1996


Kevin Murphy

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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

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 Company (Charter), hired independent contractor Russell Bliss to dispose of hazardous waste materials. IPC disposed of the waste as a courtesy to IPC's customer, Northeastern Pharmaceutical and Chemical Company (NAPACCO). NAPACCO's waste contained dioxin, which, in sufficient concentrations, has been found to be harmful to humans, plants, and animals.

Bliss did not appropriately dispose of the hazardous waste. 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. Later Bliss sprayed the dioxin-laced waste oil as a dust suppressant at various locations throughout Missouri.

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. In addition, over 1,600 claimants in 57 separate actions, filed civil suits alleging bodily injury and property damage from the dioxin contaminated soil. The individuals requested aggregate relief of $4 billion, and punitive damages of $4 billion. All of the private suits, except one, had been settled by the time the trial court rendered its opinion in January, 1994. Settlements with the United States and the State of Missouri were also awaiting court approval.

IPC sought coverage from insurance policies which had been purchased

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1 69 F.3d 1160 [D. C. Cir. 1995].
2 Id.
3 Id. at 1162.
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, Shenandooh Stables, Timberline Stables, Bubbling Springs Stable, Saddle and Spur Club, Rosati/Piazza Road, Frontenac, Quail Run, Castlewood/Sonntag Road, Highway 100/Enkleben, East North Street, Lacy Manor/Sandcut Road, Bliss Farm/Mid-America Arena, Bull Moose Tube Company, Harmon 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, Minter/Stout/Romaine Creek, and Southwestern Bell. Id. at 676 n.3.
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. Charter sued the insurers in November 1983, seeking a declaratory judgment that would force them to indemnify Charter for Bliss’ oil spraying activities. The defendants in that action were the twenty-three different insurers that had issued IPC sixty-seven primary and excess liability policies. In February, 1991, the court granted summary judgment in favor of defendants, in cases, where New York law controlled.

At trial, the court granted summary judgment for those defendants over whom Missouri law was controlling. 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. These pollution exclusion clauses, however, contained exceptions that permitted recovery for “sudden and accidental” discharges of pollutants. The specific provision at issue stated that the insurance did not cover:

(bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalies, 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.

Three of the four types of pollution exclusion clauses read the same as the one above. The remaining form of insurance contract, issued by Travelers, included an exception that allowed for indemnification if the pollution was neither “expected” nor “intended.” The parties agreed that the “expected nor intended” language was functional equivalent to “accidental.”

The parties agreed that the “sudden and accidental” clause was ambiguous, and as such should be interpreted against the insurance companies, the parties who drafted the contract. Accordingly, Charter argued, the insurers would, therefore, have to indemnify them for the remediation costs associated with the cleanup of the dioxin. The trial court refused to accept this argument holding that under Missouri law the insurance companies had no duty to indemnify. The D.C. Circuit Court of Appeals also found in favor of the insurance companies.

III. LEGAL HISTORY

Generally speaking, Comprehensive General Liability (CGL) insurance policies are designed to protect businesses against liability to third parties. 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
loss. 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.

CGLs are standardized in order to make them easier to interpret. 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. A trade organization, Insurance Service Office (ISO), drafts many of the CGL standard policies which are used by almost every major American insurance company. ISO was responsible for drafting the standard pollution exclusion that was the subject of the instant case. 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.

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. 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. 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. This, "sudden and accidental" exclusionary clause was found in practically every CGL between 1973 and 1985.

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. 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. Apparently in an attempt to establish more predictability, the ISO replaced the standard pollution exclusion with an "absolute pollution exclusion." 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.

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. The first case to interpret the exclusion clause was LansiCo, Inc. v. Department of Environmental Protection. Vandals had opened the valve of an oil storage tank, spilling oil onto LansiCo's property, and a nearby river. 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.


39 See Murphy, supra note 33, at 164.

40 Id. at 621.

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


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.


50 Id. at 521.
Hurry Up and Have an Accident

was unintentional, an act of vandalism, the court held that the pollution was "sudden and accidental" from Lansco's perspective. 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. 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 Lansco's situation. 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. This was a development from previous decisions which had allowed coverage in cases where the pollution was unintended. In this case, the court found waste that seeped from an intentionally made landfill to be insurable. 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.

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. A waste hauler dumped hazardous waste into a landfill, which subsequently seeped into the environment. 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." The court observed that the dumping may have happened suddenly, but the harmful seepage from the dump leached slowly into the groundwater. The court held that the slow, harmful seepage into groundwater, even if unexpected and unintended, was precluded by the pollution exclusion clause. Thus, insureds could not recover.

One case often cited by insureds is, Claussen v. Aetna Casualty & Surety Co.60 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." The court used ordinary dictionary definitions to resolve the conflict. The court found that the word sudden could mean both "unexpected" and "abrupt," although the primary definition of sudden seemed to be "unexpected." Some dictionaries, however, also included "abrupt" within the definition. The court noted:

(1) It 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.

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. The court dismissed Aetna's argument that when the contact was entered into no one anticipated the extent of pollution liability that lay ahead. The court observed that insurance companies must bear the brunt of

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51 Id. at 524.
52 Id.
53 Id.
55 Id. at 995.
56 Id. at 993-94.
57 Id. at 994.
58 Ballard and Manus, supra note 38, at 636.
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.
67 Id. at 688.
68 Id.
69 Id.
71 Claussen, 380 S.E.2d at 688.
72 Id.
73 Id.
74 Id. at 689.
any lack of clarity.\textsuperscript{75} In addition, the court found that the interpretation advanced by Clausen 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.\textsuperscript{76}

The court in Morton, Inc. v. General Accident Insurance Company of America\textsuperscript{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.\textsuperscript{78} The court overturned a lower court decision and held that “sudden and accidental” included a temporal element.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{82}

In Missouri, the principal case interpreting the “sudden and accidental” language is Allied Casualty & Surety Co. v. General Dynamics\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{86} Furthermore, the court held that both the insured and insurer's definitions were reasonable interpretations of the “sudden and accidental” language.\textsuperscript{87} Since an ambiguity existed, the contract had to be construed in favor of the insureds, as controlled by Missouri law.\textsuperscript{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.\textsuperscript{89}

On appeal, the decision in favor of the insureds was overturned. In relevant part, the court noted that other courts have 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.\textsuperscript{90} The appellate court chose the second view.\textsuperscript{91} Unless the pollution was both unexpected and unintended, as well as sudden, General Dynamics would not be covered.\textsuperscript{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.\textsuperscript{93} However, the court noted that all of the terms in the contract must be given meaning.\textsuperscript{94} The General Dynamics court based this view on what the Charter court referred to as the anti-redundancy canon.\textsuperscript{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.\textsuperscript{96}

General Dynamics recognized that courts generally agree that “accidental”

\begin{footnotesize}
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} 629 A.2d 831 (N.J. 1993).
\textsuperscript{78} Id. at 873.
\textsuperscript{79} Id. at 847.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 875.
\textsuperscript{83} 968 F.2d 707 (8th Cir. 1992).
\textsuperscript{85} Allied at 1207.
\textsuperscript{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)).
\textsuperscript{87} Allied, 783 F. Supp. at 1208.
\textsuperscript{88} Id. at 1209.
\textsuperscript{89} Id.
\textsuperscript{90} General Dynamics, 968 F.2d at 710.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{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)).
\textsuperscript{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 (Clausen makes no mention of the rule that requires all insurance contract terms be given meaning).
\textsuperscript{95} Charter Oil Co. v. American Employers' Ins. Co., 69 F.3d 1160, 1164 (D.C. Cir. 1995).
\end{footnotesize}
If accidental means "unexpected," then to interpret the whole phrase "sudden and accidental" as "unexpected" leaves the word "sudden" without any real meaning. Thus, "sudden" must mean abrupt, because otherwise, the word would be superfluous. 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.

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. Because the Missouri Supreme Court refuses to accept cases certified to it from federal courts, the court was left to interpret Missouri law without state guidance.

First, the court set out Charter's arguments. 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." Charter, favoring the former interpretation, argued that under Missouri law, ambiguous insurance contracts should be construed in a light most favorable to the insured. Thus, went Charter's reasoning, the facially ambiguous language, "sudden and accidental," should be interpreted to favor coverage. In the alternative, Charter argued that the phrase, "sudden and accidental," constituted a latent ambiguity. 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.

The court, addressing Charter's facial ambiguity argument, observed that Missouri law applied an "anti-redundancy canon." Under the anti-redundancy canon, Missouri requires that all words in an insurance contract be given meaning.

Based on the Eighth Circuit interpretation of "sudden and accidental" under Missouri law in Aetna Casualty & Surety Co. v. General Dynamics Corp., the court decided that the trial court had correctly applied the anti-redundancy theory to Charter's arguments.

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." The court made this observation after analyzing the competing definitions of the word sudden. The court, after defining "accidental" to mean "unexpected," noted that Charter's definitions for both "sudden" and "unexpected" contained the same meaning: unexpected. To allow "sudden" to mean only "unexpected" would create a redundancy since both "sudden" and "accidental" would mean unexpected.

The anti-redundancy canon requires that "sudden" be defined to eliminate the redundancy. Thus, "sudden" must mean "abrupt," or "quick." Returning to the whole phrase, the court held that "sudden and accidental" meant that the pollution must be both unexpected and temporally abrupt. To hold otherwise, the court said, would mean that insurance

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98 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)).
99 Id.
100 Id.
101 Charter, 69 F.3d at 1163.
104 Id.
105 Id.
107 Charter, 69 F.2d at 1163.
108 Id.
109 Id.
110 Id. at 1164.
111 Aetna Casualty & Surety Co. v. General Dynamics, 968 F.2d 707 (8th Cir. 1992).
112 Charter, 69 F.3d at 1163.
113 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 Id. at 1164.
116 Id.
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.\textsuperscript{122}

In addition, the court noted that under Missouri law, policy contracts are given


circuit, interpreting Utah law in


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layman who bought and paid for the pol-

would be "ordinarily understood

sureds would be able to choose redun-

specifically exclude one member of

companies would find it impossible to spe-

128 The court distinguished the instant case from others that had interpreted “sudden” to mean only “unexpected.”\textsuperscript{129} Citing examples from Claussen v. Aetna Casu-

accuracy & Indemnity Co. v. United States Fidelity & Guaranty Co.,\textsuperscript{126} reached the conclusion that sudden and abrupt were synonyms in the “ordinary and popu-

The court then considered the purpose of the policy’s “sudden and accidental” terminology.\textsuperscript{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 in-

134 This model of unintentional pol-

140 The court acknowledged that sudden-

135 The court observed that the policy lan-

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.\textsuperscript{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.\textsuperscript{138} To interpret “sudden” as “abrupt” added another limiting factor guaranteeing that fewer intended pollution events are cov-

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.
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.
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 insurers 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 insurers’ 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 anti-redundancy rule makes 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.
Arguments that insureds had successfully argued in favor of insurers will be accepted. It is less likely that the first typical argument 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 Clausens that the plain language of “sudden” and “accidental,” can simply mean unexpected, is disputed by the Missouri anti-redundancy rule. 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.

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, Hamden v. Continental Ins. Co., gives the rule that no clause of an insurance contract should perish by a court’s construction of the contracts terms. 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.’” 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. 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. 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. The absence of “perfect fit” was not reason enough to “distort” the meaning of the contract. 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 the real intent of the parties was to rule out only unexpected and unintended harm. Perhaps the court, constrained 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 insureds, 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. 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.

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.

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169 See supra text accompanying note 79.

170 612 S.W.2d at 392.

171 Id. at 394.


173 Id. at 518-21.

174 Charter, 69 F.3d at 1166.

175 See supra notes 66-76 and accompanying text.

176 See supra notes 66-76 and accompanying text.

177 See supra notes 66-76 and accompanying text.
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.

179 Ballard and Manus, supra note 38, at 640.
180 Id.
181 Id. at 638.
182 Id. at 640.
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).