QUAKER STATE MINIT-LUBE, INC. V. FIREMAN'S FUND INSURANCE CO.: VENTURING INTO THE HAZARDOUS WASTE SITE THAT IS THE "SUDDEN AND ACCIDENTAL" CLAUSE

I. OVERVIEW

Plaintiff, Quaker State Minit-Lube, Inc. (Quaker State), owns and operates a number of automobile service centers.[1] The service centers drain engine oil during automobile maintenance, store it, and periodically resell it to refiners and recycling centers.[2] Between 1977 and 1985, Quaker State sold the used oil to Ekotek, Inc. (Ekotek), which operated an oil recycling and re-refining facility in Salt Lake City, Utah (the Ekotek Site).[3] During the period that Ekotek and Quaker State conducted business, unknown amounts of oil and other wastes were released into the ground at the Ekotek Site without Quaker State's knowledge.[4] Because of the numerous waste discharges that occurred at the Ekotek Site, the soil, surface water, and groundwater near the site became severely contaminated.[5]

In 1988, the United States Environmental Protection Agency (EPA) commenced response activities involving the site pursuant to its authority granted by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[6] The EPA designated the Ekotek Site as a CERCLA facility[7] because the site was

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1. Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co., 52 F.3d 1522, 1524 (10th Cir. 1995).

2. *Id.*

3. *Id.*

4. *Id.*

5. Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co., 868 F. Supp. 1278, 1283-84 (Utah 1994) (detailed list of the various spills and mishaps, including train accidents, fires, inadequate procedures, faulty equipment, neglect, and general incompetence that resulted in the disastrous contamination at the Ekotek site).

6. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988), amended by Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613 (1988).

7. The term "facility" means

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

heavily contaminated by hazardous substances.[8] Eventually, the EPA listed the Ekotek Site as a "Superfund" cleanup site.[9] Quaker State was among 470 potentially responsible parties (PRPs)[10] identified by the EPA as potentially liable for response costs incurred during the EPA cleanup efforts.[11] Quaker State, along with other PRPs, formed the Ekotek Site Remediation Committee, which has funded the cleanup activities at the Ekotek Site.[12] As of January 1993, the Committee had already expended ten million dollars at the Ekotek Site, with total costs potentially exceeding sixty million dollars.[13]

In March 1992, in an effort to defray some of its mounting costs, Quaker State filed a declaratory action seeking a determination of the scope of coverage from defendant insurance companies[14] under several comprehensive general liability (CGL)[15] policies. Quaker State and

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42 U.S.C. § 9601(9) (1988).

8. The term "hazardous substance" means "(A) any substance designated pursuant to section 1321(b)(2)(A) of title 33 . . .," 42 U.S.C. § 9601(14)(A), and

> The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone or in connection with activities under The Outer Continental Shelf Lands Act . . . or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States . . . present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

33 U.S.C. § 1321(b)(2)(A) (1988).

9. 40 C.F.R. § 300, App. B, at 214 (1994).

10. Liability for removal, remedial, investigatory, and any other necessary costs can be imposed by 42 U.S.C. § 9607(a)(3):

> (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-
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> . . .
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> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances. . . .

42 U.S.C. § 9607(a)(3) (1988).

11. *Quaker State*, 52 F.3d at 1525.

12. *Id.*

13. *Id.*

14. *Id.* at 1523-24. Fireman's Fund Insurance Company is the named defendant. Other defendants include the American Insurance Company, National Surety Corporation, Liberty Mutual Insurance Company, Continental Insurance Company, and Unigard Insurance Company.

15. *See infra* note 34.

Fireman's Fund filed cross motions for summary judgment.[16] The Federal District Court for the District of Utah granted summary judgment for Fireman's Fund.[17] Quaker State appealed the decision. The Tenth Circuit Court of Appeals affirmed and *held* that 1) releases of oil were not sudden and accidental within the meaning of the sudden and accidental exception to the pollution exclusion clause, and 2) discharges were to be viewed from the standpoint of the actual polluter when determining whether such discharges were sudden and accidental. *Quaker State Minit-Lube, Inc. v. Fireman's Fund Insurance Co.*, 52 F.3d 1522 (10th Cir. 1995).

II. BACKGROUND

The United States Congress established CERCLA[18] with the underlying rationale that polluters should pay to clean up polluted sites.[19] The United States House of Representatives report stated that CERCLA "was to provide for a national inventory of inactive hazardous waste sites and to establish a program for appropriate environmental response action to protect public health and the environment from the dangers posed from such sites."[20] CERCLA empowers the EPA to cleanup polluted sites by imposing the cost of the cleanup on the sites' past or present owners and operators.[21] Under CERCLA, a polluter that contributed only a small amount of the overall total damage can be assessed the entire cost of the cleanup.[22]

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16. *Quaker State*, 52 F.3d at 1526. Quaker State alleged that it had established the basic elements of the coverage and that Fireman's Fund had failed to show that the pollution exclusion clause excluded coverage. Fireman's Fund contended that Quaker State's discharges did not fall within the "sudden and accidental" exception to the policy.

17. Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co., 868 F. Supp. 1278 (Utah 1994).

18. *See* 42 U.S.C. §§ 9601-9675 (1988), *supra* note 6.

19. *See generally* Sharon M. Murphy, Note, *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, 173 n.76 (1990) *(*citing 2 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 10 A.02[1][c] (1990); WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 8.1, at 683 n.20 (2d ed. 1994) (suggesting that the overriding purpose of CERCLA is adequate site cleanup)); *see also* Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528, 1537 (E.D. Cal. 1992) (one of CERCLA's primary purposes is to encourage cleanup).

20. H.R. Rep. No. 1016, 96th Cong., 2d Sess. 1 (1980) *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119.

21. *See* 42 U.S.C. § 9607.

22. *See* David J. Barberie, Note, *Reaching In the Wrong Pocket?: Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corporation*, 9 J. LAND USE & ENVTL. L. 161, 165 n.29 (1993). *See* 42 U.S.C. § 9607.

CERCLA establishes a federal cause of action, akin to strict liability, enabling the EPA Administrator to "pursue . . . recovery of the costs incurred for the costs of such actions undertaken by him from persons liable therefor and to induce such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites."[23] The Senate Report stated that strict liability would provide maximum incentive for careful handling and incentive to minimize the effects of releases when they occur.[24] Congress, after focusing on cleaning up air (Clean Air Act)[25] and water pollution (Clean Water Act)[26] in the early 1970s and the movement of hazardous waste in the mid-1970s (Resource Conservation and Recovery Act),[27] turned its focus to the problem of inactive hazardous waste sites.[28] Congress admitted that existing law was inadequate to deal with the "unfortunate human health and environmental consequences"[29] of improper, negligent, and reckless waste disposal practices.[30] Therefore, CERCLA was the necessary remedy for the problem.

Essentially, the existence of CERCLA enforcement provisions allows actions taken by a company or industry thirty years ago to come back to haunt them with huge cleanup costs.[31] "Section 107 [42 U.S.C. § 9607] liability is strict and unforgiving, and has emerged rapidly as perhaps the most feared of all the new environmental liabilities that has been created in the last twenty years."[32] Polluters, when presented with these potentially out-of-control costs,[33] often seek to shift the burden onto their insurers.

Polluters will try to minimize their costs by seeking coverage under one of their insurance policies. The language in the insurance policies that gives rise to litigation in many cases is in the form of an

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23. *See* H.R. Rep. No. 1016, *supra* note 20, at 17, *reprinted in* 1980 U.S.C.C.A.N. at 6120.
24. S. Rep. No. 848, 96th Cong., 2d Sess. 12 (1980).
25. 42 U.S.C. §§ 7401-7671q (1988).
26. 33 U.S.C. §§ 1251-1387 (1988).
27. 42 U.S.C. §§ 6901-6992k (1988). *See* H.R. Rep. No. 1016, *supra* note 20, at 17, *reprinted in* 1980 U.S.C.C.A.N. at 6120 (termed a cradle-to-grave regulatory scheme for toxic substances).
28. *See* H.R. Rep. No. 1016, *supra* note 20, at 17, *reprinted in* 1980 U.S.C.C.A.N. at 6120.
29. *Id.*
30. *Id.*
31. Murphy, *supra* note 19, at 173-74.
32. Rodgers, *supra* note 19, § 8.6, at 748-49 & n.17. This source contains an excellent list of articles pertaining to CERCLA.
33. Murphy, *supra* note 19, at 173; *see generally* Kenneth S. Abraham, *Environmental Liability and the Limits Of Insurance*, 88 COLUM. L. REV. 942, 956 (1988).

exclusionary clause[34] in the CGL policy. The purpose of CGL insurance is to protect business and industry against liability for damages to third parties.[35] In 1966, insurance companies thought that courts[36] were construing the term "accident"[37] too broadly; in response, the insurance companies changed the basis[38] of the CGL policy from "accident" to "occurrence."[39] The insurance industry asserted that it did not intend to provide liability coverage for its clients who knowingly and voluntarily discharged polluting substances into the environment.[40] The insurers had hoped this change in language would help limit their liability; however, this was not the case and the new clause proved to be an ineffective limit on liability.[41] Courts found coverage for pollution-related damages despite the insurance industry's wishes to exclude coverage.[42] The

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34. The exclusionary clause on the forms in the present case is basically the same on each form and provide coverage for:

> [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 water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Quaker State, 52 F.3d at 1526.

The court in the present case stated that "[s]imply put, the clause excludes coverage for a pollution discharge which causes bodily injury or property damage unless the discharge is 'sudden and accidental.'" *Id.* at 1526.

35. R. Stephen Burke, Comment, *Pollution Exclusion Clauses: The Agony, the Ecstasy, and the Irony for Insurance Companies*, 17 N. KY. L. REV. 443, 447 (1990).

36. Robert M. Tyler, Jr. & Todd J. Wilcox, *Pollution Exclusion Clauses: Problems in Interpretation and Application Under the Comprehensive General Liability Policy,* 17 IDAHO L. REV. 497, 499 n.19 (1981).

37. "Accident" is defined by one commentator as "a distinctive event that takes place by some unexpected happening at a date that can be fixed with reasonable certainty." 11 MARK S. RHODES, COUCH ON INSURANCE 2d. Rev. vol. § 44:288 (1982).

38. Tyler and Wilcox, *supra* note 36, at 499-500.

39. "Occurrence" is defined by the policies in the current case as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *Quaker State*, 52 F.3d at 1526.

40. Tyler and Wilcox, *supra* note 36, at 499-500.

41. *See* Grand River Lime Co. v. Ohio Casualty Ins. Co., 289 N.E.2d 360 (Ohio Ct. App. 1972) (court rejected the insurer's proposition that one who emits large quantities of waste over a seven year period must expect some resulting damage and instead found that the damage was unexpected or unintended so the insurer must pay). *See also* Tyler and Wilcox, *supra* note 36, at 503 (finding that *Grand River Lime* illustrates the view that the shift to occurrence-based coverage abolished any prerequisite that the event establishing liability can be fixed in time).

42. "Insurers wanted to focus coverage only on unforeseeable damage, thereby emphasizing the responsibility of industry to oversee the safe disposal of hazardous waste." Murphy, *supra* note 19, at 165 n.25 (citing James Houriboun, *Insurance Coverage for Environmental Damage Claims*, 15 FORUM 551, 553 (1980)).

judiciary's differentiation between intended acts and intended damage spelled the end for the "occurrence"-based policy language.[43] Once again, potentially far reaching liability from judicial decisions caused insurance companies to redraft the CGL language.[44]

The insurance industry added the policy exclusion clause at issue in this case in 1973 by inserting the "sudden and accidental" language into the CGL policy forms.[45] For whatever reason,[46] the terms "sudden" and "accidental" were left undefined in the policy. This omission created a gap in the policy spurring litigation[47] and causing policyholders to use every possible argument in an attempt to fit the pollution-related events for which they are responsible under the "sudden and accidental" exception.[48] In most situations, courts could look to the drafting history of the insurance policy to help clarify the meaning of the policy language. Unfortunately, in this particular situation the policy's drafting history is generally considered to be cloudy and does not help the court clarify the meaning of the disputed phrase.[49]

With the crucial terms in the policy left undefined, the courts have had to take it upon themselves to define and interpret "sudden and accidental."[50] Not surprisingly, courts in many jurisdictions have interpreted the policy exclusion language differently than the insurers might have intended.[51]

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43. Murphy, *supra* note 19, at 167.

44. For policy language, see *supra* note 34. For reasoning of the insurance industry, see Murphy, *supra* note 19, at 167; Tyler and Wilcox, *supra* note 36, at 500 & n.23-24.

45. Murphy, *supra* note 19, at 167 & nn.40-42.

46. Most commentators and courts note that the language is undefined while never asking why the drafters would not define such an important phrase.

47. Nancer Ballard and Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610, 612-13 (1990) (disputes over the exclusion clause language have produced a mammoth amount of litigation in virtually every state).

48. Murphy, *supra* note 19, at 168 n.45.

49. Murphy, *supra* note 19, at 168; Ballard & Manus, *supra* note 47, at 627 (the authors think that the intent of the drafters is far from obvious); *but see* S. Hollis Greenlaw, *The CGL Policy and the Pollution Exclusion Clause: Using the Drafting History to Raise the Interpretation Out of the Quagmire*, 23 COL. J.L. & SOC. PROBS. 233, 270-72 (1990).

50. Ballard & Manus, *supra* note 47, at 614. The authors state that "as a rule, in the absence of a specific definition in a policy, the terms of an insurance contract are interpreted in accordance with the plain, ordinary, and commonly understood meaning of the language employed." *See, e.g.*, Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686, 687-88 (Ga. 1989) (under Georgia rules of contract interpretation, words in a contract generally bear their usual and common meaning).

51. Jonathan C. Averback, Comment, *Comparing the Old and the New Pollution Exclusion Clauses in General Liability Insurance Policies: New Language—Same Results?*, 14 B.C. ENVTL. AFF. L. REV. 601, 605 (1987).

The manner in which the courts have interpreted the disputed "sudden and accidental" clause falls into three general categories.[52] In one set of cases, courts have found the undefined terms ambiguous, and therefore, have ruled against the insurers by finding coverage under the policies.[53] In a second set of cases, the courts have found the phrase "sudden and accidental" to be unambiguous and have defined "sudden" to mean "unexpected or unintended,"[54] essentially reiterating the coverage under the terms "accident" and "occurrence."[55] In this group of cases, the insurer may be obligated to pay for the cost of the cleanup of the polluted site. In the third group of cases,[56] courts have decided that the phrase is unambiguous and have defined "sudden" as having a temporal quality and "accident" to mean "unintended." Often, these courts have given a separate meaning to each word.[57] In these cases, the courts have found that the pollution can be excluded under the policy and that the insurer may not have to pay depending on the facts of the particular case.

III. THE COURT'S DECISION

After acknowledging that the Utah Supreme Court had yet to rule on this matter,[58] the Tenth Circuit described the issue in the present case

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52. Murphy, *supra* note 19, at 178-79.

53. At the root of these decisions is the court's idea that if the policy is ambiguous, under insurance contract law, it will find against the insurance company because the insurance company usually authored the language. For a partial listing of cases, *see*, *e.g.,* Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991); Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686 (Ga. 1989); Outboard Marine Corp. v. Liberty Mut. Ins. Corp., 607 N.E.2d 1204 (Ill. 1992); Queen City Farms, Inc., v. Central Nat'l Ins. Co. of Omaha, 882 P.2d 703 (Wash. 1994); Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W. Va. 1992); Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990).

54. Two such cases are: National Garage Mut. Ins. Co. v. Continental Casualty Co., 650 F. Supp. 1404 (S.D. N.Y. 1986); Lansco, Inc. v. Department of Envtl. Protection, 350 A.2d 520 (N.J. Super. Ct. Ch. Div. 1975), *aff'd*, 368 A.2d 363 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 372 A.2d 322 (N.J. 1977).

55. Murphy, *supra* note 19, at 179 (courts in this group fail to recognize the basic distinction between the coverage language and the exclusion).

56. Two federal court decisions are: Aetna Casualty & Sur. Co. v. General Dynamics Corp., 968 F.2d 707 (8th Cir. 1993); Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984). A partial list of state court cases includes: Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd., 597 N.E.2d 1096 (Ohio 1992), *cert. denied*, 113 S. Ct. 1585 (1993); Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392 (Mich. 1991); Board of Regents of the Univ. of Minn. v. Royal Ins. Co., 517 N.W.2d 888 (Minn. 1994); Technicion Elec. Corp. v. American Home Assurance Co., 542 N.E.2d 1048 (N.Y. 1989); Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374 (N.C. 1986).

57. Murphy, *supra* note 19, at 180.

58. *Quaker State*, 52 F.3d at 1527. The court considers "state court decisions, decisions of other states, federal decisions, and the general weight of authority and trend of authority." Armijo v.

as: "[w]hether the numerous pollution discharges over the years at the Ekotek Site were 'sudden and accidental' within the meaning of the exception to the pollution exclusion clause."[59] The court stated that in *Hartford Accident & Indemnity Co. v. United States Fidelity & Guaranty Co*.[60] it had construed "sudden and accidental" under Utah law to mean temporally abrupt and unexpected or unintended.[61] In *Hartford Accident*, the El Paso Natural Gas Company had released lubricating oils containing polychlorinated biphenyl (PCB) into the surrounding environment.[62] Hartford had insured El Paso under a CGL policy.[63] El Paso demanded indemnification from Hartford, and Hartford refused to pay.[64] In *Hartford Accident,* the court rejected the holdings of courts that had found the term "sudden" to be ambiguous.[65] El Paso had principally relied on the reasoning of the Third Circuit Court of Appeals (applying Delaware law) in *New Castle County v. Hartford Accident & Indemnity Co*.[66] In

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Ex Cam, Inc., 843 F.2d 406, 407 (10th Cir. 1988). At least one commentator finds it disturbing that federal courts are ruling on insurance questions, areas traditionally left to state law and decision, without guidance from the highest court in the state on the matter. Murphy, *supra* note 19, at 190 n.122 (commentator hoping that the Eleventh Circuit's decision to certify an interpretative question to the Georgia Supreme Court will spark a trend in the federal courts). Since Murphy's article was published, the Eleventh Circuit certified the "sudden and accidental" question to the Florida Supreme Court in Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700 (Fla. 1993).

59. *Quaker State*, 52 F.3d at 1527.

60. 962 F.2d 1484 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 411 (1992).

61. *Id.* at 1486.

62. *Id.*

63. *Id.*

64. *Id.* at 1487. El Paso argued, in part, that (1) "sudden and accidental" was ambiguous and therefore, the court should construe the policy in favor of the insured; (2) "sudden and accidental" means "unexpected or unintended" and since El Paso did not expect or intend for the PCB to enter the environment the court should find for the insured. Hartford argued that "sudden and accidental" is (1) unambiguous and had to imply temporality; and (2) that the clause relates to the release of discharges, not the damage done. Essentially, the discharge itself must be unexpected or unintended (accidental) and abrupt or immediate (sudden).

65. Hartford Accident & Indem. Co. v. United States Fidelity & Guar. Co., 962 F.2d 1484, 1488-89 (10th Cir. 1992).

66. 933 F.2d 1162, 1194-95 (3d Cir. 1991). The court found that because "sudden and accidental" was capable of two reasonable interpretations, the term was ambiguous under Delaware state law.

The Third Circuit stated that:

> Simply put, sudden means unexpected, and accidental means unintended . . . . Insurance policies routinely use words that, while not strictly redundant, are somewhat synonymous . . . . We think that the words "sudden" and "accidental" when read together, serve the same purpose as "discharge, dispersal, release or escape": they each connote the same general concept—namely fortuity—with a small variation. Neither do we think that annexing the word "sudden" to the word "accidental" with the conjunctive "and" necessarily

explicitly rejecting *New Castle County,* the Tenth Circuit stated what it reasoned to be the proper way to interpret the clause in the general context of the policy:

> We think the "annexation" of "sudden" to "accidental" is precisely the issue: reading "sudden" without a temporal component renders "accidental" redundant. While both conditions might include "unexpected" or "unintended," "sudden" cannot mean "gradual," "routine" or "continuous." Since Utah law dictates each contract provision be given effect . . . the conjunctive association of "sudden" with "accidental" is exactly the point on which our interpretation turns. . . . Giving effect to every provision obliges us to construe "sudden" and "accidental" as separate, conditional requirements for coverage.[67]

Both the *Hartford Accident* court and the court in the noted case cite[68] *Gridley Associates Ltd. v. Transamerica Insurance Co.*[69] as the leading Utah state court decision on this issue. *Gridley* supports the conclusion that "sudden and accidental" unambiguously means "abrupt and unexpected or unintended."[70] In the *Gridley* case, Gridley Associates Ltd. (Gridley) owned a gas station in California.[71] Gridley suspected that there was a leak in a pipe that connected the gas storage

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> injects a temporal element, such as brevity or abruptness, into the exception to the pollution exclusion clause.

Id. at 1194-95.

67. *Hartford Accident*, 962 F.2d at 1490 (citations omitted). The *Hartford Accident* court cited several decisions of other jurisdictions with approval. *See, e.g.*, Ogden Corp. v. Travelers Indem. Co., 924 F.2d 39 (2d Cir. 1991) (under New York law, a "sudden" discharge had to be over a short period of time); A. Johnson & Co., Inc. v. Aetna Casualty & Sur. Co., 933 F.2d 66 (1st Cir. 1991) (if sudden is to have any meaning within the clause, only an abrupt discharge qualifies for the exception); United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988) (where polluter had discharged excessive pollutants during routine business, the court could not define "sudden" without reference to a temporal element). *See also* Ballard and Manus, *supra* note 47, at 613-17 (for an exhaustive discussion of possible dictionary definitions for "sudden and accidental" and how to apply them properly).

68. *Hartford Accident*, 962 F.2d at 1490; *Quaker State*, 52 F.3d at 1528.

69. 828 P.2d 524 (Utah Ct. App. 1992) (finding that a "clean break" in a gas line was "sudden" and, therefore, within the policy exclusion language). In *Gridley*, the court noted that the issue was one of first impression in Utah. The Utah Supreme Court has yet rule on the meaning of the clause, *see supra* note 58 of this text for criticism of federal courts ruling on matters of state law without direction from state supreme courts.

70. *Id.* at 527.

71. *Id.* at 524.

tanks with the gasoline dispensers. Because of the leak, every time the gasoline pump was activated gasoline was discharged into the ground.[72] Gridley repaired the pipe and cleaned up the pollution that resulted from the spill.[73] Gridley then tried to get the costs paid for by Transamerica under a CGL policy.[74] Transamerica claimed that the spill was not covered because it was not "sudden."[75] After looking at interpretations of courts in other jurisdictions,[76] the *Gridley* court settled on the temporal definition of "sudden." The *Gridley* court explicitly rejected past opinions holding the phrase "sudden and accidental" as ambiguous.[77]

The court in the present case also cites *Anaconda Minerals Co. v. Stoller Chemical Co.*[78] as support for the proposition that "sudden and accidental" is unambiguous under Utah law, and that it means "abrupt or instantaneous" and "unexpected or unintended."[79] *Anaconda* is instructive because it involves a situation where the discharge of pollution continued for several years,[80] just as in the present case.

In *Anaconda*, Stoller had stored flue dust containing lead and other pollutants on the bare ground and in storage hoppers. The storage arrangements were inadequate, and the soil at the storage site was polluted.[81] The *Anaconda* court drew heavily on the *Hartford* court's analysis of "sudden and accidental."[82] Also, the *Anaconda* court stated that because the policy language was unambiguous it would not look at extrinsic evidence such as the drafting history.[83]

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72. *Id.* at 525.

73. Gridley Associates Ltd. v. Transamerica Ins. Co., 828 P.2d 524, 525 (Utah Ct. App. 1992).

74. *Id.*

75. *Id.*

76. *See, e.g.*, FL Aerospace v. Aetna Causality & Sur. Co., 897 F.2d 214 (6th Cir.), *cert. denied*, 498 U.S. 911,(1990); United States Fidelity and Guar. Co. v. Star Fire Coals Inc., 856 F.2d 31 (6th Cir. 1988); U.S. Fidelity & Guar. Co. v. Morrison Grain Co., 734 F. Supp. 437 (D. Kan. 1990), *aff'd*, 999 F.2d 489 (10th Cir. 1993).

77. *Gridley,* 828 P.2d at 527 n.1. The *Gridley* court stated that the decisions of courts finding the phrase "sudden and accidental," unambiguous were more well reasoned and thus that was the approach adopted.

78. 990 F.2d 1175 (10th Cir. 1993).

79. *Id.* at 1177-78.

80. *Id.* at 1179.

81. *Anaconda*, 990 F.2d at 1176.

82. *Id.* at 1177-78.

83. *Id.* at 1179. At least one court has decided that the drafting history and the statements made by insurance officials are important in construing the clause and in finding against the insurance companies. Morton Int'l, Inc. v. General Accident Ins. Corp., 629 A.2d 831 (N.J. 1993), *cert. denied*, 114 S. Ct. 2764 (1994). *See generally* Jennifer Goodman, Casebrief, *Morton*

The Tenth Circuit then analogized the present case to *Industrial Indemnity Insurance Co. v. Crown Auto Dealerships, Inc.*,[84] which the Tenth Circuit determined was factually similar.[85] Crown Auto was an automobile dealership that performed oil changes as a service to customers.[86] It sold the used oil to a recycler, Peak Oil Company, that contaminated the groundwater at its storage site.[87] The EPA identified Crown Auto as a PRP,[88] and Crown Auto sought coverage under a CGL policy.[89] The policy contained a pollution exclusion clause identical to the clause at issue in *Quaker State*.[90] In *Crown Auto,* the district court found that "sudden" had a "temporal meaning to it as well as a sense of the unexpected."[91] The court defined "sudden" to mean pollution which occurs abruptly.[92] "Accident" was defined as an event which is unexpected or unintended and is not in the usual course of events.[93] On appeal, the Eleventh Circuit certified the issue to the Florida Supreme Court.[94] Over a strong dissent, the Florida Supreme Court accepted the analysis of the federal district court and concluded that recurring discharges made during the usual course of business at a recycling site were not "sudden and accidental," and, therefore, the liability was excepted under the clause.[95]

The Florida Supreme Court found that because the clause itself was unambiguous it did not have to consider the drafting history or the representations made by the insurance board to the state insurance commissioner.[96] The strongly worded dissent attacked this analytical

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International v. General Accident Insurance Co.: The New Jersey Supreme Court Defines the Scope of the Qualified Pollution Exclusion Clause in Comprehensive General Liability Policies, 6 VILL. ENVTL. L.J. 227 (1995); *see* Murphy, *supra* note 19, at 168-73 (drafting history of clause).

84. Industrial Indem. Ins. Co. v. Crown Auto Dealerships, Inc., 731 F. Supp. 1517 (M.D. Fla. 1990), *aff'd sub nom*, Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700 (Fla. 1993).

85. *Quaker State*, 52 F.3d at 1529-30.

86. *Crown Auto*, 731 F. Supp. at 1518.

87. *Id.*

88. *Id.* at 1518-19.

89. *Id.* at 1519.

90. *Id.*

91. Industrial Indem. Ins. Co. v. Crown Auto Dealerships, Inc., 731 F Supp. 1517, 1520 (M.D. Fla. 1990). The Court relies on C.L. Hathaway & Sons v. American Motorists Ins. Co., 712 F. Supp. 265, 268 (D. Mass. 1989), in support of this definition.

92. *Crown Auto*, 731 F. Supp. at 1520.

93. *Id.*

94. 935 F.2d 240 (11th Cir. 1991).

95. *Dimmitt Chevrolet*, 636 So. 2d at 705.

96. *Id.*

omission and claimed that by failing to consider the insurance industry's intent, the decision was wrong on the merits.[97] The Tenth Circuit did not mention the angry dissent in *Dimmitt Chevrolet*. The Tenth Circuit decided that based upon the trial court's record, the spills, leaks, and mishaps at the Ekotek Site were common, everyday events that occurred during the regular business operations.[98] Therefore, as a matter of law, the discharges could not be viewed as "sudden and accidental."[99]

Peripheral to the court's analysis of the meaning of "sudden and accidental" was the Tenth Circuit's specific rejection of Quaker State's other theories on how to view the pollution at the Ekotek Site.[100] The court stated that although individual discharges may have been "sudden and accidental" when viewed in isolation, the overall pattern of discharges was not "sudden and accidental." In support of this proposition, the court cited *Cincinnati Insurance Co. v. Flanders Electric Motor Service*,[101] in which the Seventh Circuit rejected the idea that "because one or more spills may have been accidental it would change the overall pattern of mishaps to 'sudden and accidental.'"[102] The Tenth Circuit, citing *A. Johnson & Co. v. Aetna Casualty & Surety Co*.[103] stated that it would not engage in a microanalysis of discrete discharges when the discharges otherwise occur in the course of everyday business.[104] Simply put, the court rejected Quaker State's argument that each discharge should be looked at in isolation to determine whether it was "sudden and accidental."[105]

Lastly, the court rejected Quaker State's argument that discharges at the Ekotek Site should be viewed from the insured party's point of view instead of that of the actual polluter.[106] The court found that the plain language of the clause excluded coverage regardless of whether the insured caused or intended the discharge.[107]

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97. *Id.* at 706-10 (Overton, J., dissenting) (for a general discussion of the actions and intent of the insurance companies in Florida and other jurisdictions).

98. *Quaker State*, 52 F.3d at 1530.

99. *Id.* The court cites to Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc., 40 F.3d 146, 154 (7th Cir. 1994) as supporting this general notion.

100. *Quaker State*, 52 F.3d at 1530.

101. 40 F.3d 146 (7th Cir. 1994).

102. *Id.* at 154.

103. 933 F.2d 66 (1st Cir. 1991).

104. *Quaker State,* 52 F.3d at 1529.

105. *Id.* at 1530.

106. *Id.* at 1530-31.

107. *Id.* at 1531.

IV. ANALYSIS

The importance of a court's interpretation of "sudden and accidental" cannot be overstated. The interpretation essentially dictates who will pay the costs to cleanup a polluted site. In most cases, either it will be the potentially responsible party or their insurance company, usually under some version of a comprehensive general liability policy.

CERCLA's mandates and age-old common law doctrines of insurance policy and contract construction[108] provide competing masters for the courts to serve. CERCLA is designed to provide for the cleanup of sites by having the polluters pay the cleanup costs.[109] If site cleanup is the priority, one must ask if it matters at all who pays for the site remediation. But, if the prevention of pollution is the primary goal of CERCLA, then one does not want to remove CERCLA's strict liability penalty provisions, because they might be the only incentive for a company not to pollute.[110] Set against this environmental backdrop are the judge-made doctrines of insurance policy construction that have evolved without relation to the goals of environmental law and policy.[111]

The decision by the Tenth Circuit interpreting Utah law comports with many of the recent decisions interpreting the disputed "sudden and accidental" language.[112] However, many jurisdictions still interpret the language in favor of the insured.[113] The insurance companies and some commentators suggest that by making insurers liable for pollution cleanup, courts are circumventing Congress's intent to force polluters to pay.[114] If courts insist that insurance companies foot the bill, there will be no incentive for industry to look for cleaner, safer methods of production and disposal.[115] However, as the *Dimmitt* dissent points out, reading "sudden" too strictly can lead to a windfall for insurance companies while penalizing small business.[116]

The Tenth Circuit decisions interpreting Utah law all fail to consider the drafter's intent and the assurances that the insurance company executives gave to state insurance commissioners and

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108. Murphy, *supra* note 19, at 177 n.107.
109. *See supra* note 19 and accompanying text.
110. *See* Murphy, *supra* note 19, at 175-76 & nn.100-02.
111. *Id.* at 177 n.107
112. *See* cases cited *supra* note 56.
113. *See* cases cited *supra* notes 53-54.
114. *See* Murphy, *supra* note 19, at 175-76 nn.100-02.
115. *Id.* at 175-76.
116. *Dimmitt Chevrolet*, 636 So. 2d at 711-12.

regulatory boards.[117] If insurance companies did convey to the State that the exclusion clause would not further limit coverage then the insurance industry should not now be rewarded for this vagueness. Courts in many jurisdictions construe the ambiguity in insurance policies against the insurers, no matter how sophisticated the insured party, because most policies are essentially contracts of adhesion.[118] This policy of contract construction is the court's competing master. To find against the insurers may subvert CERCLA's goal of having responsible parties pay for cleanup, and that is one argument the insurance companies make when pressing their arguments to the court.[119]

Because of the continued uncertainty surrounding the interpretation of the phrase, industry and its insurers are sure to continue litigating this issue at great expense to all involved.[120] Many commentators have suggested alternatives to the "run to court" approach currently being taken.[121] One of the suggestions is to establish a common fund from surcharges on insurance premiums and company profits.[122] While this might eliminate extended and costly legal battles it would provide only an attenuated incentive not to pollute.[123] One thing that commentators almost universally agree upon is that money must be re-routed from litigation to cleanup.[124] A cost-sharing system between insurers and insureds brokered by the EPA would at least produce some stability ending "business as usual" litigation.[125]

V. CONCLUSION

The Tenth Circuit in *Quaker State* firmly reiterated its past readings of "sudden and accidental" under Utah law. Its interpretation comports with several other state and federal courts. Interestingly, the court's initial assumption that the phrase "sudden and ambiguous" is unambiguous precludes it from receiving extrinsic evidence that several courts have decided is critical in making its decisions. The only certainty

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117. *See, e.g.*, *Dimmitt Chevrolet*, 636 So. 2d at 706 (Overton, J., dissenting); Morton Int'l, Inc. v. General Accident Ins. Co. of America, 629 A.2d 831 (N.J. 1993).

118. Brooke Jackson, *Liability Insurance for Pollution Claims: Avoiding a Litigation Wasteland*, 26 TULSA L.J. 209, 243 (1990).

119. Murphy, *supra* note 19, at 175-76.

120. Jackson, *supra* note 118, at 242-43.

121. Murphy, *supra* note 19, at 162 n.3.

122. *Id.* at 194 n.237.

123. *Id.*

124. *See* Jackson, *supra* note 118, at 242.

125. *Id.* at 243.

in this area of law is the uncertainty as to how different state and federal courts will define "sudden and accidental."

Roy Spurbeck