seeped” and “as to Avondale’s culpable actions that contributed to the occurrence.” The court then assumed for purposes of argument that even if the term “sudden” had a temporal component, the insurer still had a duty to defend because the complaints did not refer specifically to discharges of waste material that Avondale had shipped to the site.

The insurer in Avondale also argued that it had no obligations with respect to the administrative matter because the state environmental agency sought only reimbursement of cleanup costs from the insured and not “damages.” While the federal district court appreciated that there was a split in authority on this issue, it held that under New York law the term should be construed according to “the reasonable expectation and purpose of the ordinary businessman,” and stated that “[t]he average businessman does not differentiate between ‘damages’ and ‘restitution;’ in either case, money comes from his pocket and goes to third parties.”

Notwithstanding the Appellate Division’s ruling in Technicon, the federal district court also held that the insurer had an obligation to defend the letter from the DEQ. The Avondale court stated that the decision of the Appellate Division was not controlling and emphasized that a federal court should not disregard the decisions of intermediate appellate courts “unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.” However, instead of pointing to other “persuasive data” that the New York Court of Appeals would rule differently, the district court proceeded to attack the reasoning of the Appellate Division and those cases upon which the Appellate Division relied. By imposing a duty to defend the DEQ letter without any support beyond its own disagreement with the Second Department, the federal district court redefined the Estate of Bosch standard to eliminate whatever element of self-restraint that decision demands from the federal bench.

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110 Id. at 1317.
111 Id.
112 Id. at 1318.
113 Id. at 1319.
114 Id. at 1333.
115 Id. at 1231 (quoting Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967)).
116 In West v. A.T.& T. Co., 311 U.S. 223, 236-37 (1940), the Supreme Court declared: A state is not without law save as its highest court has declared it. There are many
The Avondale court placed its emphasis on the fact that the underlying complaints did not detail the insured's conduct or allege that the insured intended to pollute. The Technicon opinion, however, strongly suggested that for purposes of applying the pollution exclusion, whether the insured itself caused the pollution was irrelevant and the only consideration was the manner in which the liability-causing event happened. Less than one month after the district court's Avondale decision, in Powers Chemco, Inc. v. Federal Insurance Co., the Second Department unequivocally rejected the "actual polluter" rationale of Niagara County and Autotronic and held: "The clear and unambiguous language of the pollution exclusion makes no exception for pollution caused by someone other than the insured where that pollution is not 'sudden and accidental.'"

Against this background, the New York Court of Appeals rendered its decision in Technicon. The court engaged in a straightforward analysis limited to the allegations in the complaint and the language of the pollution exclusion, which the court found "unambiguously plain." The court stated that since the complaint alleged a discharge of toxic waste resulting in pollution, the exclusion applied. The court then turned to the question of whether the allegations could be deemed to fall within the "sudden and accidental" exception to the exclusion. The court rejected the insured's contention that the exclusion did not apply because it

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rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable.

Id. 137 Technicon, 141 App. Div. 2d at 1614, 533 N.Y.S.2d at 103. The Second Department stated:

In our view, the logical and proper application of the pollution exclusion depends solely upon the method by which the pollutants entered the environment. The relevant factor is not whether the policyholders anticipated or intended the resultant injury or damage, but whether the toxic material was discharged into the environment unexpectedly and unintentionally or knowingly and intentionally.

Id. (citation omitted).


139 Id. at 448, 533 N.Y.S.2d at 1012.


141 Id. at 71, 542 N.E.2d at 1049, 544 N.Y.S.2d at 532.

142 Id. at 74, 542 N.E.2d at 1050, 544 N.Y.S.2d at 533.
did not intend the environmental harm or the specific injuries claimed by the injured plaintiffs.\(^{143}\) Instead, the court concluded that since the alleged discharges were not accidental there was no coverage.\(^{144}\)

Having found that Technicon's discharges were not "accidental," the Court of Appeals stated that it would be "superfluous" to define the scope of the term "sudden."\(^{145}\) The court similarly declined to rule upon whether the EPA letter constituted the institution of a "suit" that could trigger a duty to defend because the pollution exclusion barred coverage.\(^{146}\) By confining its discussion to the meaning of the term "accidental," the decision set a pattern for narrow resolution of environmental coverage issues in the context of particular cases.

Once again, a federal tribunal spoke shortly after the state court. The United States Court of Appeals for the Second Circuit delivered its decision in *Avondale*,\(^{147}\) using the occasion to issue an opinion as broad in scope as the Court of Appeals' decision in *Technicon* was narrow. In an opinion by Judge Cardamone, who authored the *Niagara County* opinion while on the state bench eight years earlier, the Second Circuit affirmed the district court's decision that the pollution exclusion did not relieve the insurer of its duty to defend.\(^{148}\) The court then proceeded to the issues of whether the PRP letter from the Louisiana DEQ was a "suit"

\(^{143}\) Id. at 75, 542 N.E.2d at 1050-51, 544 N.Y.S.2d at 533-34. The court stated: That argument fails because the pollution exclusion clause, by its own terms, does not distinguish between intended or unintended consequences of intentional discharges; rather, it excludes from coverage liability based on all intentional discharges of waste whether consequential damages were intended or unintended. . . . To accept Technicon's interpretation of the pollution exclusion clause would otherwise render that clause meaningless in context.

\(^{144}\) Id. at 74-75, 542 N.E.2d at 1050-51, 544 N.Y.S.2d at 533-34.

\(^{145}\) Id. at 76, 542 N.E.2d at 1051, 544 N.Y.S.2d at 534. The court strongly implied, however, that the term "sudden" had a meaning independent of the term accidental. Specifically, the court stated: "Since the exception is expressed in the conjunctive, both requirements must be met for the exception to become operative. Stated conversely, discharges that are either nonsudden or nonaccidental block the exception from nullifying the pollution exclusion." Id. at 75, 542 N.E.2d at 1050, 544 N.Y.S.2d at 533. See Powers Chemco, Inc. v. Federal Ins. Co., 74 N.Y.2d 910, 911, 548 N.E.2d 1301, 1302, 549 N.Y.S.2d 650, 651 (1989) (exception to pollution exclusion not operative unless discharge of pollutants is "both 'sudden' and 'accidental'").

\(^{146}\) Technicon, 74 N.Y.2d at 76, 542 N.E.2d at 1051, 544 N.Y.S.2d at 534.

\(^{147}\) 897 F.2d 1200 (2d Cir. 1989), modified, 984 F.2d 498 (2d Cir. 1990).

\(^{148}\) Id. at 1204-06.
within the terms of the insurance contract,\textsuperscript{140} and whether cleanup costs constituted "damages"\textsuperscript{150}—affirming the district court on both counts. Although the Second Circuit acknowledged its responsibility to apply state law, the court made scant citation to New York authority and displayed little, if any, deference to the recent New York cases.\textsuperscript{151}

Like the district court, the Second Circuit distinguished \textit{Technicon} by focusing upon the insured's admission that it had intentionally discharged hazardous wastes.\textsuperscript{152} However, that concession is legally irrelevant for purposes of determining an insurer's duty to defend\textsuperscript{153} and played no significant role in the New York cases.\textsuperscript{154}

\textsuperscript{140} See id. at 1206. With respect to the district court's interpretation of the term "suit," the Second Circuit made only a token effort to demonstrate adherence to New York precedent by citing a single thirty-five year old arbitration case, \textit{Madawich Contracting Co. v. Travelers Ins. Corp.}, 307 N.Y. 111, 120 N.E.2d 520 (1954). The Second Circuit then found the Second Department's \textit{Technicon} ruling "distinguishable" on the ground that the PRP letter in \textit{Technicon} was, in the Appellate Division's own words, "an invitation to voluntary action" while the correspondence at issue in \textit{Avondale} was a "coercive demand letter." 887 F.2d at 1206. In point of fact, the remedies available to the EPA and DEQ are substantially the same. \textit{Compare} 42 U.S.C. § 9607(a)(4)(A), (B) (liability for all costs of removal or remedial action incurred by federal government or state) \textit{with} La. Rev. Stat. Ann. § 30:2275(A), (B) (formerly codified at La. Rev. Stat. Ann. § 30:1149.45) (requiring responsible person to undertake remedial action or pay costs of such action). Finally, the Second Circuit offered the real basis for its ruling which was that "common sense argues that for Travelers to proffer a defense now is better for it, Avondale, and the public interest in a prompt cleanup of the hazardous waste." \textit{Avondale}, 887 F.2d at 1206-07.

\textsuperscript{150} \textit{Avondale}, 887 F.2d at 1206-07. Citing several New York cases for general propositions of insurance policy construction—but only federal precedents on the "damages" question—the court held that the insurer had a duty to defend a governmental proceeding for environmental cleanup under New York law. \textit{Id.} The Second Circuit's opinion in this regard reflects little more than a preference for one set of out-of-state authorities over another. In fact, the only extant New York intermediate appellate precedent follows \textit{Hanna} and holds that liability insurance policies do not cover the costs of complying with a mandatory injunction. \textit{See} \textit{Gulf & Western Indus. v. Seaboard Sur. Co.}, 100 App. Div. 2d 820, 821, 474 N.Y.S.2d 754, 755 (1st Dep't), appeal dismissed, 63 N.Y.2d 675, 484 N.E.2d 1058, 494 N.Y.S.2d 1060 (1984).

\textsuperscript{151} In contrast, see \textit{Ogden Corp. v. Travelers Indem. Co.}, No. 88 Civ. 4269, slip op. at 5-10 (S.D.N.Y. Sept. 22, 1989) (Westlaw, 1989 WL 116498), notable because it construes the very same insurance policies as those at issue in \textit{Avondale}, yet reaches a different result, at least in part, because the federal district court took the state court precedents more seriously. In \textit{Ogden}, the underlying pleadings alleged pollution damage resulting from thirty-three years of continuous discharges arising from scrap steel operations on property leased to an insured. The court found for the insurer both because the underlying allegations of contamination resulting from longstanding industrial operations could not be deemed "accidental" and because the discharge of pollutants was not "sudden." \textit{Id.}

\textsuperscript{152} \textit{Avondale}, 887 F.2d at 1205.

\textsuperscript{153} The answer to an underlying complaint has no bearing, either way, on an insurer's duty to defend. \textit{See} \textit{Carolina Aircraft Corp. v. American Mut. Liab. Ins. Co.}, 517 F.2d 1076,
York Court of Appeals' decision, which correctly addressed only the allegations of the underlying complaint. By explaining the Technicon result in terms of the insured's admission "that it intentionally discharged toxic wastes," the court was able to so narrow the Technicon decision that it was writing on a clean slate.

Disregarding the import of the Court of Appeals' decision, the Second Circuit employed the district court's analysis that focused upon the insured's conduct and the insured's particular waste products rather than the nature of the discharge causing the damage. Accordingly, the Second Circuit found a duty to defend the underlying private complaints because none of their "conclusory assertions" concerning the conduct that caused the pollution over twenty years "clearly negate" the possibility that discharge or escape was 'sudden and accidental.'

The district court did not have the benefit of the Second Department's Powers Chemco decision when it issued its Avondale decision. However, the Second Circuit simply ignored the Appellate Division's contrary opinion when it held that the critical factor for purposes of applying the pollution exclusion was whether the insured "itself continuously and intentionally polluted." This approach, quite similar to the "actual polluter" rationale employed by Judge Cardamone in Niagara County, became untenable when the Court of Appeals affirmed Powers Chemco one month after the Second Circuit's ruling.

In Powers Chemco, the insured, a manufacturer of photo-
graphic supplies and equipment, purchased a parcel of land on which it discovered that its predecessor had buried hazardous waste over a number of years. The insured then entered into an agreement with state authorities to clean up the site, and sought indemnification for the costs of decontamination.

The Court of Appeals continued its narrow resolution of environmental coverage disputes by disposing of the Powers Chemco case in a short memorandum decision. The court still did not interpret the term "sudden," focusing instead upon allegations by the state authorities that the insured's predecessor intentionally disposed of hazardous waste on the property purchased by the insured. It stated: "plaintiff seeks to be indemnified for intentional discharges of waste, leading to the ultimate pollution of the environment. Such an 'occurrence,' resulting from purposeful conduct cannot be considered 'accidental' under our analysis in Technicon." The memorandum opinion dismissed in a single sentence the insured's argument that it was entitled to coverage because it was not the "actual polluter." "Simply put," the court declared, "there is nothing in the language of the pollution exclusion clause to suggest that it is not applicable when liability is premised on the conduct of someone other than the insured."

The insurer's petition for rehearing in the Avondale case was pending when the Court of Appeals handed down its Powers Chemco decision and accordingly the Second Circuit had to address what had become a sharp divergence between its approach to the pollution exclusion and the bright-line standard adopted by the New York Court of Appeals. Acknowledging the discrepancy, the Second Circuit ruled that it did not constitute grounds for rehearing because of differences in the factual allegations in the underlying Louisiana private action complaints and the consent decree entered between the insured and state authorities in Powers Chemco. The Second Circuit stated that in Avondale, unlike Powers Chemco, no party "was alleged to have or admitted to having engaged in intentional conduct that caused the pollution dam-

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144 App. Div. 2d at 446, 533 N.Y.S.2d at 1011.
145 Id.
146 Powers Chemco, 74 N.Y.2d at 911, 548 N.E.2d at 1302, 549 N.Y.S.2d at 651.
147 Id.
The Second Circuit also chose to discount the allegations that Avondale intentionally transported and disposed of waste at the site, finding that the pleadings did “not negate the possibility of intentional transportation and burying of properly sealed drums containing wastes, followed by sudden and accidental discharge from such drums.”

Under the most critical reading, each of the complaints in the Louisiana private actions alleged that over the course of more than twenty years the operations at the Denham-Springs oil reclamation facility and dumpsite resulted in air, soil and water pollution. The alleged pollution was the result of intentional operations, and based upon the Court of Appeals’ rulings in Technicon and Powers Chemco the insurer should not have been obliged to defend Avondale in the underlying litigation.

In order to put teeth in the pollution exclusion, the Technicon decision did not require that the underlying pleadings negate any remote possibility that ordinary industrial discharges were “sudden and accidental.” Instead, the Court of Appeals held that the pollution exclusion would bar coverage unless the underlying pleadings made affirmative allegations within the “sudden and accidental” exception. While the Second Circuit could not, after Technicon and Powers Chemco, find the pollution exclusion ambiguous, it has demanded such a high degree of specificity in the underlying pleadings that it has, in effect, accomplished the same result.

Underlying the Second Circuit’s Avondale opinions is a policy choice to put an end to litigation concerning the insurer’s defense obligations and to maximize the pool of insurance proceeds available for environmental cleanup. The New York Court of Appeals,

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167 See Technicon Elec. Corp. v. American Home Assur. Co., 74 N.Y.2d 66, 73-74, 542 N.E.2d 1048, 1050, 544 N.Y.S.2d 531, 533 (1989); see also Waste Management Inc. v. Peerless Ins. Co., 315 N.C. 688, 700, 340 S.E.2d 374, 383 (1986) (sudden release or escape of contaminants must be expressly or impliedly alleged in pleading or deposition for occurrence to be within coverage); Just v. Land Reclamation, Ltd., 151 Wis. 2d 593, 598, 445 N.W.2d 683, 687-88 (Wis. Ct. App. 1989) (requiring the underlying complaint to allege or imply that the discharge of pollutants was accidental and sudden for the insurer to have duty to defend); review granted, 449 N.W.2d 275 (1989). See generally 19 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 79:385, at 338 (2d ed. 1983) (noting authority for proposition “that when a policy contains an exception within an exception, the insurer need not negative the internal exception; rather, the plaintiff must show that the exception from the exemption from liability applies”).

on the other hand, resolved to construe the policy language in accordance with New York's past legislative policy to deter pollution by preventing industry from passing the costs of ineffective waste disposal to the insurance system. In this vein, the Technicon opinion cited the legislative history of former Insurance Law § 461 as evidence that the exclusionary language limits insurance coverage available to generators who are responsible for pollution even if they acted legally and did not intend to cause harm.169

Whatever the merits of the respective points of view, at least since Erie Railroad Co. v. Tompkins,170 a federal court, sitting in diversity, does not have the power to arrogate for itself the decision-making authority constitutionally vested in the state courts. In Avondale, the Second Circuit violated its obligations by conducting what amounts to a holding action designed to minimize the impact of state law rulings by New York's highest court. As a result, there are now two bodies of New York environmental coverage law—one state and one federal—and litigants are faced with the prospect of receiving very different kinds of hearings depending upon whether their cases are in federal or state court.171

B. Illinois

1. Early Precedents

Illinois had two early pollution exclusion decisions. The first, Willett Truck Leasing Co. v. Liberty Mutual Insurance Co.,172 involved a truck leasing company that allegedly was negligent in al-

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169 See supra notes 85-86 and accompanying text.
170 See Technicon, 74 N.Y.2d at 76, 542 N.E.2d at 1051, 544 N.Y.S.2d at 534.
171 304 U.S. 64 (1938).
172 In a related development, the New York courts and the Second Circuit appear to be in conflict on the standard necessary to demonstrate whether pollution damage is caused by an "occurrence." Compare City of Johnstown v. Bankers Standard Ins. Co., 877 F.2d 1146, 1150-1151 (2d Cir. 1989) (insurer had duty to defend CERCLA proceeding against city in connection with waste leaking from city-owned and operated landfill because although city federal and state authorities warned that landfill was apparently contaminating groundwater, city neither intended to cause harm nor did city expect "that those damages would flow directly and immediately from its intentional acts" but instead, in opting to keep landfill open, city merely took a "calculated risk") with County of Broome v. Aetna Casualty & Sur. Co., 146 App. Div. 2d 337, 340, 540 N.Y.S.2d 620, 622 (3d Dep't 1989) (insurer had no duty to defend federal and state proceedings against county that owned and operated a landfill because there was no "occurrence" where county was aware of pollution and leakage problems but continued to permit dumping), appeal denied, 74 N.Y.2d 614, 547 N.E.2d 103, 547 N.Y.S.2d 848 (1989).
lowing fumes to enter the cab of one of its trucks. At the time of the decision there was very little outstanding case law construing the exclusion and the court ordered the insurer to defend without raising any of the interpretive issues.

In the second case, *Reliance Insurance Co. v. Martin*, decided four years later, the court relied heavily upon New York's *Klock Oil* decision. In *Reliance*, the operator of a parking garage sought coverage for a suit brought by owners of an adjacent condominium who allegedly suffered harm from carbon monoxide and soot that "'regularly'" escaped from the garage into their home. Following the early mold, the court held that under the *Klock Oil* analysis the relevant question was "not the time frame involved" but whether the insured could have "intended or expected" the pollutants to enter the condominium unit. The court found that this fact could not be determined from the pleadings and thus ordered the insurer to defend.

2. *International Minerals, Specialty Coatings* and the Use of Policy Drafting History as a Precedent-Breaking Device

As in New York, the first test of the pollution exclusion in a case concerning industrial discharges did not arise in Illinois until 1988. The case, *International Minerals & Chemical Corp. v. Liberty Mutual Insurance Co.* concerned the same site that was the subject of the First Circuit's *Great Lakes Container* decision four years earlier. International Minerals had owned the site and operated the barrel reconditioning business for a three year period in the mid-1970's before selling the property to Great Lakes Container Corporation. International Minerals was similarly sued by the EPA in the district of New Hampshire for cleanup and

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174 Id. at 135, 410 N.E.2d 377.
175 Id. at 139, 410 N.E.2d at 381.
178 *Reliance*, 126 Ill. App. 3d at 96, 467 N.E.2d at 288.
179 Id. at 98, 467 N.E.2d at 290.
180 Id.
182 *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984); see supra note 46 and accompanying text.
183 *International Minerals*, 168 Ill. App. 3d at 365, 522 N.E.2d at 761.
response costs.\textsuperscript{184}

The Illinois appellate court differed with the First Circuit in \textit{Great Lakes} by finding that the facts stated in the underlying complaint at least potentially alleged an "occurrence".\textsuperscript{185} Accordingly, the court turned to the pollution exclusion. The court noted the split in authorities interpreting the exclusionary language\textsuperscript{186} and then commenced its own analysis. As a preliminary matter, the court found the complaint plainly alleged that International Minerals had discharged hazardous waste that resulted in damage and thus the exclusion applied.\textsuperscript{187} In discussing whether the allegations fell within the exception to the exclusion, the court stated:

Whereas the general insuring provision focuses only on the damage and the pollution exclusion clause focuses on the event or activity as well as on the nature of the damage, the exception is concerned only with the event or activity—the discharge, dispersal, release or escape of pollutants. If that discharge, dispersal, release or escape is \textit{both} sudden and accidental, coverage removed by the exclusion is restored.\textsuperscript{188}

The court stated that there was a "remote potentiality" that the alleged discharges could be considered "accidental" for purposes of the exception to the exclusion.\textsuperscript{189} Nevertheless, the court found no basis in the allegations for the insured to claim that the discharge was "sudden."\textsuperscript{190} With respect to the line of cases which held that the term "sudden" meant unexpected and unintended, the court found their reasoning "seriously flawed" because those decisions made the term "sudden" synonymous with "accidental" and thus read the term "accidental" out of exception, and deprived the term "sudden" of its commonly understood temporal significance.\textsuperscript{191}

The court made an unpersuasive effort to reconcile its decision with \textit{Reliance} on the ground that the \textit{Reliance} court did not find the pollution exclusion ambiguous and held only that there was an issue of fact as to whether the release of soot and carbon monoxide

\begin{itemize}
  \item \textsuperscript{184} \textit{Id.}
  \item \textsuperscript{185} \textit{Id.} at 374-75, 522 N.E.2d at 767.
  \item \textsuperscript{186} \textit{Id.} at 373-74, 522 N.E.2d at 765-766.
  \item \textsuperscript{187} \textit{Id.} at 375-76, 522 N.E.2d at 767.
  \item \textsuperscript{188} \textit{Id.} at 376, 522 N.E.2d at 767-68.
  \item \textsuperscript{189} \textit{Id.} at 377, 522 N.E.2d at 768.
  \item \textsuperscript{190} \textit{Id.} at 376-77, 522 N.E.2d at 768.
  \item \textsuperscript{191} \textit{Id.} at 378, 522 N.E.2d at 769.
\end{itemize}
was sudden and accidental.\textsuperscript{192} However, the court continued:

"[T]o the extent that Reliance adapted the reasoning in Klock and/or stands for the proposition that \textquoteleft\textquoteleft sudden and accidental\textquoteright\textquoteright \ldots\textquoteleft\textquoteleft unintended and unexpected,\textquoteright\textquoteright with reference to the mental state, i.e., intentions and expectations, of the insured we think it is incorrect and respectfully but unhesitatingly decline to follow it.\textsuperscript{193}

Less than one year later, in \textit{United States Fidelity & Guar-anty Co. v. Specialty Coatings Co.},\textsuperscript{194} a different panel of the same court had much the same reaction to \textit{International Minerals}. The \textit{Specialty Coatings} panel disinterred Reliance, which, in the words of the panel, \textquoteleft\textquoteleft rendered any time factor inherent in the term \textquoteleft\textquoteleft sudden\textquoteright\textquoteright irrelevant and concluded that where the resultant damage was neither expected nor intended, the pollution exclusion did not apply.\textsuperscript{195}

\textit{Specialty Coatings} involved affiliated chemical companies—Specialty Coatings and Specialty Chemical—that were sued by the State of Illinois for providing waste to a hauler who illegally dumped the waste on its property.\textsuperscript{196} In addition, Specialty Coatings received a PRP letter from the EPA informing it of potential liability under CERCLA for cleaning up the Illinois site.\textsuperscript{197}

The \textit{Specialty Coatings} court distinguished the case from \textit{International Minerals} by noting that in the previous case the insured was charged with \textquoteleft\textquoteleft active polluting conduct\textquoteright\textquoteright whereas Specialty Coatings and Specialty Chemical allegedly did no more than deliver their waste to the third parties actually responsible for the pollution.\textsuperscript{198} The \textit{Specialty Coatings} court ignored the bright-line approach of their colleagues in \textit{International Minerals} who looked only to the nature of the discharge. Instead, it held that the pollution exclusion was ambiguous where the insured was not an \textquoteleft\textquoteleft active polluter.\textquoteright\textquoteright The \textit{Specialty Coatings} panel found this ambiguity in

\begin{footnotesize}
\begin{enumerate}
  \item Id. at 379, 522 N.E.2d at 769-70.
  \item Id., 522 N.E.2d at 770.
  \item Id. at 385-86, 535 N.E.2d at 1076.
  \item Id. at 381-82, 535 N.E.2d at 1073-74.
  \item Id. at 382, 535 N.E.2d at 1074. Both companies were also third-party defendants in a suit by the EPA for cleanup and response costs in connection with two industrial dump sites in Gary, Indiana. The third-party action sought contribution from ninety parties, including the insureds. Id.
  \item Id. at 387, 535 N.E.2d at 1077.
\end{enumerate}
\end{footnotesize}
According to the opinion, the historical record developed by the insured and *amicus curiae*, persuaded the court that the insurance industry did not intend the pollution exclusion to restrict coverage beyond the limitations of the "occurrence" definition. Moreover, in light of this history, the court found that "interpreting 'sudden' to mean 'abrupt' and 'instantaneous' contravenes the insurance industry's announced intent in adding the pollution exclusion to the general liability policy." After finding the pollution exclusion inapplicable, the Specialty Coatings panel ruled that the insurer had an obligation to defend the PRP letter and that the reimbursement for cleanup and response costs sought in the three underlying matters constituted "damages."

The drafting history of the "sudden and accidental" pollution exclusion has been urged recently by a number of commentators to support their position that the insurance industry designed the exclusion to limit coverage only in situations where an insured actually expects or intends to harm the environment. They find their proof in submissions by the Insurance Rating Board and Mutual Insurance Rating Bureau to obtain approval of the new clause from state regulatory bodies. For example, an oft-cited explanatory memorandum prepared by the industry trade groups states:

Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above clears this situation to avoid any question of intent. Coverage is continued for pollution or contamination caused injury when the pollution or contamination results from accident.

The flaw in this drafting history is that it is not "history" at all because it fails to account for changes in the meaning of the

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199 Id. at 385, 535 N.E.2d at 1076.
200 Id. at 387, 535 N.E.2d at 1076.
201 Id.
202 Id. at 388-89, 535 N.E.2d at 1078-79.
203 Id. at 390-95, 535 N.E.2d at 1079-82.
205 Sayler & Zolensky, *supra* note 204, at 4432.
terms "accident" and "occurrence" over time. First, while the underwriters had a clear idea of what they meant by the term "accident," it is apparent that they added the term "sudden" in the exclusionary clause because of the manner in which the courts had treated the "caused by accident" language in the pre-1966 standard liability policy. Second, prior to 1970 there were very few judicial decisions interpreting the "occurrence" definition. It is only from the perspective of twenty years of judicial expansion of the "occurrence" language, that the pollution exclusion seems far more restrictive than a simple "clarification" of the "occurrence" definition.

In any event, to the extent the Specialty Coatings panel purports to make a principled use of policy drafting history to distinguish the case from International Minerals, the court is disingenuous. The Specialty Coatings panel is silent as to whether the International Minerals court had the benefit of the historical evidence that it found dispositive. However, the same counsel appeared for the amicus curiae Illinois Manufacturers' Association in both cases, and, in fact, counsel made similar arguments. At least for the Specialty Coatings panel, the drafting history provided little more than a means to overcome the obstacle of an inconvenient decision of another panel of the same court in order to reach an outcome to which it was otherwise predisposed.

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205 See Wilmarth, Pollution Liability—What Are the Insurance Companies Doing In This Area?, 21 Ten'n Ins. Couns. Q. 18, 20-21 (1971); Note, supra note 25 at 1252.
207 See supra notes 33-39 and accompanying text.
208 See International Minerals, 168 Ill. App. 3d at 385, 370 n.3, 522 N.E.2d at 760, 764 n.3 (1988); Specialty Coatings, 180 Ill. App. 3d at 380, 387, 535 N.E.2d at 1073, 1077.
210 One historian, criticizing the Supreme Court's embrace of partisan "law office" history as a precedent-breaking device, aptly remarked: "A historical or scientific truth may be useful, but in the liberal system of values that usefulness is expected to flow from truth as an independent entity. The truth of history does not flow from its usefulness." Kelly, Clio and the Court, An Illicit Love Affair, 1985 Sup. Ct. Rev. 119, 157.
C. California

The controversy in California has been over whether the costs of environmental cleanup are "damages" within the meaning of the insuring agreement. There was only one unreported superior court decision, holding that they were not, at the time a federal district court was called upon to predict California law in Intel Corp. v. Hartford Accident & Indemnity Co. There, the insured, Intel, stored chemical solvents used in its manufacturing operations in an unsecured underground storage tank. In 1981, Intel commissioned soil sampling and testing of the site and determined that the solvents had contaminated the soil and groundwater. Intel ultimately entered into a consent decree with the EPA by which it agreed, without admitting liability, to implement containment and cleanup measures.

The district court was quite conscious of its obligation to apply California law in the diversity case and, while discussing decisions from other jurisdictions, sought guidance from California cases and statutes. The court began with the proposition that under California law insurance contracts are to be read "in the light of the reasonable and normal expectations of the parties as to the extent of the coverage." Under this standard, the court had little trouble finding that there had been damage and that the state and people of California had suffered a detriment for which they were entitled to damages. Although the consent decree required payments by Intel to clean up its own property in order to abate the contamination, the court deemed these payments mitigation of damages and cited Globe Indemnity Co. v. State of California, as authority that California recognized a right to indemnification for mitigation costs.

In Globe Indemnity, the State of California brought suit for

\(^{214}\) Id. at 1172.
\(^{215}\) Id. at 1172-73.
\(^{216}\) Id. at 1173. The pollution exclusion was not an issue in the case because the insurer failed to specify the exclusion as a ground for disclaiming coverage. Id. at 1176-80.
\(^{217}\) Id. at 1189-90 (quoting Globe Indem. Co. v. State, 43 Cal. App. 3d 745, 751, 118 Cal. Rptr. 75, 79 (5th Dist. 1974)).
\(^{218}\) Intel, 692 F. Supp. at 1189.
\(^{219}\) 43 Cal. App. 3d 745, 118 Cal. Rptr. 75 (5th Dist. 1974).
the costs of suppressing a fire caused by the insureds.\textsuperscript{221} The insurer instituted a declaratory judgment action to determine whether its liability policies covered the costs claimed by the state.\textsuperscript{222} The California court stated:

When an insured takes out an indemnity policy, as in this case, it is more reasonable to suppose that he expects to be protected by his insurance in any situation wherein he becomes liable for damage to tangible property. It would seem strangely incongruous to him, as it does to us, that his policy would cover him for damages to tangible property destroyed through his negligence in allowing a fire to escape but not for the sums incurred in mitigating such damages by suppressing the fire.\textsuperscript{223}

Based upon the Globe Indemnity analysis, the district court in \textit{Intel} concluded that the California Supreme Court would hold that liability insurance policies cover the costs incurred by the insured in investigating and cleaning up pollution that is damaging to public property and presenting a continuing threat to public health.\textsuperscript{224} The court then offered a public policy justification for its holding, claiming that "{p}ropects for PRP cooperation would be undermined if insurer's contributions are made contingent on a government cleanup first, followed by a judgment against the insured, and then a claim against the insurer."\textsuperscript{225}

The California Court of Appeals has now had the occasion to articulate state law on the "damages" issue in two cases, \textit{Aerojet-General Corp. v. San Mateo County Superior Court}\textsuperscript{226} and \textit{AIU Insurance Co. v. Superior Court}.\textsuperscript{227} Both cases concerned the obligation of general liability insurers to reimburse insureds for the cost of environmental cleanup. Both cases focus their attention upon the reasonable expectations of the insureds in determining whether the policies afford coverage for equitable monetary relief. Both cases—decided within five months of each other—reached diametrically opposite results.\textsuperscript{228}

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\item \textsuperscript{221} \textit{Globe Indemnity}, 43 Cal. App. 3d at 749, 118 Cal. Rptr. at 77.
\item \textsuperscript{222} \textit{Id.}
\item \textsuperscript{223} \textit{Id.} at 751, 118 Cal. Rptr. at 79.
\item \textsuperscript{224} \textit{Intel}, 692 F. Supp. at 1192.
\item \textsuperscript{225} \textit{Id.} at 1193.
\item \textsuperscript{228} Neither case discusses the pollution exclusion because both were interlocutory ap-
\end{itemize}
\end{footnotesize}
In Aerojet-General, the State of California and the United States sued the insured in three separate actions for injunctions to prevent the discharge of toxic waste from its research and development facility near Sacramento, for removal of waste from the groundwater and removal of waste yet to reach the groundwater. The insured also was sued for reimbursement of response costs already expended by state and federal agencies. The parties entered into a consent decree that resolved the lawsuits and established Aerojet-General’s obligation to pay cleanup and response costs. Aerojet-General, in turn, sought to recoup the costs from its insurers. In ruling for the insured, the court stated that: “[f]rom the standpoint of the lay insured, ‘damages’ could well include any sum expended under sanction of law, including both money damages and sums paid out to an injured party in response to its claim for equitable relief.” The Aerojet-General opinion distinguished the Armco and NEPACCO decisions on the ground that they used a narrow definition of the term “damages” at odds with California’s standard that requires an insurance policy to be read as a lay person would read it.

AIU Insurance concerned the obligations of the insurers of FMC Corporation to provide coverage to FMC in environmental actions brought by federal and state agencies at various sites nationwide. In these proceedings, the agencies sought both reimbursement for the costs of investigating and remediating pollution caused by FMC, and to compel FMC to take preventative and re-

Id. 822 F.2d 1348 (4th Cir. 1987), cert. denied, 484 U.S. 1008 (1988); see supra notes 70-73 and accompanying text.

Id. 842 F.2d 977 (8th Cir) (en banc), cert denied, 109 S. Ct. 66 (1988); see supra notes 74-78 and accompanying text.

Aerojet-General, 209 Cal. App. 3d at 983, 257 Cal. Rptr. at 632.

AIU Insurance, 213 Cal. App. 3d at 1222, 262 Cal. Rptr. at 184.
The court held that in accordance with the precedents deriving from *Hanna*, insurance companies did not intend to assume “the massive and open ended risk of the costs of the insured’s compliance with mandatory injunctions to remedy toxic pollution conditions.” Liability insurance policies, the court concluded, simply were never intended to “foot the bill” for CERCLA-like remedies because the potentially enormous liability is out of proportion to the risk insured. The *AIU* panel noted that this issue was not confronted in the *Globe Indemnity* mitigation of damages decision because in that case there was no serious discrepancy between the fire suppression costs and the costs of fire damage to the adjacent property.

With respect to *Aerojet-General*, the *AIU* court stated that it did not disagree with its sister court to the extent that the *Aerojet-General* panel held that state and federal agencies could recover “damages” for tangible injury to proprietary governmental interests in property. However, the court continued:

> [I]nsofar as the decision holds that there is coverage for the costs of compliance with the police power, we must respectfully disagree. Otherwise, we would disregard the unambiguous language of the policies here and completely distort well founded doctrines of insurance policy interpretation, as well as discard a mass of authority that compels our conclusion that, when the parties contracted for the insurance policies here, they could not reasonably have expected that the liability for damages provisions would cover response costs under CERCLA (or analogous provisions).

Lastly, the *AIU Insurance* court treated the public policy argument raised by the insured and also discussed in *Intel*. The court commented that regardless of the private views of its own members, its role was “limited to interpreting the language of these contracts in light of well-established legal principles.” The court declined “the invitation to assume the role of legislators.”

236 *Id.*
237 224 F.2d 499 (5th Cir. 1955); *see supra* notes 67-69 and accompanying text.
238 *AIU Insurance*, 213 Cal. App. 3d at 1224, 262 Cal. Rptr. at 187.
239 *Id.*
240 *Id.* at 1226, 262 Cal. Rptr. at 188.
241 *Id.* at 1226-27, 262 Cal. Rptr. at 190.
242 *Id.*
243 *Id.* at 1230, 262 Cal. Rptr. at 193.
244 *Id.*
This issue will soon be resolved in California since the California Supreme Court has granted review in *AIU Insurance*.

Whatever the ultimate resolution of this issue, *AIU Insurance* has one analytical advantage over *Aerojet-General* which is that the *AIU Insurance* court made a serious effort to decide the case according to what it believed were the objectively reasonable expectations of an insured in FMC Corporation's position. *Aerojet-General*’s interpretation of insurance contracts held by a multinational aerospace company “from the perspective of a layperson” blinks at reality and thus cannot possibly form the foundation for sensible jurisprudence.

**VI. Conclusion**

The contract analysis that judges perform in insurance coverage disputes is familiar and routine. However, in high-stakes, highly charged environmental coverage litigation, courts applying the same general principles often do not agree. At best, the disagreements reflect legitimate differences of opinion. At worst, as in New York and Illinois, competing courts ignore the precedents that supposedly bind them.

One immediate result of all this was that in 1986 ISO extensively revised the standard CGL policy, which among other changes, includes a sweeping pollution exclusion that eliminates the “sudden and accidental” exception. However, because pollution damage frequently happens over long periods of time and is often not discovered until long after the pollution begins, pre-1986 policies will be litigated well into the next century. In the end, if things continue as they are, the process of case-by-case adjudication will yield a rough justice with insurers and industry each paying a share of the daunting tab for cleaning up the environment.

For the present, the disarray in the judiciary, which makes

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247 See Hendrick and Wiezel, *The New Commercial General Liability Forms—An Introduction and Critique*, 36 Fed’n Ins. Couns. Q. 319, 343-50 (Summer 1986). The new pollution exclusion also addresses the statutory liability imposed upon polluters as well as the split of authority on the “damages” question, expressly excluding: “Any loss, cost or expense arising out of any governmental directive or request that you test for, monitor, clean-up, remove, contain, treat, detoxify or neutralize pollutants.” *Id.* at 347.
every case a potential winner, only encourages more litigation. But before they enter the fray both insurers and insureds should take pause. Only fools fight in a burning house.