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by THAD R. MULHOLLAND

The issues confronting insurers and insureds in pollution damage claims inherently differ from liability issues that face other fields. Policy and economic implications exist which are unlike other discrete areas of insurance liability. These differences become important in the context of the social and political climate that currently exists.

As the environment has become a social, political and scientific issue in recent years, courts have filled with environmental litigation. Discussion of the environment is so ubiquitous that even those skeptical of all of the scientific data have a difficult time denying the importance of environmental issues. One unique aspect of the environment deserves especially close attention. This comment examines the principal issues in determining who will pay for pollution damage.

The unique status of pollution damage claims is attributable to several factors. First, the pollution-causing activity usually occurs over an extended period of time.[1] Such events may involve the leaking of hazardous waste from barrels for a period of years[2], or the accumulation and subsequent dispersal of pesticide dust.[3] Accordingly, as land uses change, many evidentiary difficulties confront involved parties in their quest to attribute pollution to a single event or source. Second, the pollutant generally causes extensive damages.[4] This significantly increases the monetary stake involved, thereby increasing the number of contested lawsuits. Another exacerbating factor that distinguishes pollution damage claims from standard insurance liability claims is the latency period of many pollutants.[5] In a large number of these cases, the pollution and its effects go unrecognized for many years. For example, in contaminant disposal cases, contaminants thought to be safely disposed of escape into the groundwater.[6] The polluters may be long gone when subsequent landowners discover the pollution.

A final complicating factor is the presence of multiple claimants, defendants, and insurance companies in cases contesting substantial pollution claims.[7] This is a result of a surge in public opinion favoring environmental protection[8] accompanied by the promulgation and vigilant enforcement of stringent regulations by state and federal government agencies.[9] Today, multiple tools exist with which to hale polluters into court. The net effect of these variables is more advocates, more plaintiffs, and more defendants.[10]

Overwhelming public interest in the environment further confuses some already convoluted legal issues.[11] Often, the courts that hear environmental pollution suits serve as forums for public policy-making. Judge Sprecher acknowledged the "sensitive" nature of this issue in *Izaak Walton League of Am. v. The Atomic Energy Comm'n.*[12] In that case, the Court found that the defendant did not give due consideration to the population density and the uses of the site environs in approving the site of a commercial nuclear reactor.[13]

Together these factors compound the existing problems in most insurance liability suits.[14] As a result, determining who will pay for pollution damages is difficult. In many instances, the clean-up of a contaminated

1 James Hourihan, *Insurance Coverage for Environmental Damage Claims*, 15 FORUM 551 (1980).
2 Bureau of Engraving v. Federal Ins. Co., 1993 WL 382626 (8th Cir. Minn.).
3 Canadyne-Georgia Corp. v. Continental Ins. Co., 1993 U.S. App. LEXIS 22636 (11th Cir. Ga.).
4 Hourihan, *supra* note 1, at 551-2.
5 Hourihan, *supra* note 1, at 552.
6 *See, e.g.*, White v. Smith, 440 S.W.2d 497 (Mo. Ct. App. 1969).
7 Hourihan, *supra* note 1, at 552.
8 Robert S. Soderstrom, *The Role of Insurance in Environmental Litigation*, 11 FORUM 762, 762 (1976). "As the awareness of the magnitude, complexity and potentiality of the ecology problem reflected in this proclamation slowly increased among private citizens, they turned to the courts for the environmental protection they did not always obtain through legislative bodies, administrative agencies or political pressure." *Id.*
9 In the past twenty years there have been numerous state and federal statutes enacted that govern pollution and polluters. These include: Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9657 which imposes strict liability for past hazardous waste activities; the Clean Water Act, 33 U.S.C. §§ 1251-1376; and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6991 which regulates the disposal of solid waste.
10 Soderstrom, *supra* note 8, at 763.
11 That is, trying to sort-out the complex fact scenarios, the issues of causation, and the tangle of state and federal regulations is a daunting task by itself without the sympathy and concern that environmental issues evoke from the general public and the political pressure they apply to legislators and judges. Hourihan observed: "It is apparent that, since environmental litigation is so imbued with the public interest, the forum in which the case is litigated may very well determine the outcome of the litigation." Hourihan, *supra* note 1, at 555.
12 *Izaak Walton League*, 515 F.2d 513, 515 (7th Cir. 1975), *rev'd* 423 U.S. 12 (1975), *cert. denied*, 429 U.S. 945 (1976.
13 Judge Sprecher wrote: "In view of the vast consequences of shutting off or delaying a potential source of considerable energy in these times of energy crisis, together with the effect of such an occurrence upon the economic, financial and industrial well-being and development of Northern Indiana, obviously we cannot finally act without giving very serious consideration to every possible factor which may conceivably bear upon the problem." *Id.* at 530.
14 For instance, compare the average environmental pollution suit and subsequent declaratory judgment action to determine whether insurance coverage exists with the average tort claim arising out of a car accident. In the latter, the insurer's liability will not be questioned in many cases because the facts can be tied to a specific incident and the bounds of coverage are generally well-established. In addition, most personal injury cases involve one or two plaintiffs, and one or two insurance company defendants. Also, the general public is completely disinterested in such matters. The typical environmental claim cannot be so simplified.

site is delayed pending the outcome of these cases.[15] Unfortunately, prompt and consistent resolutions of environmental insurance claims are all too rare.

The proliferation of environmental damage claims in the last twenty years and the accompanying potential for huge damage awards prompted the insurance industry to take notice.[16] Because contract law generally determines insurance liability, the interpretation of insurance contracts can vary from jurisdiction to jurisdiction. The insurance industry has tried to maximize consistency in insurance contract interpretation through the use of industry-wide standard language.[17]

Insurers constantly endeavor to narrow the scope of liability. Their primary weapon in environmental law has been the "pollution exclusion clause" ("clause").[18] The clause eliminates all coverage for environmental damage, but then excepts from the exclusion those occurrences that are "sudden and accidental." With this clause, the insurance industry attempted to drastically narrow the scope of insurer liability in light of public outcries for environmental protection.[19] A typical clause reads as follows:

> 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, 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.[20]

This much-maligned clause, a standard exclusion under the comprehensive general liability policy, contains the operative language in deciding many pollution damage cases. Much to the frustration of the drafters, the mere presence of an exclusion has not significantly diminished the liability of insurers. Rather, judicial construction of this clause often yields unpredictable, and, sometimes unexplainable, results.

Fiscal realities dictate that insurers and insureds know exactly how liability policies will be construed. For the insurance industry, consistency in construction means that insurers can more efficiently insure against risks. If an insurer cannot discern the scope of its obligation, "it cannot accurately calculate the risk."[21] One industry insider remarked that the only way insurers could remain solvent was to be aware of their liability obligations when they set their premiums.[22] In fact, the inconsistency with which policy language has been construed has compelled some insurers to exclude completely from coverage all pollution damages.[23]

For the insureds, coherent judicial construction is crucial for a number of reasons. Foremost, more insurers[24] could offer lower premiums because of increased efficiency in risk prediction.[25] Currently, new regulations and legislation mandate that entities in the business of handling hazardous waste meet financial responsibility requirements.[26] Most satisfy these requirements with proof of liability coverage for pollution contamination.[27] However, many small contractors cannot afford this insurance and, as a consequence, cannot fulfill their contractual obligations of cleansing hazardous waste sites which further delays decontamination.[28] These events produce little more than "hindered environmental progress."[29]

The logical conclusion is that a uniform judicial construction of insurance contracts, specifically in regard to the pollution exclusion clause, would facilitate environmental clean-up. Further, those courts that distort the plain meaning of insurance contracts to facilitate environmental clean-up must step back and review the ramifications of their decisions. Some courts' "well intentioned zeal to compensate blameless victims [has lead to the unwitting creation of a] new

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15 E. J. Rosenkranz, Comment, *The Pollution Exclusion Clause Through The Looking Glass*, 74 GEO. L.J. 1237, 1278 (1986).

16 Robert M. Tyler, Jr. and Todd J. Wilcox, *Pollution Exclusion Clauses: Problems in Interpretation and Application Under The Comprehensive General Liability Policy*, 17 IDAHO L. REV. 497, 498 (1981).

17 Rosenkranz, *supra* note 15, at 1246-48.

18 Tyler and Wilcox, *supra* note 16, at 499-500.

19 Soderstrom, *supra* note 8, at 766-67.

20 *Id.* at 766 (citing Fire Cas. & Sur. Bull., Casualty and Surety Sec., Public Liability, May 1971, at Cop-2).

21 Rosenkranz, *supra* note 15, at 1278.

22 Gilbert L. Bean, *The Accident Versus the Occurrence Concept*, 1959 INS. L.J. 550, 550 (1959). Mr. Bean was the assistant secretary of Liberty Mutual Insurance Company at the time he authored this article.

23 Rosenkranz, *supra* note 15, at 1279. *See also*, Scott D. Marrs, *Pollution Exclusion Clauses: Validity and Applicability*, 26 TORT & INS. L.J. 662, 687-88 (1991).

24 It has been suggested that of the few companies who provide pollution related insurance, some have been forced to pull out of the market as a result of reinsurance companies' unwillingness to insure against major losses that are linked to insurance. Rosenkranz, *supra* note 15, at 1279. Also, rates have increased by as much as 200% and policy limits have been drastically reduced to as little as $10 million or less. Only three or four of the fourteen companies that provided this type of insurance remain. *Id.* at 1279 & n.248 (citing WALL ST. J., March 19, 1985 at 1 (eastern ed.))

25 *Id.* at 1278-81.

26 *Id.* at 1279-80.

27 *Id.* Indeed, under the Resource Conservation and Recovery Act ("RCRA"), owners and operators of hazardous waste management facilities are required to post proof of financial viability or acquire environmental damage liability insurance valued from $1 million to $6 million. Turner T. Smith, Jr., *Environmental Damage Liability Insurance - A Primer*, 39 BUS. LAW. 333, 334.

28 Rosenkranz, *supra* note 15, at 1280.

29 *Id.* at 1279.

victim, the environment."[30]

The stakes are too high to sit idly as insurance companies and their insureds resort to the arduous process of litigation, further delaying the decontamination of polluted sites. A more predictable and reasonable interpretation would lead to fewer parties willing to test the waters,[31] and hence, less litigation.[32] Less litigation, in turn, would result in more efficient environmental clean-ups. The current state of affairs consumes too much time and too many resources which could be better allocated to clean-up activities and development of new anti-pollution technologies instead of being exhausted in the courtroom. This comment will address the construction, evolution, and future direction of the pollution exclusion clause.

I. Legal History

A. The Comprehensive General Liability Policy — The vehicle used to insure most commercial activity is the comprehensive general liability policy ("CGL").[33] CGLs typically contain pollution exclusion clauses. Under the CGL, any analysis must assume coverage.[34] The language of this policy standing alone is broad and probably the chief cause of the courts' varied results in interpreting it. Under this regime, the courts usually found the existence of coverage.

1. Accident-Based Coverage

Prior to 1966, the CGL covered only damage attributable to an accident.[35] The insurance industry intended that only "identifiable"[36] events equivalent to a "sudden and accidental" discharge would give rise to coverage.[37] The industry, however, left the term "accident" undefined. The insurers feared that coverage not confined to a referable event would create a morale hazard because of the undetectability inherent in gradual damage.[38] Indeed, in *N.W. Elec. Power Coop., Inc., v. American Motorists Ins. Co.*,[39] the Court recognized that intentional conduct was not a covered event under an accident-based policy.[40] However, the intentions of the insurers failed to impress many courts.

A majority of the jurisdictions held that the accident-based policy provided coverage for unexpected events that occurred on reasonably ascertainable dates.[41] In *White v. Smith*[42] the court labeled the term "accident" "chameleonic."[43] The *White* court ruled that where a term is susceptible to a different construction, the policy should be interpreted in favor of the insured.[44] In ruling for the insured, the court found irrelevant that the pollution resulted from contaminated water seeping into the ground over an indeterminable period.[45] Citing prior case law, the court reasoned that "[t]he accident mentioned in the policy need not be a blow but *may be a process.*"[46] The *White* court reiterated the premise that when the results of the insureds' acts were unintentional, coverage would be found in most cases.[47]

The minority view added the temporal requirement of suddenness to their construction.[48] This view effectively excluded from coverage any pollution event that could not be pinpointed in time. *American Casualty Co. of Reading v. Minnesota Farm Bureau Serv. Co.*,[49] is typical of this position. There the court held that discharges from recurring explosions over a six-year period were not accidental.[50] In so concluding, the court reasoned that acts performed with the insured's knowledge "and which continue over a long period of time and which continuously cause damage cannot be termed accidents."[51] Coverage therefore failed.[52]

2. Occurrence-Based Coverage

In the face of public demand and the

30 *Id.* at 1240.
31 Seth A. Ribner, *Modern Environmental Insurance Law: "Sudden and Accidental,"* 63 St. John's L. Rev. 755, 773 (1989).
32 Currently, the insurers and insureds frequently re-litigate the same issues of liability; a more consistent interpretation would eliminate many of the more typical claims. *Id.*
33 Tyler and Wilcox, *supra* note 16, at 498. The clause generally reads as follows: "The company will pay on behalf of the insured all sums which the insured shall become legally liable to pay as damages because of bodily injury or property damage to which this insurance applies caused by an occurrence." Soderstrom, *supra* note 8, at 764. (This is the pre-1966 language.)
34 Tyler and Wilcox, *supra* note 16, at 498.
35 Hourihan, *supra* note 1, at 552.
36 Bean, *supra* note 22, at 551.
37 Hourihan, *supra* note 1, at 552.
38 Bean, *supra* note 22, at 553, 555. Bean asserted that "it would not be advisable to insure in this area without the protection of a strong requirement that coverage apply only if the gradual property damage were inadvertent.... [I]nsurers expected that they were eliminating coverage not only for conduct deliberately intended to injure or damage someone, but for irresponsible and willful conduct, borne of gross indifference for the public safety which results in foreseeable injury or damage." *Id.*
39 *N.W. Elec. Power*, 451 S.W.2d 356 (Mo. App. 1969).
40 *Id.* at 364.
41 Tyler and Wilcox, *supra* note 16, at 499.
42 *White*, 440 S.W.2d 497 (Mo. Ct. App. 1969).
43 *Id.* at 511.
44 *Id.*
45 *Id.* at 510.
46 *Id.* (quoting The Travelers v. Humming Bird Coal Co., 371 S.W.2d 35, 38 (Ky. 1963).)
47 *Id.*
48 *See, e.g.*, Hutchens v. McClure, 269 P.2d 473 (Ks. 1954).
49 270 F.2d 686 (Minn. 1959).
50 *Id.* at 692.
51 *Id.* at 691.
52 *Id.*
53 Marrs, *supra* note 23, at 662-63.
54 *Id.*

judicial trend toward expanding coverage,[53] the insurance industry moved to occurrence-based coverage from accident-based coverage in 1966.[54] This clause lacked temporal restrictions as to the insurable event.[55] In adopting the new scheme, the industry aimed to limit coverage to acts that were unintentional and nonreckless[56] and, additionally, to expand the scope of coverage by eliminating the suddenness requirement.[57] Two motivating factors prompted these changes. First, the industry wanted to clarify the meaning of the word "accident," which they believed in turn would limit their liability; and, second, they wanted to correct what they perceived as errors made by the courts in construing the accident-based policy.[58] The drafters sacrificed the temporal requirement in order to more clearly exclude pollution resulting from intentional acts.

Under the new scheme, the term "occurrence" is defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[59] Clearly, this occurrence-based policy was not meant to cover deliberate polluters, and, more importantly, it was not intended to cover damages which resulted from an insured's gross indifference to safety.[60] However, the apparently clear language and intent of the policy was muddled by the synergetic effect of mounting environmental pollution claims and a perceived need to subsidize the clean-up. The product was ever-expanding judicial creativity which favored coverage in most cases.

Most liability disputes under the occurrence-based policies hinged on the interpretation of the phrase "neither expected nor intended." The apparent failure of the industry to clarify these terms was the crack in the door many courts exploited to construe coverage in instances which the industry had not intended to insure.

International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co.,[61] is indicative of this line of cases. The dispositive factor in construing coverage was "that the *damage was unintended* and unexpected from the standpoint of the insured,"[62] not that the polluting act was unintended. Similarly, in *Aetna Casualty & Sur. Co. v. Martin Bros. Constr. and Timber Corp.*,[63] the court held that "[i]t is not the event, but the resulting injury which must be expected,"[64] thereby opening the floodgates of coverage to include pollution damages that were a result of intentional conduct. The only exclusion, the court reasoned, would be for damages that were foreseeable with a "high degree of certainty."[65]

Under this line of cases the court focused on the loss, not the act which caused it.[66] Simply put, if the *loss* was neither expected nor intended by the insured, the courts construed coverage.[67]

City of Carter Lake v. Aetna Casualty and Sur. Co.,[68] offered a slightly different view. In this case, as under the majority view, the court held that the term "accidental", as it appeared in the CGL, referred to the foreseeability of the harm. But, the *Carter Lake* court diverged from the majority view by holding that no "occurrence" existed when the insured knew or should have known that a "substantial probability" existed that his acts would result in damage.[69] Specifically, the insured's knowing and deliberate failure to replace a faulty pump did not constitute an "occurrence" and the damage caused by the subsequent malfunctions of that pump was, therefore, not a covered event.[70]

B. The Pollution Exclusion Clause

With the implications of the majority construction all too apparent, the insurance industry again moved to sharply limit coverage. The vehicle this time was the pollution exclusion clause.[71] This clause amended the Comprehensive General Liability Policy in

55 Hollis M. Greenlaw, Comment, *The CGL Policy And the Pollution Exclusion Clause: Using The Drafting History to Raise The Interpretation Out Of The Quagmire*, 23 COLUM. J.L. & SOC. PROBS. 233, 236 (1990). An occurrence is defined as "an accident, including continuous or repeated exposure to conditions, which results during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Soderstrom, *supra* note 8, at 764.
56 Greenlaw, *supra* note 37, at 239.
57 Hourihan, *supra* note 1, at 553.
58 Greenlaw, *supra* note 55, at 238.
59 William R. Fish, *An Overview of the 1973 Comprehensive General Liability Insurance Policy and Products Liability Coverage*, 34 J. MO. BAR 257, 258 (1978).
60 Greenlaw, *supra* note 55, at 238.
61 *International Minerals & Chemical*, 522 NE.2d 758 (Ill. Ct. App. 1988).(The definition of occurrence is substantially similar here as the definition mentioned in the body of this Comment.) *See also, e.g.*, Buckeye Union Ins. Co. v. Liberty Solvents & Chemicals, 477 N.E.2d 1227 (Ohio 1984); and Steyer v. Westvaco Corp., 450 F. Supp. 384 (D. Md. 1978).
62 *International Minerals & Chem.*, 522 N.E.2d at 766 (emphasis added).
63 *Martin Bros. Constr.*, 256 F.Supp. 145 (D. Or. 1966).
64 *Id.* at 150.
65 *Id.*
66 Marrs, *supra* note 23, at 664.
67 *See, e.g.*, International Minerals & Chemical Corp. v. Liberty Mutual Ins. Co., 522 N.E.2d 758, 767 (Ill. Ct. App. 1988).
68 *Carter Lake*, 604 F.2d 1052 (8th Cir. 1979).
69 *Id.* at 1059.
70 *Id.*
71 Marrs, *supra* note 23, at 663.
72 *Id.* at 663. The language of the typical exclusion clause appears on pages 3-4, *supra*, of this Comment.

1973.[72]

Much to the consternation of the insurers, the pollution exclusion clause failed to eliminate inconsistent interpretation. The reappearance of the word "accidental" in the clause bears much of the blame.[73] The ambiguities of the words are apparent when viewed as a single unit: the phrase "sudden and accidental" connotes immediacy; conversely, it can also refer to an unexpected result.[74] Indeed, one authority contends that much of the litigation arising out of the pollution exclusion clause turns on the meaning of the phrase "sudden and accidental."[75]

The pollution exclusion clause shifts the inquiry to the foreseeability of the discharge that gives rise to the loss rather than the foreseeability of the loss itself.[76] The court scrutinizes the act of the insured and determines whether it was "sudden and accidental."[77] The United States District Court for the District of Kansas followed this interpretation when it held that the pollution exclusion clause focuses on the "act of releasing or discharging the pollutants."[78] According to one commentator, the exclusion enabled insurers "to perform their traditional function as insurers of the unexpected event or happening and yet did not allow an insured to seek protection from his liability insurer if he knowingly polluted."[79]

As construction of the phrase "sudden and accidental" determines most pollution damage insurance claims, examining the different ways in which courts address the problem may be instructive of a better analytical approach. Sometimes the decisions purport to rely on contract law but in actuality are result-oriented.[80] At other times, the decisions reflect principles of contract interpretation with little consideration for environmental implications.[81] Generally, courts have subscribed to one of two approaches when construing the exclusion clause.[82]

1."Reading Out" the Pollution Exclusion

First is the line of cases that find the clause ambiguous,[83] and construe it as "coextensive with the occurrence limitation."[84] In finding for the insured, these courts reason that standard form insurance policies are contracts of adhesion, and therefore any ambiguities warrant a favorable construction for the insured.[85] The resulting interpretation reads the pollution exclusion clause as "simply a restatement of the definition of 'occurrence'...."[86]

In these cases, the insureds argue that the phrase "sudden and accidental" was not defined within the policy and therefore it should be interpreted in light of its "plain, ordinary, and commonly understood meaning."[87] The insureds resorted to any number of dictionaries to substantiate their claim of ambiguity. In response to these contentions, the courts twisted the language of the exclusion to such a degree, that they "effectively read [it] out of the standard policy...."[88] With the aid of two dictionaries, the *Lansco* court reasoned that "sudden" connoted an unforeseen and unexpected event[89] and that "accident" meant something that transpired unexpectedly.[90] The court held the insurer liable.[91]

Aetna Casualty and Surety Co. v. General Dynamics ("*General Dynamics I*"),[92] parallels this reasoning. The Court reduced the key phrase "sudden and accidental" to two discrete analyses. First, the court concluded that under Missouri law the term "accidental" described an incident that was unforeseeable and unexpected but was not necessarily sudden.[93] Second, the court

73 In the pollution exclusion clause the word "accidental" is accompanied by the word "sudden" (see pp. 5-6 of the text of this Comment.)
74 Greenlaw, *supra* note 55, at 245.
75 *Id.* at 245 (citing 2 R. Long, The Law of Liability Insurance § 10A.02 (1987)). While there are a myriad of interpretations regarding insurance law, this comment is limited to discussions of policy language on sudden and accidental questions.
76 Marrs, *supra* note 23, at 675.
77 *Id.*
78 United States Fidelity & Guaranty Co. v. Morrison Grain Co., 734 F.Supp 437, 447 (D. Kan. 1990), *aff'd*, 999 F.2d 489 (1993).
79 Soderstrom, *supra* note 8, at 768 (quoting Francis X. Bruton, *Historical, Liability and Insurance Aspects of Pollution Claims*, Proceedings of Insurance, Negligence and Compensation Law Section, A.B.A., 1971, p. 311.)
80 Garrett L. Joest, III, *Will Insurance Companies Clean the Augean Stables?– Insurance Coverage for the Landfill Operator*, 50 INS. COUNS. J. 258, 261 (1983). "The courts, faced with a dilemma of inadequate resources, have found coverage under preexisting policies in order to fund the clean-up of the environment and recompense those persons injured by toxic waste." *Id.*
81 *See, e.g.*, City of Carter Lake v. Aetna Casualty and Surety Co., 604 F.2d 1052 (8th Circ. 1979); American Motorists Ins. Co. v. General Host Corp., 667 F. Supp. 1423 (D. Kan. 1987), *aff'd*, 946 F.2d 1482 (10th Cir. 1991), *vacated in part on reh'g*, 946 F.2d 1489 (10th Cir. 1991).
82 Ribner, *supra* note 31, at 764-66; Aetna Casualty and Sur. Co. v. General Dynamics Corp., 783 F.Supp. 1199, 1209 (E.D. Mo. 1991), *rev'd in part*, 968 F.2d 707 (8th Cir. 1992).
83 Lansco, Inc. v. Dep't of Environmental Protection, 350 A.2d at 524-25.
84 Rosenkranz, *supra* note 15, at 1256.
85 Robert D. Chesler *et al.*, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 RUTGERS L.J. 9, 18 (1986). *See, e.g.*, Denis v. Woodmen Accident & Life Co., 334 N.W.2d 463 (Neb. 1983). Similar in result are Missouri cases that hold an insurance clause exclusionary by nature must be construed against the insurer. *See, e.g.*, Aetna Casualty and Surety Co. v. Haas, 422 S.W.2d 316, 321 (Mo. 1968).
86 Jackson Township Municipal Utils. Auth. v. Hartford Accident & Indem. Co., 451 A.2d 990, 994 (1982).
87 *Lansco*, 350 A.2d at 523.
88 Ribner, *supra* note 31, at 764.
89 Greenlaw, *supra* note 55, at 245. *Lansco*, 350 A.2d at 524.
90 *Lansco*, 350 A.2d at 524.
91 *Id.*
92 783 F. Supp. 1199, (E.D. Mo. 1991), *rev'd in part*, 968 F.2d 707 (8th Cir. 1992) (*General Dynamics I*).
93 *Id.* at 1208 (citing Murphy v. Western & S'ern Life Ins. Co., 262 S.W.2d 340, 342 (Mo. Ct. App. 1953); St. Paul Fire & Marine Ins. Co. v. Northern Grain Co., 365 F.2d 361, 364 (8th Cir. 1966).
94 *Id.*

held that because the term "sudden" was not defined within the policy and was otherwise ambiguous, the meaning which the insured accorded to it should be considered.[94] Here, the court stated that the term "sudden" was sufficiently ambiguous to militate in favor of coverage.[95]

In *General Dynamics I* the court did not accord a separate definition to the term "sudden." Rather, the court held that though the pollution was gradual,[96] the event was "accidental" under the terms of the policy since the damage was unexpected and unintended.[97] The determinative factor, the court held, is the state of mind of the polluter without regard to the duration of the pollution.[98] In so concluding, the court cited the drafting history of the pollution exclusion clause as evidence of the industry's intent "to exclude coverage only from accidental pollution occurrences."[99] Decisions like this effectively nullified the pollution exclusion clause.

a. Criticism: Unfaithful to the Insurers' Intent

Two main criticisms plague this line of cases. The principal criticism is that such a construction contradicts the insurers' intent in drafting the policies.[100] Despite the alleged facial ambiguity of the pollution exclusion clause, the insurance industry intended to exclude nearly every pollution claim.[101] Representations made by the industry when the exclusion clause was implemented reflect the intentions of the industry to exclude from coverage the reckless and intentional polluters who failed to take reasonable steps to prevent pollution.[102] Further, the insurers felt that the pre-exclusion policy definition of the term "occurrence" exposed them to excessive liability.[103] Thus, the critics assert, the insurance industry had moved to curtail liability, not to expand it.[104]

Soderstrom captured the intended shift in focus: "Coverage for willful, intentional or expected violations was to be excluded. Under the policy, coverage was available as long as the damage was not expected or intended. With the pollution [exclusion], the question was the intent of the insured in his actions, rather than the results."[105]

Other bases exist with which to ascertain the intent of the insurance industry. One commentator proposes that the meaning of the terms be interpreted in light of the historical context of pollution claims.[106] Such a perspective leads to a more confining construction of the pollution exclusion clause.[107] Courts should take into account that the policy drafters made the word "sudden" part of the exclusionary clause in response to "the manner in which the courts had treated the 'caused by accident' language in the pre-1966 standard liability policy."[108] Additionally, at the time the clause was drafted, few cases construed the term "occurrence."[109]

Another criticism leveled at the *General Dynamics I* line of cases, recognizes that the industry always intended to limit coverage to sudden events as indicated by the sale of gradual pollution policies at a higher premium.[110] If the industry had intended to cover gradual damages from the onset, this development would be illogical.[111] These critics argue that in drafting the pollution exclusion, the industry intended to shift the focus from the foreseeability of the harm to the insured's knowledge concerning the discharge.[112]

Conversely, supporters of the *General Dynamics I* courts present strong arguments that the insurance industry intended to do no more than restate the definition of occurrence in formulating the pollution exclusion clause.[113] These proponents cite statements by institutions within the insurance industry as illustrative of this intent.[114] One such source states:

> [T]he exclusion simply reinforces the definition of occurrence. That is, the policy states that it will not cover claims where the "damage

95 *Id.*, "Interpretation in the insured's favor is particularly appropriate if an ambiguity arises in an exclusion, since the insurer there attempts to limit/exclude the insured's coverage." *Id. See also, e.g.*, Meyer Jewelry Co. v. General Ins. Co., 422 S.W.2d 617 (Mo. 1968); and Greer v. Zurich Ins. Co., 441 S.W.2d 15 (Mo. 1969).
96 *General Dynamics I*, 783 F.Supp. at 1210. Here, pollutants seeped into the ground over a number of years. *Id.*
97 *Id.* at 1210.
98 *Id. See also*, Jackson Township Municipal Utils. Auth. v. Hartford Accident & Indem. Co., 451 A.2d 990, 994 (N.J. 1982)(holding pollution exclusion clause ambiguous and merely a restatement of the term "occurrence").
99 *General Dynamics I*, 783 F.Supp. at 1209.
100 Greenlaw, *supra* note 55, at 246. *See also*, Rosenkranz, *supra* note 15, at 1252-53.
101 Greenlaw, *supra* note 55, at 248 (quoting letter from Graham V. Boyd, Jr., Assistant Manager, Insurance Rating Board, to the Honorable Samuel H. Weese, Insurance Commissioner, State of West Virginia (July 31, 1970).)
102 Greenlaw, *supra* note 55, at 246-47.
103 Soderstrom, *supra* note 8, at 767. "[T]he policy definition of occurrence included not only an accident, but also a continuous exposure to conditions which would obviously include a great many pollution situations." *Id.*
104 *Id.* at 767-68.
105 *Id.* at 767.
106 Ribner, *supra* note 31, at 792-93.
107 *Id.*
108 *Id.* at 793 (quoting Wilmarth, *Pollution Liability– What Are the Insurance Companies Doing in This Area?* 21 FED'N INS. & CORP. COUNS. Q. 18, 20-21 (1971)).
109 *Id.*
110 Rosenkranz, *supra* note 15, at 1252.
111 Or, intent aside, it may simply be an insurance industry reaction to the construction of their policies.
112 Tyler and Wilcox, *supra* note 16, at 506.
113 Sheldon Hurwitz and Dan D. Kohane, *The Love Canal-Insurance Coverage For Environmental Accidents*, 50 INS. COUNS. J. 378, 379 (1983).
114 *Id.*
115 *Id.* (quoting *The Fire, Casualty & Surety Bulletin* (the underwriter's handbook)).

> was expected or intended" by the insured and the exclusion states, in effect, that the policy will cover incidents which are sudden and accidental — unexpected and not intended.[115]

The Illinois Court of Appeals in *U.S. Fidelity & Guaranty v. Specialty Coatings Co.*,[116] in subscribing to this reasoning,[117] held that the exclusion clause was ambiguous and therefore must be interpreted in favor of the insured.[118] These arguments offer a potent response to the critics who claim that the courts frustrated the intent of the insurers. The intent of the industry, however, should only be considered where the clause has been declared ambiguous. Otherwise, clear language should prevail over a sketchy history of either party's intent.

b. Criticism: Result-Oriented Decisions

The other criticism of the *General Dynamics I* line of cases is that these courts are simply result-oriented.[119] These critics contend that courts construe an otherwise clear clause as ambiguous in order to facilitate the finding of coverage, and thereby subsidize environmental clean-up.[120]

Indeed, some courts appear wary of this judicial "gerrymandering."[121] In *International Minerals & Chem. Corp.* v. *Liberty Mut. Ins. Co.*,[122] the court stated that when construing insurance contracts

> the court should neither distort the meaning of the words so as to reach a desired result nor search for or invent ambiguities where none exist but, rather, should examine the policy as a whole and, to the extent possible, give effect to all provisions and interpret words according to their plain, ordinary and popular meanings.[123]

A judicial declaration that the exclusion clause is ambiguous often results from judicial attempts to subsidize the clean-up. Typical is *Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co.*,[124] where the court deemed irrelevant the fact that the pollution events occurred on numerous occasions and over an extended period of time.[125] Such a scenario constituted "sudden and accidental" according to the *Jackson Township* court.[126] The *Jackson Township* court arguably ignored the plain and reasonable meaning of the term "sudden" in arriving at their decision. Certainly, *General Dynamics I* is susceptible to all of these criticisms as well.

Obviously, the decisions based on this brand of judicial activism are difficult to ascertain with complete accuracy. No court explicitly professes its desire to circumvent the plain meaning of the pollution exclusion clause to subsidize environmental decontamination. One authority, however, suggests that this "gerrymandering" was in response to non-industrial pollution occurrences, such as mudslides and crop sprayers.[127] This assertion finds legitimacy in those cases finding coverage where "unusual" pollution events occurred.[128] In those cases, the courts relied on the doctrine of reasonable expectations to preclude the exclusion where the pollution event and subsequent lawsuit were atypical.[129] The *Wasmuth* court reasoned that a lay insured would expect coverage for damage attributable to a negligent installation of insulation.[130] This "unusual" event made the term "sudden and accidental" ambiguous.[131] But where there are multiple claimants and far-reaching pollution, and the potentially hazardous waste has been deliberately disposed of causing damage which is discovered years later, a typical pollution event has occurred and the pollution exclusion applies.[132] In the large majority of industrial pollution cases, however, the "unusual" exception will not save coverage.

One author posits that in response to inadequate resources, courts have bank-rolled the environmental clean-up by finding coverage.[133] This criticism necessarily has some

116 535 N.E.2d 1071 (1989), *appeal denied*, 545 N.E.2d 133 (Ill. 1989).
117 *Id.* at 1078. In addition to the historical background of the pollution exclusion clause, the court based its decision in part on the policy language. *Id.*
118 *Id.*
119 *See, e.g.*, Rosenkranz, *supra* note 15, at 1240; Lac D'Amiante Du Quebec, Ltee. v. American Home Assurance Co., 613 F.Supp 1549, 1557 (D. N.J. 1985) ("...subjected the policies to an interpretation designed to 'promote coverage' and to 'fulfill the dominant purpose of providing indemnification'."); Joest, *supra* note 80, at 261. "The courts, faced with a dilemma of inadequate resources, have found coverage under preexisting policies in order to fund the clean-up of the environment and recompense those person injured by toxic waste." *Id.*
120 Joest, *supra* note 80, at 261; Rosenkranz, *supra* note 15, at 1240.
121 Rosenkranz, *supra* note 15, at 1253.
122 522 N.E.2d 758 (Ill. Ct. App. 1988).
123 *Id.* at 764.
124 451 A.2d 990 (1982).
125 *Id.* at 994-95.
126 *Id.*
127 Ribner, *supra* note 31, at 766.
128 *E.g.*, Grinnell Mut. Reinsurance Co. v. Wasmuth, 432 N.W.2d 495 (Minn. Ct. App. 1988).
129 Grinnell Mut. Reinsurance Co. v. Wasmuth, 432 N.W.2d 495 (Minn. Ct. App. 1988).
130 *Id.* at 500.
131 *Id.*
132 *Id.* at 498.
133 Joest, *supra* note 80, at 261.

validity. What else can describe the seemingly contrived constructions of courts like the *Jackson Township* court?

2. A New Trend: Strict Construction of Exclusion Clauses

Recently, many courts have done an about-face in interpreting pollution exclusion clauses.[134] The trend is toward judicial adoption of the industry position on the meaning of the exclusion clause.[135] Many courts now tend to focus on the insured's state of mind with respect to the discharge rather than the resulting damage, and accordingly construe the term "sudden" as meaning "abrupt" or "immediate."[136]

Representative of these cases is *American Motorists Ins. Co. v. General Host Corp.*[137] There, the court lambasted its counterparts which declared the pollution exclusion ambiguous, stating that the language is so clear that "only a lawyer's ingenuity could make [it] ambiguous."[138] The court reasoned that even if the term "accidental" was ambiguous, the term "sudden" was not susceptible to subjective construction.[139] "[D]eclin[ing] to contort the plain language of the policy,"[140] the court held that a seventy-five year pollution event was not "sudden" and accordingly granted the insurer summary judgment.[141]

Waste Mgmnt. v. Peerless Ins. Co.,[142] simplifies the ambiguity and subjective issues. In *Waste Mgmnt.*, the North Carolina Supreme Court declared the pollution exclusion clause unambiguous. In making this determination, the court reduced the policy to its constituent parts and considered each part separately. The resulting opinion consisted of a clearly reasoned three-part analysis.[143] The CGL policy, the pollution exclusion clause, and the exception to the pollution clause were the foci of the analysis.[144] In so narrowing the focus, the court held that the term "occurrence" under the CGL provided coverage for unintentional and unexpected events.[145] Further, the court pared the inquiry under the exclusionary clause to whether the incident in fact constituted a polluting event.[146] Finally, the court held the exception to the pollution exclusion took effect only upon an instantaneous event.[147]

II. An Examination of Missouri Law

Aetna Casualty & Sur. Co. v. General Dynamics Corp.("*General Dynamics II*"),[148] overruled the part of *General Dynamics I* that construed the terms "sudden and accidental."[149] *General Dynamics II* supports the line of cases holding the pollution exclusion clause unambiguous, and pursuant to the general precepts of contract law accorded the terms their ordinary meaning.[150]

The Eighth Circuit Court of Appeals in *General Dynamics II* noted that under Missouri law, all terms of a contract must be given meaning.[151] Consequently, the United States District Court for the Eastern District of Missouri erred when it failed to define the term "sudden" and the term "accidental" separately.[152] The origin of the misconstruction lies in the conceptualization of the two terms as a single phrase, and not as semantically discrete words. In fact, the court held, defining each of these two words separately purges the clause of any ambiguity.[153] Specifically, the lower court found "sudden" ambiguous because it could alternately mean unexpected or abrupt.[154] However, this construction was unsatisfactory according to the *General Dynamics II* court because the term "accidental" encompasses the unexpected, thereby necessarily rendering "sudden" the equivalent of abrupt.[155] Any other reading "would render the word 'sudden' superfluous."[156]

Recently two other federal courts of appeals concurred with the reasoning of *General Dynamics II*. In *United States Fidelity & Guaranty Co. v. Morrison Grain Co.*,[157] the Tenth Circuit Court of Appeals, applying Kansas law, held the term "sudden and accidental" unambiguous.[158] Accord-

134 Ribner, *supra* note 31, at 766.
135 *Id.*
136 *Id.* at 766-67.
137 667 F.Supp. 1423 (D. Kan. 1987), *aff'd*, 946 F.2d 1482 (10th Cir. 1991), *vacated in part on reh'g*, 946 F.2d 1489 (10th Cir. 1991). *See also*, United States Fidelity & Guaranty Co. v. Morrison Grain Co., Inc., 734 F.Supp. 437 (D. Kan. 1990).
138 *General Host*, 667 F.Supp. at 1429.
139 *Id.* at 1428. At a minimum, the term "sudden" must refer to an event that happens on brief notice and unexpectedly. *Id.*
140 *Id.* at 1429.
141 *Id.* at 1427. Thus coverage was excluded via the pollution exclusion clause.
142 340 S.E.2d 374 (N.C. 1986).
143 *See* Greenlaw, *supra* note 55, at 261.
144 *Waste Management*, 340 S.E.2d at 382.
145 *Id.*
146 *Id.* at 380.
147 *Id.* at 382. The Illinois Court of Appeals employed a similar analysis in International Minerals & Chem. v. Liberty Mut. Ins., 522 N.E.2d 758 (Ill. App. Ct. 1988).
148 968 F.2d 707 (8th Cir. 1992), *rev'g* 783 F.Supp. 1199 (E.D. Mo. 1991).
149 *Id.* at 710.
150 *See, e.g.*, American Motorists Ins. Co. v. General Host Corp., 667 F.Supp. 1423 (D. Kan. 1987); Int'l Minerals & Chem. Corp. v. Liberty Mut. Ins. Co., 522 N.E.2d 758 (Ill. App. Ct. 1988).
151 *General Dynamics II*, 968 F.2d at 710 (citing Harnden v. Continental Ins. Co., 612 S.W.2d 392, 394 (Mo. Ct. App. 1981)).
152 *Id.*
153 *Id.*
154 *General Dynamics I*, 783 F.Supp. at 1208.
155 *General Dynamics II*, 968 F.2d at 710. Note that the *General Dynamics I* Court defined the term "accident" as a matter of law and found ambiguity in the term "sudden," whereas the *General Dynamics II* Court chose to define "sudden" objectively.
156 *Id.*
157 *Morrison Grain*, 999 F.2d 489 (10th Cir. 1993). (See summary at 1 Mo. Envt'l L. & Pol'y Rev. 97 (1993)).
158 *Id.* at 493.
159 *Id.* at 491.

ingly, no coverage existed where containers holding pesticides rusted and subsequently disintegrated contaminating the surrounding area.[159] The court reasoned that to assign a single meaning to "sudden and accidental" would frustrate Kansas law which mandates that all terms of a contract be given meaning.[160] Additionally, the court held that the term "sudden and accidental" has an "objective temporal meaning,"[161] thereby making the intent of the insured immaterial.[162]

Interpreting Minnesota law, the United States Court of Appeals for the Eighth Circuit ruled similarly.[163] In citing to *General Dynamics II*, the *Bureau of Engraving* court held that if the term "sudden" meant unexpected, then the term "accidental" was redundant.[164] The court accorded "sudden" temporal meaning and denied coverage to the insured where hazardous wastes leaked from barrels for a period of ten years.[165] Interestingly, the *Bureau of Engraving* court also distinguished the instant case from those cases dealing with "unusual" pollution events and indicated that where an event was "unusual," the pollution exclusion would be inapplicable.[166]

The regional trend is unmistakable: courts utilize traditional tenets of contract law to find that pollution events are precluded from coverage by the pollution exclusion clause. It seems as though the clause is finally receiving the construction the insurers intended. Now that they are often faced with sole liability for their pollution, maybe the insureds will reprioritize their commitment to a clean environment.

III. Policy Analysis

The recent shift in focus comes as a welcome change for a number of reasons. Most importantly, the strict construction of the exception to the pollution exclusion clauses will galvanize a sense of increased responsibility on the part of those entities involved with potential pollutants.

Generally, change in any industry will not occur without some motivating force. The industry of polluters is no different. Therein lies the mechanism for providing a cleaner environment. By mandating that a pollution exclusion be part of all policies, insureds will be compelled to develop innovative anti-pollution measures as a check on their potentially enormous liability.[167] However, this mechanism for change has been repeatedly rendered ineffective by the judiciary.

The State of New York, as a matter of public policy, enacted just such a statute[168] as a means of promoting a clean environment.[169] This statute mandated that the pollution exclusion be part of all CGLs.[170] The statute's principal purpose lay in keeping the polluters from taking advantage of the opportunity to spread the risk of loss that their pollution caused.[171] The concern of the Legislature was that a polluter could spend a minimal amount of money to insure against extensive pollution-related damages whereas if the same entity was directly liable for those damages, it would have an incentive to more closely monitor its behavior.[172] Governor Rockefeller explained upon signing the bill that it would "preclude any insurance company from undermining public policy by offering this type of insurance protection."[173] This law, however, was later repealed based on the perceived need to compensate victims.[174] Ironically, an identical rationale contributed to the problems in defining the coverage limits of pollution exclusion clauses in the first place.

The intent of laws like this is unmistakable: make industry responsible for its actions. Still, these laws do not provide the definitive solution since all standard form CGLs contain pollution exclusion clauses anyway. Rather, by implementing such a law, a legislature would manifest its intolerance for irresponsible industry. Faced with the pressure of a such a mandate, courts, in turn, may feel compelled to construe the

160 *Id.* at 493.
161 *Id.*
162 *Id.*
163 Bureau of Engraving, Inc., v. Federal Ins. Co., 5 F.3d 1175 (8th Cir. 1993).
164 *Id.* at 1177.
165 *Id.* at 1177-78.
166 *Id.* at 1176-77. (*See supra* notes 127-132 and accompanying text.)
167 Note that in most cases the insureds are in a much better position to research and develop new technologies to combat pollution than are the insurers with their cadre of actuaries and lawyers.
168 N.Y. Ins. Law § 46 (McKinney 1971) (repealed 1982).
169 AllState Ins. Co. v. Klock Oil Co., 73 A.D.2d 486, 487-88, 426 N.Y.S.2d 603, 604 (N.Y. App. Div. 1980).
170 N.Y. Ins. Law § 46 (McKinney 1971) (repealed 1982).
171 *Id.*
172 Niagara County v. Utica Mut. Ins. Co., 80 A.D.2d 415, 418, 439 N.Y.S.2d 538, 540 (N.Y. App. Div. 1981).
173 Memorandum of Governor Nelson A. Rockefeller, reprinted in 1971 N.Y. Laws 2633 (quoted in Rosenkranz, *supra* note 15, at 1253, and at n.83.)
174 Rosenkranz, *supra* note 15, at 1269 and n.173.

exclusion clauses as just that — an exclusion with few exceptions. Certainly with such a policy on the legislative record, courts would not be so prone to blur clear language.

Indeed, those courts initiating the trend toward strict construction have remarked on the necessity of such a public policy. In *Bureau of Engraving v. Federal Ins. Co.*,[175] the Court, in denying coverage, stated that such a construction acted as a deterrent to those who negligently and recklessly handle contaminants in that they could no longer "hid[e] behind their ignorance."[176] The Court added that its construction eliminated from coverage those damages caused by pollution that results from ordinary business practices.[177]

Environmental damages claims ought to be given special scrutiny for reasons unique to the fields of property insurance and private industry. Inherent in this assertion is the general belief that private industry views pollution issues as an economic problem and not a social problem.[178] In other words, imposing upon their consciences will not be an effective deterrent; reducing their bank accounts will.

Of equal importance are those intrinsic difficulties present in providing property insurance that other types of personal insurance do not experience.[179] Gilbert Bean attributes these problems to society's covetousness of material things and to the tendency of individuals to be less conscientious when safeguarding their property as compared to safeguarding their person.[180] Mark Greene attests to the truth of this human trait:

> [S]uppose that managers of Company ABC believe that the federal government will provide disaster assistance that will fully compensate ABC for all earthquake losses it may incur. In making plans for a new building near a major fault line, ABC management may be tempted to ignore more expensive construction designs and procedures that can lessen damage from earthquakes. In essence, ABC's assumption regarding the potential for federal disaster aid makes its management indifferent to the prospect of loss and, therefore, more prone to more careless decisions.[181]

Certainly, this example depicts a problem inherent in insuring against property damage. The state of our environment indicates that this phenomenon is probably not atypical. With this built-in "morale hazard,"[182] the pollution exclusion clause should be a check on the apathy inspired by insurance rather than a clause which enables it. The accountability afforded by strict interpretation may be the impetus necessary for change.

Decreased vigilance is not the only problem with which insurers must contend. Not only are people less likely to be concerned with damaging the environment, Bean implicitly asserts that in fact a certain temptation to pollute exists among those inclined to act unscrupulously.[183] Simply put, since pollution damage is usually gradual and is not detected for years, the would-be polluters can feel reasonably certain that they will escape responsibility for the damages.[184] In this regard, when a court construes the "sudden and accidental" clause to cover gradual damages caused by intentional conduct, it passes a disproportionate risk of dishonesty to the insurers. A construction more in accord with the plain meaning of the words compensates for the risk intrinsic in insuring against pollution damages.

Construing the pollution exclusion clause as it was intended — that is, as a preclusion to most environmental damage claims — will lead to greater accountability and responsibility among those handling potential contaminants. In turn, less such claims will arise in the future, resulting in what most advocates have demanded all along: a cleaner environment.

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175 793 F.Supp. 209 (D. Minn. 1992), *aff'd*, 5 F.3d 1175 (8th Cir. 1993).
176 *Id.* at 213.
177 *Id.*
178 Soderstrom, *supra* note 8, at 763.
179 *See* generally Bean, *supra* note 22, at 552-53.
180 *Id.* at 552-53.
181 Mark R. Greene *et al.*, Risk and Insurance 11 (8th ed. 1992).
182 *Id.* Greene characterizes the morale hazard as "circumstances [which] may cause someone to be indifferent to the possibility of a loss, thus causing that person to behave in a careless manner." *Id.*
183 Bean, *supra* note 22, at 553.
184 *Id.*