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Hurry Up and Have an Accident: Comprehensive General Liability Contract Standard Pollution Exclusion Clause Includes a Temporal Element

*Charter Oil Company v. American Employers' Insurance*¹

by Kevin Murphy

I. INTRODUCTION

In *Charter Oil Company v. American Employers' Insurance Company*, Charter appealed the lower court's decision, seeking coverage based on comprehensive liability insurance. Applying Missouri law, the Court of Appeals found that the insurance companies did not have to cover Charter's CERCLA costs because the insurance contract only covered "sudden and accidental" environmental damage. One of a multitude of courts to interpret this "pollution exclusion clause," the D. C. Circuit held that under Missouri

law, the "pollution exclusion clause" would be interpreted in favor of the insurers. However, it is still unclear whether Missouri state courts would decide the case as the D. C. Circuit predicted.

II. FACTS AND HOLDING

In 1971, Independent Petrochemical Corporation (IPC), a wholly-owned subsidiary of plaintiff/appellant Charter Oil (Charter), hired independent contractor Russell Bliss to dispose of hazardous waste materials.² IPC disposed of the waste as a courtesy to IPC's customer, Northeastern Pharmaceutical and

Chemical Company (NAPACCO).³ NAPACCO's waste contained dioxin,⁴ which, in sufficient concentrations, has been found to be harmful to humans, plants, and animals.⁵

Bliss did not appropriately dispose of the hazardous waste.⁶ Five times between February, 1991, and October, 1971, Bliss moved the waste to Frontenac, Missouri, where he mixed it with waste oil and stored it.⁷ Later Bliss sprayed the dioxin laced waste oil as a dust suppressant at various locations throughout Missouri.⁸

When the government and public became aware of the dioxin contamination at the sites Bliss sprayed, IPC faced class action suits from the United States and the State of Missouri.⁹ In addition, over 1,600 claimants in 57 separate actions, filed civil suits alleging bodily injury and property damage from the dioxin contaminated soil.¹⁰ The individuals requested aggregate relief of \$4 billion, and punitive damages of \$4 billion.¹¹ All of the private suits, except one, had been settled by the time the trial court rendered its opinion in January, 1994.¹² Settlements with the United States and the State of Missouri were also awaiting court approval.¹³

IPC sought coverage from insurance policies¹⁴ which had been purchased

¹ 69 F.3d 1160 (D. C. Cir. 1995).

² *Id.*

³ *Id.* at 1162.

⁴ *Independent Petrochemical Corp. (IPC) v. Aetna Casualty and Sur. Co.*, 842 F. Supp. 575 (D.D.C. 1994), *aff'd sub nom. Charter Oil Co. v. American Employers' Ins. Co.*, 69 F.3d 1160 (D.C. Cir. 1995).

⁵ *Charter*, 69 F.3d. at 1162.

⁶ The trial court and appellate cases leave some doubt as to whether Bliss acted knowingly. The appellate opinion suggested that Bliss did not know that the waste oil he sprayed contained dioxin. See *Charter*, 69 F.3d at 1162 ("Bliss Oil's president tasted the oil to check its suitability for other uses and found the flavor fit, Bliss sprayed it as a dust suppressant . . . throughout Missouri The waste oil turned out to contain dioxin") The trial court's more detailed opinion indicated that Bliss mixed hazardous waste with oil before spraying it in Missouri. *Charter*, 69 F.3d at 1162. However, the trial court held that it did not need to decide if Bliss polluted intentionally, but only that he intentionally sprayed the contaminated oil. *IPC*, 842 F. Supp. at 584.

⁷ *IPC*, 842 F. Supp. at 676.

⁸ *Id.* EPA found the soil to be contaminated in 29 different locations as a result of Bliss's spraying. These locations included Times Beach, Shenandoah Stables, Timberline Stables, Bubbling Springs Stable, Saddle and Spur Club, Rosati/Piazza Road, Frontenac, Quail Run, Castlewood/Santag Road, Highway 100/Erleben, East North Street, Lacy Manor/Sandcut Road, Bliss Farm/Mid-America Arena, Bull Moose Tube Company, Hamill Transfer Company, Jones Truck Line, Overnight Transport/P.I.E., Southern Cross Lumber, Arkansas Best Freight, Bonifield Brother Trucking, Community Christian Church, Manchester Methodist Church, Baxter Garden Center, Access Road to Old Highway 141, East Texas Freight, Bristol Steel, Hellwig Fruit Market, Minker/Stout/Romaine Creek, and Southwestern Bell. *Id.* at 676 n.3.

⁹ *Independent Petrochemical Corp. (IPC) v. Aetna Casualty and Sur. Co.*, 842 F. Supp. 575, 576 (D.D.C. 1994).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

between 1971, the year when IPC agreed to assist NEPACCO in disposing of the hazardous waste, and 1983, the filing of *Charter Oil*.¹⁵ Charter sued the insurers in November 1983, seeking a declaratory judgment that would force them to indemnify Charter for Bliss' oil spraying activities.¹⁶ The defendants in that action were the twenty-three different insurers that had issued IPC sixty-seven primary and excess liability policies.¹⁷ In February, 1991, the court granted summary judgment in favor of defendants, in cases, where New York law controlled.¹⁸

At trial, the court granted summary judgment for those defendants over whom Missouri law was controlling.¹⁹ Summary judgment was granted because each of the defendant insurance companies had standard pollution exclusion clauses in their insurance contracts that did not allow recovery for releases of pollution.²⁰ These pollution exclusion clauses, however, contained exceptions that permitted recovery for "sudden and accidental" discharges of pollutants.²¹ The specific provision at issue stated that the insurance did not cover:

[b]odily 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.²²

Three of the four types of pollution exclusion clauses read the same as the one above.²³ The remaining form of insurance contract, issued by Travelers, included an exception that allowed for indemnification if the pollution was neither "expected" nor "intended."²⁴ The parties agreed that the "expected nor intended" language was functional equivalent to "accidental."²⁵ The Travelers contract did not include language corresponding to the other contracts' use of the word "sudden."²⁶

Charter argued that the "sudden and accidental" clause was ambiguous, and as such should be interpreted against the

insurance companies, the parties who drafted the contract.²⁷ Accordingly, Charter argued, the insurers would, therefore, have to indemnify them for the remediation costs associated with the cleanup of the dioxin.²⁸ The trial court refused to accept this argument holding that under Missouri law the insurance companies had no duty to indemnify.²⁹ The D. C. Circuit Court of Appeals also found in favor of the insurance companies.³⁰ That court held that under Missouri law the phrase "sudden and accidental" was not sufficiently ambiguous and that the counterbalancing public policy considerations of allowing insurance companies to reserve pollution exclusions all prevented recovery.³¹

III. LEGAL HISTORY

Generally speaking, Comprehensive General Liability (CGL) insurance policies are designed to protect businesses against liability to third parties.³² Available for all types of commercial ventures, CGLs require the insurer to defend the insured if litigation arises, and indemnify the insured for any payment resulting from a business

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Charter Oil Co. v. American Employers' Ins. Co.*, 69 F.3d 1160, 1162 (D.C. Cir. 1995).

¹⁷ *IPC*, 842 F. Supp at 576. Defendants in this action were Aetna Casualty and Surety Company (Aetna), American Employers' Insurance Company (American Employers), American Home Assurance Company (American Home), American Re-Insurance Company (American Re-Insurance), Continental Casualty Company, Continental Insurance Company, Employers Commercial Union Insurance Company, First State Insurance Company, Harbor Insurance Company, Hartford Accident and Indemnity Co., Insurance Company of North America, The Insurance Company of the State of Pennsylvania, North Star Reinsurance Company, Stonewall Insurance Company, The Travelers Indemnity Company (Travelers), Unigard Security Insurance Company, and Certain London Market Defendants (the London Defendants). *Id.*

¹⁸ *IPC*, 842 F. Supp at 576.

¹⁹ *Id.*

²⁰ *Charter*, 69 F.3d at 1162.

²¹ *Id.*

²² *Id.* at 1163.

²³ *Id.* The trial court referred to this form of exclusion as the "domestic insurers exclusion." *IPC*, 842 F. Supp. at 577. The trial court also mentioned what it referred to as the "London exclusion" and the "INA exclusion." *Id.* Charter and defendants agreed that the domestic insurers exclusion, the London exclusion, and the INA exclusion should all be interpreted identically, based on the theory that the word "accidental" is nearly identical to the words "expected and intended" in some of the insurers' contracts. *Id.*

²⁴ *Independent Petrochemical Corp. (IPC) v. Aetna Casualty and Sur. Co.*, 842 F. Supp. 575, 577 (D.D.C. 1994).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 576.

²⁸ *Id.*

²⁹ *Id.* at 585.

³⁰ *Charter Oil Co. v. American Employers' Ins. Co.*, 69 F.3d 1160, 1163 (D.C. Cir. 1995).

³¹ *Id.* at 1163.

³² Carl A. Solisbury, *Pollution Liability Insurance Coverage, The Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia*, 21 ENVTL. L. 357, 359 n.6 (1991).

loss.³³ Under a CGL policy, the insurer has five obligations: 1) promoting safety and reducing claims; 2) investigating claims; 3) defending policy holders in suits; 4) indemnifying policy holders when obligated; 5) helping to mitigate losses.³⁴

CGLs are standardized in order to make them easier to interpret.³⁵ The idea is that once courts have interpreted a given policy, an insurance company can plan financially for the future because the company knows what the likelihood is that it will have to pay out on the policy.³⁶ A trade organization, Insurance Service Office (ISO), drafts many of the CGL standard policies which are used by almost every major American insurance company.³⁷ ISO was responsible for drafting the standard pollution exclusion that was the subject of the instant case.³⁸ Generally, the insured purchases the policy from a broker without having any input on the language of the policy and in many cases not seeing the policy contract until they have already paid for it.³⁹

During the last two decades potential environmental liability for business has increased to the level that coverage has become essential to the survival of many business.⁴⁰ Business owners who have purchased CGL policies to guard against liability have turned to the insurance policies they purchased during the seventies and early eighties for environmental coverage.⁴¹ Insurance companies, however, often refuse to indemnify, arguing that the "sudden and accidental" clause only covers pollution that is both "unexpected and unintended" and abrupt, a burden few insureds can overcome.⁴² This, "sudden and accidental" exclusionary clause was found in practically every CGL between 1973 and 1985.⁴³

The ambiguous nature of the "sudden and accidental" language has prompted numerous lawsuits against various insurance companies throughout the years. Courts, however, have failed to agree on a consistent interpretation of the language.⁴⁴ The fact that almost every CGL

purchased between 1978 and 1985 contains this same "sudden and accidental" exclusionary clause makes the need for a uniform interpretation all the more important.⁴⁵ Apparently in an attempt to establish more predictability, the ISO replaced the standard pollution exclusion with an "absolute pollution exclusion."⁴⁶ Businesses, however, still face unpredictable litigation under the old standard pollution exclusion for pollution events that occurred during the years where the older pollution exclusion clause was used.⁴⁷

As the interpretation of the pollution exclusion clause began to be litigated, courts unanimously held that "sudden and accidental" meant unexpected, unintended, and abruptly beginning.⁴⁸ The first case to interpret the exclusion clause was *Lansco, Inc. v. Department of Environmental Protection*.⁴⁹ Vandals had opened the valve of an oil storage tank, spilling oil onto Lansco's property, and a nearby river.⁵⁰ Even though the actual pollution

³³ Sharon M. Murphy, *The "Sudden and Accidental" Exception to the Pollution Exclusion Clause in Comprehensive General Liability Insurance Policies: The Gordian Knot of Environmental Liability*, 45 *VAND. L. REV.* 161, 163. Usually, CGL policies promise "to pay on behalf of the insured all sums . . . [it is] legally to pay as damages because of bodily injury or property damage to which the insurance applies caused by an occurrence . . ." *Id.* at n.7.

³⁴ See Salisbury, *supra* note 32, at 359 n.6.

³⁵ See Murphy, *supra* note 33, at 164.

³⁶ *Id.*

³⁷ *Id.* at 164 n.17.

³⁸ Nancer Ballard and Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 *CORNELL L. REV.* 610, 625 n.59 (1990).

³⁹ *Id.* at 621.

⁴⁰ *Id.* at 612. The increase in of liability is in large part due to the passage of environmental statutes such as CERCLA.

⁴¹ *Id.*

⁴² *Charter Oil Co. v. American Employers' Ins. Co.*, 69 F.3d 1160, 1166 [D.C. Cir. 1995].

⁴³ Murphy, *supra* note 33, at 167. In 1985, because insurance companies were facing overwhelming liability costs, the ISO removed all coverage for pollution based injuries. *Id.*

⁴⁴ Ballard and Manus, *supra* note 38, at 612. The authors found at least one court which had taken note of the smorgasbord of judicial viewpoints:

There is a plethora of authority [on the pollution exclusion] from jurisdictions throughout the United States which, depending on the facts presented on the allegations of the underlying complaints, go "both ways" on the issues presented today. The cases swim the reporters like fish in a lake. The Defendants would have this Court pull up its line with a trout on the hook, and argue that the lake is full of trout only, when in fact the water is full of bass, salmon, and sunfish, too. *Id.* at n.7, (citing *Pepper's Steel and Alloys, Inc. v. United States Fidelity & Guar. Co.*, 668 F. Supp. 1541, 1549-50 [S.D. Fla. 1987]).

⁴⁵ *Id.*

⁴⁶ Amy Timmer, *Are They Lying Now or Were They Lying Then? The Insurance Industry's Ambiguous Pollution Exclusion: Why the Insurer, and Not the Innocent Insured, Should Pay for Pollution Caused by Prior Landowners*, 46 *BAYLOR L. REV.* 355, 357 n.3 (1994). The post-1986 exclusion now reads:

It is agreed that this policy does not apply to personal injury or property damage arising out of the contamination of the environment by pollutants introduced at any time into or upon land, the atmosphere or any water course or body of water or aquifer. This exclusion applies whether or not the contamination is introduced into the environment intentionally or accidentally or gradually or suddenly and whether or not the insured or any other person or organization is responsible for the contamination. *Id.* at 375 n.72.

⁴⁷ See *supra* notes 44-47 and accompanying text.

⁴⁸ Ballard and Manus, *supra* note 38, at 633. For this initial section, I adopt the cases and organization chosen by the author.

⁴⁹ 350 A.2d 520 (N.J. Super. 1975), *aff'd* 368 A.2d 363 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 372 A.2d 322 (N.J. 1977).

⁵⁰ *Id.* at 521.

was intentional, an act of vandalism, the court held that the pollution was "sudden and accidental" from Lansco's perspective.⁵¹ Based on dictionary definitions of both accidental and sudden, the court decided that the clause must exclude coverage for pollution that is unexpected and unintended.⁵² Pollution by third party vandals was not intended or expected by the insured, so the court held that the exclusion clause did not apply in Lasco's situation.⁵³ In 1982, in *Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co.*,⁵⁴ for the first time a court held that an insured could recover if the damages were unexpected, although intended.⁵⁵ This was a development from previous decisions which had allowed coverage in cases where the pollution was unintended.⁵⁶ In this case, the court found waste that seeped from an intentionally made landfill to be insurable.⁵⁷ Rather than ending the effectiveness of the pollution exclusion clause as had been predicted, *Jackson* actually created a backlash that caused subsequent courts to find for the insurers.⁵⁸

In *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*⁵⁹, the court found for the insurers on the basis that a "sudden and accidental" pollution must

be instantaneous.⁶⁰ A waste hauler dumped hazardous waste into a landfill, which subsequently seeped into the environment.⁶¹ The court ruled that, to avoid a redundancy in the "sudden and accidental" language, "occurrence," which refers to the "sudden and accidental" pollution, must mean "instantaneous."⁶² The court observed that the dumping may have happened suddenly, but the harmful seepage from the dump leached slowly into the groundwater.⁶³ The court held that the slow, harmful seepage into groundwater, even if unexpected and unintended, was precluded by the pollution exclusion clause.⁶⁴ Thus, insureds could not recover.⁶⁵

One case often cited by insureds is, *Claussen v. Aetna Casualty & Surety Co.*⁶⁶ This case illustrates how divided the courts were after *Peerless*. The court in *Claussen* observed the conflict between courts that had interpreted "sudden and accidental" to simply mean unexpected, and courts that had assigned the phrase the additional meaning of "abrupt."⁶⁷ The court used ordinary dictionary definitions to resolve the conflict.⁶⁸ The court found that the word sudden could mean both "unexpected" and "abrupt,"⁶⁹ although the primary definition of sudden

seemed to be "unexpected".⁷⁰ Some dictionaries, however, also included "abrupt" within the definition.⁷¹ The court noted that:

[I]t is indeed difficult to think of 'sudden' without a temporal connotation: a sudden flash, a sudden burst of speed, a sudden bang. But, on reflection one realizes that, even in its popular usage, "sudden" does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death. Even when used to describe the onset of an event, the word has an elastic temporal connotation that varies with expectations: Suddenly, it's spring.⁷²

Because the court recognized that there was more than one plausible definition for the pollution exclusion clause, the *Claussen* court followed the rule that ambiguous contract terms are to be construed in favor of the insured.⁷³ The court dismissed Aetna's argument that when the contract was entered into no one anticipated the extent of pollution liability that lay ahead.⁷⁴ The court observed that insurance companies must bear the brunt of

⁵¹ *Id.* at 524.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 451 A.2d 990 (N.J. Super. Ct. Law Div. 1982).

⁵⁵ *Id.* at 995.

⁵⁶ *Id.* at 993-94.

⁵⁷ *Id.* at 994.

⁵⁸ Ballard and Manus, *supra* note 38, at 636.

⁵⁹ 340 S.E.2d 374 (1986).

⁶⁰ *Id.* at 380.

⁶¹ *Id.* at 374.

⁶² *Id.* at 381. Ballard and Manus call this a misconstruction of the word "occurrence," and believe the ruling has resulted in successful arguments by insurers for the last decade. Ballard and Manus, *supra* note 38, at 640.

⁶³ *Peerless*, 340 S.E.2d at 340.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 380 S.E.2d 686 (1989).

⁶⁷ *Id.* at 688.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* See WEBSTERS' THIRD NEW INTERNATIONAL DICTIONARY 2284 (10th ed. 1995). See also BLACK'S LAW DICTIONARY 1284 (6th ed. 1990).

⁷¹ *Claussen*, 380 S.E.2d at 688.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 689.

any lack of clarity.⁷⁵ In addition, the court found that the interpretation advanced by Claussen was not contrary to that given by insurers at the time the clause was created, that in most cases the "sudden and accidental" clause would still make only intentional polluters liable.⁷⁶

The court in *Morton, Inc. v. General Accident Insurance Company of America*⁷⁷ also found in favor of the insureds, but based its decision on the representations made by the insurance companies at the time the standard pollution exclusion clause was adopted, rather than the language itself.⁷⁸ The court overturned a lower court decision and held that "sudden and accidental" included a temporal element.⁷⁹ The *Morton* court said that it would be unfair to insureds to interpret "sudden and accidental" beyond simply "unexpected and unintended" in light of representations the insurance industry made to state regulators.⁸⁰ The court noted that in a non-regulatory context, it regularly construed misrepresentations by insurers about what the policy covered as grounds to estop the insurer from asserting that the contract did provide such coverage.⁸¹ Because the insurance company had made misrepresentations to the state regulatory agency and others, the court had no trouble finding in favor of the

insureds.⁸²

In Missouri, the principal case interpreting the "sudden and accidental" language is *Aetna Casualty & Surety Co. v. General Dynamics*⁸³. This is the only Eighth Circuit case to use Missouri contract law to interpret this language. At the trial court level, the court held for insureds.⁸⁴ That court pointed out that Missouri law required provisions designed to restrict coverage of insureds to be construed against the insurer, with the insurer bearing the burden of expressing the limitation in clear and unambiguous terms.⁸⁵ In addition, the court noted that Missouri courts give insurance contracts their plain meaning, and when there is duplicity, indistinctness or uncertainty of meaning, or where the policy is reasonably and fairly open to different constructions, an ambiguity is created.⁸⁶ Furthermore, the court held that both the insured and insurer's definitions were reasonable interpretations of the "sudden and accidental" language.⁸⁷ Since an ambiguity existed, the contract had to be construed in favor of the insureds, as controlled by Missouri law.⁸⁸ The trial court also observed that the drafting history of the pollution exclusion clause illustrates the insurance companies intended "sudden and accidental" to mean "unexpected and

unintended" without any temporal connotations.⁸⁹

On appeal, the decision in favor of the insureds was overturned. In relevant part, the court noted that other courts have been split on this issue; many courts have found for insureds holding "sudden and accidental" means only unexpected, while others have held "sudden and accidental" to include a temporal element which includes coverage from non-"gradual" pollution.⁹⁰ The appellate court chose the second view.⁹¹ Unless the pollution was both unexpected and unintended, as well as sudden, *General Dynamics* would not be covered.⁹²

In deciding for the insurers, the appellate court in *General Dynamics* also pointed out that Missouri requires that insurance contracts be given their plain meaning.⁹³ However, the court noted that all of the terms in the contract must be given meaning.⁹⁴ The *General Dynamics* court based this view on what the *Charter* court referred to as the anti-redundancy canon.⁹⁵ In Missouri, courts interpret ambiguous terms with two possible constructions to exclude any meaning that creates a "redundant, illusory, absurd, and therefore unreasonable" result.⁹⁶

General Dynamics recognized that courts generally agree that "accidental"

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 629 A.2d 831 (N.J. 1993).

⁷⁸ *Id.* at 873.

⁷⁹ *Id.* at 847.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 875.

⁸³ 968 F.2d 707 (8th Cir. 1992).

⁸⁴ *Aetna Casualty and Sur. Co. v. General Dynamics Corp.*, 783 F. Supp. 1199 (E.D. Mo. 1991), *aff'd in part, rev'd in part, and remanded* 968 F.2d 707 (8th Cir. 1992).

⁸⁵ *Aetna* at 1207.

⁸⁶ *Id.* at 1208 (citing *Nixon v. Life Investors Ins. Co.*, 675 S.W.2d 676, 679 (Mo. Ct. App. 1984); *Pearce v. General American Life Ins. Co.*, 637 F.2d 536, 539 (8th Cir. 1980)).

⁸⁷ *Aetna*, 783 F. Supp. at 1208.

⁸⁸ *Id.* at 1209.

⁸⁹ *Id.*

⁹⁰ *General Dynamics*, 968 F.2d at 710.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* (citing *Continental Ins. Co. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977, 985 (8th Cir. 1988), *cert. denied*, 488 U.S. 821 (1988)).

⁹⁴ *General Dynamics*, 968 F.2d at 710 (citing *Harnden v. Continental Ins. Co.* 612 S.W.2d 392, 394 (Mo. Ct. App. 1981)). See *supra* notes 66-76 and accompanying text (Claussen makes no mention of the rule that requires all insurance contract terms be given meaning).

⁹⁵ *Charter Oil Co. v. American Employers' Ins. Co.*, 69 F.3d 1160, 1164 (D.C. Cir. 1995).

means unexpected.⁹⁷ If accidental means “unexpected,” then to interpret the whole phrase “sudden and accidental” as “unexpected” leaves the word “sudden” without any real meaning.⁹⁸ Thus, “sudden” must mean abrupt, because otherwise, the word would be superfluous.⁹⁹ Therefore, the court held, the insurer does not have to cover General Dynamics, because the pollution exclusion clause does not apply to cases where the pollution is not unexpected and abrupt.¹⁰⁰

IV. INSTANT DECISION

The court began by noting that there have been no Missouri decisions interpreting the “sudden and accidental” language of a CGL pollution exclusion clause.¹⁰¹ Because the Missouri Supreme Court refuses to accept cases certified to it from federal courts,¹⁰² the court was left to interpret Missouri law without state guidance.¹⁰³

First, the court set out Charter’s arguments.¹⁰⁴ Charter argued that the “sudden and accidental” language of the CGL was facially ambiguous; that it could be

interpreted to mean “unexpected and unintended” or “unexpected, unintended, and abrupt.”¹⁰⁵ Charter, favoring the former interpretation, argued that under Missouri law, ambiguous insurance contracts should be construed in a light most favorable to the insured.¹⁰⁶ Thus, went Charter’s reasoning, the facially ambiguous language, “sudden and accidental,” should be interpreted to favor coverage.¹⁰⁷ In the alternative, Charter argued that the phrase, “sudden and accidental,” constituted a latent ambiguity.¹⁰⁸ In the absence of extrinsic evidence in favor of the insurer’s, Charter argued that the latent ambiguity should also be construed in their favor.¹⁰⁹

The court, addressing Charter’s facial ambiguity argument, observed that Missouri applied an “anti-redundancy canon.”¹¹⁰ Under the anti-redundancy canon, Missouri requires that all words in an insurance contract be given meaning.¹¹¹ Based on the Eighth Circuit interpretation of “sudden and accidental” under Missouri law in *Aetna Casualty & Sur. Co. v. General Dynamics Corp.*,¹¹² the court decided that the trial court had

correctly applied the anti-redundancy theory to Charter’s arguments.¹¹³

The court observed that, taken together, the words sudden and accidental must have a temporal element because to hold otherwise would make the word “accidental” an ambiguity after the word “sudden.”¹¹⁴ The court made this observation after analyzing the competing definitions of the word sudden.¹¹⁵ The court, after defining “accidental” to mean “unexpected,”¹¹⁶ noted that Charter’s definitions for both “sudden” and “unexpected” contained the same meaning: unexpected.¹¹⁷ To allow “sudden” to mean only “unexpected” would create a redundancy since both “sudden” and “accidental” would mean unexpected.¹¹⁸ The anti-redundancy canon requires that “sudden” be defined to eliminate the redundancy.¹¹⁹ Thus, “sudden” must mean “abrupt,” or “quick.”¹²⁰ Returning to the whole phrase, the court held that “sudden and accidental” meant that the pollution must be both unexpected and temporally abrupt.¹²¹ To hold otherwise, the court said, would mean that insurance

⁹⁶ *Standard Meat Co. v. Taco Kid of Springfield, Inc.*, 554 S.W.2d 592, 596 (Mo. Ct. App. 1977).

⁹⁷ *General Dynamics*, 968 F.2d at 710, (citing *St. Paul Fire & Marine Ins. Co. v. Northern Grain Co.*, 365 F.2d 361, 364 (8th Cir. 1966)).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Charter*, 69 F.3d at 1163.

¹⁰² *Id.* See *Harber v. Altec Indus., Inc.*, 5 F.3d 339, 340 (8th Cir. 1993); *Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co.*, 944 F.2d 940, 944 (D.C. Cir. 1991). See *Claussen v. Aetna Casualty & Surety Co.*, 380 S.E.2d 686 (1989) (providing an example of the certification process in Georgia).

¹⁰³ *Charter Oil Co. v. American Employers’ Ins. Co.*, 69 F.3d 1160, 1163 (D.C. Cir. 1995).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* See *Peters v. Employers Mutual Casualty Co.*, 853 S.W.2d 300, 302 (Mo. 1993), *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210 (Mo. 1992).

¹⁰⁷ *Charter*, 69 F.2d at 1163.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1164.

¹¹² *Aetna Casualty & Surety Co. v. General Dynamics*, 968 F.2d 707 (8th Cir. 1992).

¹¹³ *Charter*, 69 F.3d at 1163.

¹¹⁴ *Id.* The court based this interpretation on *General Dynamics*, which also interpreted “sudden and accidental” as it thought Missouri courts would have interpreted these terms. *General Dynamics*, 968 F.2d at 707.

¹¹⁵ *Charter Oil Co. v. American Employers’ Ins. Co.*, 69 F.3d 1160, 1163 (D.C. Cir. 1995).

¹¹⁶ *Id.* at 1164.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* The court noted that, in Missouri, “all terms of an insurance contract be given meaning.” *General Dynamics*, 968 F.2d at 710.

¹²¹ *Charter*, 69 F.3d at 1163.

companies would find it impossible to specifically exclude one member of a set of closely related circumstances because insureds would be able to choose redundant meanings to limit the scope of specific exclusions.¹²²

In addition, the court noted that under Missouri law, policy contracts are given their plain meaning, or the meaning that would be "ordinarily understood by the layman who bought and paid for the policy."¹²³ The court cited to decisions of other jurisdictions that have also decided that "sudden" means "abrupt."¹²⁴ Specifically, the court noted that the Ninth Circuit, interpreting California law in *Smith v. Hughes Aircraft Co.*,¹²⁵ and the Tenth Circuit, interpreting Utah law in *Hartford Accident & Indemnity Co. v. United States Fidelity & Guaranty Co.*,¹²⁶ reached the conclusion that sudden and abrupt were synonyms in the "ordinary and popular"¹²⁷ sense.¹²⁸

The court distinguished the instant case from others that had interpreted "sudden" to mean only "unexpected."¹²⁹ Citing examples from *Claussen v. Aetna Casualty & Surety Co.'s*,¹³⁰ the court noted¹³¹ that a "sudden" bend in the road is still sudden for a driver on a familiar road, that a "sudden" storm is not really sudden,

but also abrupt, and that a "sudden" death usually does not describe a lingering death, but one that happens abruptly in time.¹³²

The court then considered the purpose of the policy's "sudden and accidental" terminology.¹³³ The court pointed out that insurance companies may have intended the "sudden" terminology as a back up to the usual "unexpected and unintended" language of occurrence contracts because pollution over a long duration is more likely to be intended by the insured.¹³⁴ This model of unintentional pollution became less fashionable with the advent of CERCLA-style liability, but it likely informed the insurers intent to rule out pollution that was intentional.¹³⁵

The court observed that the policy language may have also been intended to banish a moral hazard.¹³⁶ If potential polluters knew that their insurance would cover them if they were sued for pollution, they would have no incentive to dispose of waste properly.¹³⁷ Both insurer and insured are interested in excluding all but accidental pollution in order to limit insurance liability, thus lowering insurers costs, and thus lowering insureds' premiums.¹³⁸ To interpret "sudden" as "abrupt" added another limiting factor guaranteeing that

fewer intended pollution events are covered by insurers.¹³⁹ Therefore, the court noted that insurers could have plausibly been interested in controlling moral hazard, thereby benefiting both insured and insurers.¹⁴⁰

The court acknowledged that suddenness was an imperfect mechanism for ruling out unexpected harm.¹⁴¹ Indeed, the court observed that suddenness has little to nothing to do with whether the harm is unexpected.¹⁴² However, the court did not require that suddenness, which was but a proxy for unexpected harm, fit perfectly with that intent.¹⁴³

Charter argued that even if the "sudden and accidental" clause was not facially ambiguous, the phrase had a latent ambiguity that could only be resolved by looking to information outside the contract.¹⁴⁴ This latent ambiguity, Charter argued, stemmed from "the insurers' prior claims behavior and representations made to state insurance regulators."¹⁴⁵ The court pointed out that once the latent ambiguity is established, Missouri allows a broad range of extrinsic evidence to be admitted to resolve it.¹⁴⁶ This evidence includes the circumstances surrounding the initial formation of the contract and the behavior of the parties with respect to

¹²² *Id.* at 1165.

¹²³ *Charter*, 69 F.3d at 1165 (citing *Robin v. Blue Cross Hosp. Serv., Inc.*, 637 S.W.2d 695, 698 (Mo. 1982)).

¹²⁴ *Id.*

¹²⁵ 22 F.3d 1432, 1437 (9th Cir. 1993).

¹²⁶ 962 F.2d 1484, 1487, 1489-90 (10th Cir. 1992).

¹²⁷ *Charter*, 69 F.3d at 1165 (citing *Smith*, 22 F.3d at 1437).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Claussen v. Aetna Casualty & Surety Co.*, 380 S.E.2d 686, 688 (1989).

¹³¹ *Charter Oil Co. v. American Employers' Ins. Co.*, 69 F.3d 1160, 1165-66 (D.C. Cir. 1995).

¹³² *Id.*

¹³³ *Id.* at 1166.

¹³⁴ *Id.* (citing Kenneth S. Abraham, ENVIRONMENTAL LIABILITY INSURANCE LAW 153 (1991)).

¹³⁵ *Charter*, 69 F.3d at 1166.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Charter Oil Co. v. American Employers' Ins. Co.*, 69 F.3d 1160, 1167 (D.C. Cir. 1995).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1168.

other, similar contracts.¹⁴⁷

Charter first argued that insurer's initial payment to Charter of \$2.8 million meant that insurer's policy had been given a practical construction requiring payment of the rest of the liability.¹⁴⁸ The insurers argued that any such payment should not bind them to a single interpretation for all similar claims.¹⁴⁹ The court, agreeing with the insurers, held that to follow Charter's logic would require insurers to make an overly thorough investigation of the claim before paying out even small amounts, because payment of a small, undeserving claim would bar the insurer from later denying coverage.¹⁵⁰

The court likewise dismissed Charter's claim that American Employers' Insurance created an ambiguity contemporaneous with drafting the exclusion clause in various fora.¹⁵¹ For example, Charter claimed that, at that time, several insurance company heads had characterized the "sudden" language as clarification to the previous "unintended and unexpected" meaning of the clause.¹⁵² Charter claimed that the representations created an ambiguity because insureds were now unsure of whether "unexpected and unintended" was going to be interpreted as it had been before.¹⁵³ The court decided in favor of the insurers.¹⁵⁴ The court noted that the "clarifying" statements should not be used against insurers in light of the expanded scope of

liability under statutes such as CERCLA.¹⁵⁵ The court dismissed Charter's other attempts at showing a latent ambiguity, finding that statements in internal Aetna memoranda and insurance industry publications failed to show that adding "sudden" was anything but an attempt to broaden the exclusion.¹⁵⁶

In a final effort, Charter argued that insurer's misrepresentations to regulators should bar enforcement of the exclusion clause on the basis of public policy.¹⁵⁷ The court reasoned that, since *General Dynamics* did not make a reasoned inquiry into the public policy argument, it could not dismiss the argument outright.¹⁵⁸ However, the court noted that the Missouri had neither legislative nor judicial doctrines that would allow for consideration of misconduct before regulators, and that even if Missouri had such a law, Charter would have failed to establish any convincing discrepancy between insurers statements and the pollution exclusion.¹⁵⁹

Having decided that "sudden" must mean abrupt, the court then decided that Bliss's sprayings were not abrupt.¹⁶⁰ The court dismissed Charter's contention that the discreet 30-40 minute sprayings were abrupt as nonsensical.¹⁶¹ The court again noted that "sudden" was but an imprecise, but enforceable, proxy for "unexpected and unintended."¹⁶²

Finally, the court ruled that the "Traveler" policy, since it did not include

the "sudden" language, could insure Charter if the discharge was accidental.¹⁶³ Since Charter did not cite "inescapable" authority, and since Charter's strategy may have been to "sandbag" insurers into not dealing fully with the argument, the court deemed this part of the argument waived.¹⁶⁴

V. COMMENT

In Missouri, the "anti-redundancy canon" is the key to deciding in favor of the insurance companies. Besides the instant case and *General Dynamics*, a Delaware court also found that the pollution exclusion clause contained an element of abruptness based on its use of the Missouri anti-redundancy rule.¹⁶⁵ In the instant case, Missouri's anti-redundancy canon appears to shortcut most arguments against construing the pollution exclusion clause against insurers. However, Missouri state courts have not yet ruled on whether pollution exclusion clause is enforceable in Missouri. Nevertheless, because of inconsistencies created between the *Charter* court's over-application of the anti-redundancy canon to the pollution exclusion clause and the intent of the parties involved, one might argue that Missouri should not use the anti-redundancy rule to find against the insureds in cases interpreting the pollution exclusion clause.¹⁶⁶

Missouri's anti-redundancy rule makes

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Charter*, 69 F.3d at 1168.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1169.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1169-1170 (citing *Abex*, 790 F.2d at 125).

¹⁵⁹ *Charter*, 69 F.3d at 1170.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* The court observed that if it allowed for Charter's argument, it would be forced to concede that two months of spraying would constitute non-abrupt spraying, while the same spraying with 5 minute breaks would be abrupt, and indemnifiable. *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1171.

¹⁶⁵ *Monsanto Co. v. Aetna Casualty & Sur. Co.*, 1993 WL 563253 *8 (Del. Super. Dec. 9, 1993).

it less likely that the first typical argument against construing the pollution exclusion clause against insurers will be accepted. In *Charter*, insureds made most of the arguments that insureds had successfully argued in other jurisdictions. For example, the argument from *Claussen* that the plain language of "sudden" and "accidental," can simply mean unexpected¹⁶⁷ is disputed by the Missouri anti-redundancy rule.¹⁶⁸ Though definitions of the common usage of the word "sudden" seems to mean unexpected, the court resolved the ambiguity by pointing out that it would be redundant for the words to mean the same thing, thus sudden must connote abrupt.¹⁶⁹

The anti-redundancy rule is misapplied because of the great weight given to the rule in deciding the meaning of the clause. The case that is originally cited in the *General Dynamics* case, *Harnden v. Continental Ins. Co.*¹⁷⁰, gives the rule that no clause of an insurance contract should perish by a court's construction of the contract's terms.¹⁷¹ That case is distinguishable because it dealt with longer clauses that would have been completely eliminated by the construction advocated, rather, as in a pollution exclusion clause, the repetition of a term for clarity. In other non-insurance contract cases in Missouri, there is an equivalent rule to the anti-redundancy canon which states that the

"more probable and reasonable of two available constructions should be utilized to the exclusion of the one which produces a 'redundant, illusory, absurd, and therefore unreasonable result.'"¹⁷² However, it appears that this rule is only used after the court has looked into extrinsic evidence of the parties' intentions to resolve the ambiguity.¹⁷³ In addition, the insured's arguments do not seem absurd or illusory. It does not seem absurd that the insurance drafters may have intended two words to mean the same thing: unexpected and unintended. If anything, it is insurer's argument that adds term — here, a third meaning from two words: "sudden."

The court's explanation of the imperfect "proxy" of the pollution exclusion clause also seems troublesome. One of the typical arguments of insureds is that the pollution exclusion clause was intended to disallow coverage for insureds who *intentionally* polluted their surroundings, and avoid the "moral hazard" of indemnifying insureds who purposefully foul the environment. *Charter* acknowledged that "suddenness" was an imperfect mechanism that had "little bearing" on whether the harm was expected or intended.¹⁷⁴ Nonetheless, the court noted that the proxy did not have to make a "perfect fit" with the insurers' goal of

excluding intentional pollution, but only had to approximate the desires of the parties to exclude intentional pollution.¹⁷⁵ The absence of "perfect fit" was not reason enough to "distort" the meaning of the contract.¹⁷⁶ It seems contradictory for the court to have expended considerable effort resolving an redundancy by defining "sudden and accidental" as "abrupt, unexpected, and unintended," only to later point out that that the real intent of the parties was to rule out only unexpected and unintended harm. Perhaps the court, constricted by the Eighth Circuit's use of the anti-redundancy rule, felt that it had no choice but to use the rule to decide in favor of the insurers, but had made note that the rule created a troublesome result. The court's discussion of the proxy problem illustrates the problematic effect of deciding a pollution exclusion clause solely on the basis of the anti-redundancy rule.

In *Charter*, insureds showed evidence that indicated that the original intent of the parties had been to exclude coverage for those pollution events that were not unexpected and unintended.¹⁷⁷ With its discussion of proxies, the court acknowledged that the intent of the parties had been to exclude coverage for events only if they were expected and intended, without the temporal requirement of abruptness.¹⁷⁸ It seems that perhaps a

¹⁶⁶ Commentators have written extensively in support of both sides. Arguments are often based on public policy grounds. Arguing in favor of the insurance companies is Murphy, who based her view on the familiar moral hazard argument and also argued that the insurance companies would face too great of an unexpected financial burden if they were to have to cover insureds under the pollution exclusion clause. See generally Murphy, *supra* note 33. For an industry that conducts business by calculating risks, the insurance companies' miscalculation with the pollution exclusion clause could be hard on the industry, and thus increase premiums for others.

Several scholars argue in favor of insureds. Timmer argued that innocent and unintentional polluters have been left in the cold by insurance companies, that insurance companies themselves would have considered insureds in cases like the instant case to be covered when the clause was drafted, and that because the nature of the business of insurance companies uniquely equips them for calculated risk taking, they should bear the cost of clean up. It also seems likely that finding for coverage would lessen the risk of government paying clean-up bills when the costs are too high for the actual unintentional polluter. See generally Timmer, *supra* note 46.

Because insureds have lost all the cases that apply Missouri law, this article seeks to argue in favor of insureds.

¹⁶⁷ See *supra* notes 66-76 and accompanying text.

¹⁶⁸ *Charter Oil Co. v. American Employers' Ins. Co.*, 69 F.3d 1160, 1165 (D.C. Cir. 1995).

¹⁶⁹ See *supra* text accompanying note 79.

¹⁷⁰ 612 S.W.2d at 392.

¹⁷¹ *Id.* at 394.

¹⁷² *Rougly v. Whitman*, 592 S.W.2d 516, 521 (Mo. Ct. App. 1979).

¹⁷³ *Id.* at 518-21.

¹⁷⁴ *Charter*, 69 F.3d at 1166.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

Missouri court reviewing the same issue would get a more suitable result by adopting the rule as it applies to normal contracts: that redundancy is one of the factors that may be considered when interpreting a contract, along with intent of the parties, but not the overriding concern. This might especially be true when considering that insurance contracts in many jurisdictions, including Missouri, are contracts of adhesion that are to be construed in the light most favorable to the non-drafting party. Here, the insureds considered themselves indemnified for unintentional pollution occurrences. While it is true that the words "sudden" and "accidental" are redundant, perhaps that factor should not be significant enough to overwhelm the rules on contracts of adhesion and extrinsic evidence at the time of drafting.

One commentator also points out that courts have teamed an anti-redundancy interpretation with a misreading of which event should under go the "sudden and accidental" analysis to get a "clear misreading" of the clause.¹⁷⁹ His argument is that the line of cases, descended from *Peerless*, that find that the words must add a temporal element or otherwise be redundant, is based on a misreading of the clause from *Peerless*.¹⁸⁰ The author argues that, following a case that was to "sound the death knell" of the pollution exclusion, there was a backlash by courts in interpreting the clause more strictly than any court, commentator, or even insurance company had thought of before.¹⁸¹ *Peerless* was part of that backlash.¹⁸² The

Peerless court failed to distinguish what "occurrence," the harmless dumping or the subsequent dangerous seepage into the environment, it was referring to, and so came to the erroneous conclusion that the insureds must be held liable. The court based that ruling on the court's reading of a temporal element in the clause, similar to the court in the instant case, based on the sudden/accidental redundancy.

At the trial level, *General Dynamics* found for the insureds. Seemingly the only difference between the trial court's opinion and the case on appeal is the appellate court's use of the anti-redundancy rule. Thus, all of the elements cited by the trial court were overwhelmed by the anti-redundancy rule. For example, the trial court pointed out that extrinsic evidence of actions at the time of contracting can be included to interpret a contract,¹⁸³ that insurance contracts are construed in the insured's favor when ambiguity arises in an exclusion that would limit insured's recovery,¹⁸⁴ and that the drafting history of the clause evidenced the insurance board's intent for the clause to exclude only unintended pollution.¹⁸⁵ However, the appeal did not mention many of these elements. Instead the appellate court took the shorter rule that, despite other evidence for the insureds, that the clause should be interpreted based on whether two words in the contract was to be interpreted based on the anti-redundancy canon.

One arguing for a change of law in Missouri would also encounter is that insurance company representations at the

time of the drafting of the clause, oft used against insurers, did not take place in Missouri. A Delaware case pointed out that to hold the insurance companies on public policy grounds based on misrepresentations to state regulators would be pointless. This is because *Morton*, the New Jersey case that found for the insureds on the basis of misrepresentations before the New Jersey regulatory. However, it is unclear whether the same misrepresentations were made to Missouri regulators.¹⁸⁶

VI. CONCLUSION

Charter appears to be the continuation of the difficulty courts have had in interpreting the standard pollution exclusion in contracts since the Eighties. However difficult the decision, it is troubling that the court would find for insureds in this case. Based on the general rule that insurance contracts are to be generally construed to favor insureds, the *Charter* result is unnecessarily harsh. The insureds in this case asked a third party to dispose of their waste, assuming that he would do so properly. Bliss failed to do so. This is not a case of moral hazard. IPC did not think they could bury their own tainted oil without fear because insurance would cover them. Though we might be able to justify insureds responsibility for cleanup in this case, the fact that IPC must know cover cleanup costs without the guard of insurance, is wrong. Insurance that they must have assumed that they obtained in the 1980's.

¹⁷⁸ *Id.*

¹⁷⁹ Ballard and Manus, *supra* note 38, at 640.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 638.

¹⁸² *Id.* at 640.

¹⁸³ *Aetna Casualty & Sur. Co. v. General Dynamics Corp.*, 783 F. Supp. 1199, 1208 (citing *Press Machinery Corp. v. Smith R.P.M. Corp.*, 727 F.2d 781, 784-785 (8th Cir. 1984); *Tri-Lakes Newspapers, Inc. v. Logan*, 713 S.W.2d 891, 893 (Mo. Ct. App. 1986)) (holding that relevant matters outside the insurance contract may be considered when interpreting insurance policies).

¹⁸⁴ *Aetna*, 783 F. Supp. at 1208 (citing *See Meyer Jewelry Co. v. General Ins. Co.*, 422 S.W.2d 617, 623 (Mo. 1968); *Greer v. Zurich Ins. Co.*, 441 S.W.2d 15, 30 (Mo. 1969)) (stating that an insurance contract is designed to furnish protection and will, where reasonably possible, be construed to accomplish this object).

¹⁸⁵ *Aetna*, 783 F. Supp. at 1209.

¹⁸⁶ *Monsanto Co. v. Aetna Casualty & Sur. Co.*, 1993 WL 563253 at *13 n16 (Del. Super. Dec. 9, 1993).