IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SIMON WRECKING COMPANY, INC., SIMON RESOURCES, INC., AND MID-STATE TRADING COMPANY, Plaintiffs, vs. AIU INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, TRANSPORTATION INSURANCE COMPANY, AND LIBERTY MUTUAL INSURANCE COMPANY, Defendants.	CIVIL ACTION NO. 03-CV-3231

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

LEE M. EPSTEIN, ESQ. (I.D. No. 61762)
FRIED & EPSTEIN LLP
325 Chestnut Street
Suite 900
Philadelphia, PA 19106
(215) 625-0123

AMY BACH, ESQ.
LAW OFFICE OF AMY BACH
222 Columbus Ave., Suite 412
San Francisco, CA 94133
(415) 393-9990

Attorneys for *Amicus Curiae*,
United Policyholders

Dated: October 12, 2007

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes **Page**

Miscellaneous **Page**

INTEREST OF *AMICUS CURIAE*

United Policyholders was founded in 1991 and is a non-profit organization dedicated to educating the public on insurance issues and consumer rights. It protects the interests and presents the positions of policyholders through participation as *amicus curiae* in insurance coverage cases throughout the country. The organization is tax-exempt under Internal Revenue Code § 501(c)(3) and is funded by donations and grants from individuals, businesses and foundations.

United Policyholders is an information resource on sales, coverage, claims and litigation related issues pertaining to the full range of personal and commercial lines insurance products. An average of 20,000 monthly visitors read articles and tips at www.unitedpolicyholders.org. The organization participates in proceedings of the National Association of Insurance Commissioners and receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues.

A diverse range of policyholders and policyholder advocates communicate on a regular basis with United Policyholders. By processing these communications and monitoring the insurance marketplace and the industry in general, United Policyholders is able to submit pertinent and accurate information to courts throughout the country via *amicus* briefs. United Policyholders has participated as *amicus curiae* in more than 240 cases across the country involving significant insurance issues. The organization's reputation as a reliable friend of the court was enhanced when its *amicus curiae* brief was cited in the United States Supreme Court's opinion in Humana Inc. v. Forsyth, 525 U.S. 299 (1999), and its arguments were adopted by the California Supreme Court in Vandenberg v. Superior Court, 88 Cal. Rptr.2d 366 (Cal. 1999) and in TRB Investments, Inc. v. Fireman's Fund Ins. Co., 145 P.3d 472 (Cal. 2006). Points raised in

United Policyholders' amicus briefs have made their way into many published opinions, including, most recently, Travelers Casualty and Surety Company v. United States Filter Corp., 870 N.E.2d 529 (Ind. Ct. App. 2007), and Landry v. Louisiana Citizens Property Insurance Co., No. 2007-247, 2007 WL 2416107 (La. Ct. App. Aug. 28, 2007).

United Policyholders has also participated as an *amicus curiae* before the Pennsylvania Supreme Court in a number of cases, including Hollock v. Erie Insurance Exchange, 903 A.2d 1185 (Pa. 2006); 401 Fourth Street, Inc. v. Investors Insurance Group, 879 A.2d 166 (Pa. 2005), and Sunbeam Corp. v. Liberty Mutual Ins. Co., 781 A.2d 1189 (Pa. 2001), the case that lies at the heart the parties' respective motions for summary judgment.

ARGUMENT

I. This Court Should Interpret And Apply The "Sudden And Accidental" Pollution Exclusion Unfettered By Prior Pennsylvania Precedent That Is Premised On An Incomplete Record

As aptly stated by former Justice Brandeis, "sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (L. Brandeis, Other People's Money, 62 (1933)). With the Pennsylvania Supreme Court's decision in Sunbeam Corp. v. Liberty Mutual Insurance Co., 781 A.2d 1189 (Pa. 2001), the darkness that had covered Pennsylvania law on the "sudden and accidental" pollution exclusion[1] has been illuminated and now all courts are free to interpret that exclusion in the full light of day, after consideration of a full evidentiary record.

---

[1] The "sudden and accidental" pollution exclusion provides as follows:

> This insurance does not apply: to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the 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.

By virtue of Sunbeam, this Court will effectively write on a clean slate when it interprets the "sudden and accidental" pollution exclusion. No court, applying Pennsylvania law, has considered the wealth of evidence concerning both the common and special meanings of the words "sudden" and "sudden and accidental" as they are used in the "sudden and accidental" pollution exclusion. As discussed immediately below, those Pennsylvania courts that have opined on the meaning of the "sudden and accidental" pollution exclusion have done so in a vacuum without consideration of the full record now before this Court.

A. The Evolution Of Pennsylvania Law Regarding The "Sudden And Accidental" Pollution Exclusion

Pennsylvania law on the "sudden and accidental" pollution exclusion begins with Techalloy Co. v. Reliance Insurance Co., 487 A.2d 820 (Pa. Super. 1984). In Techalloy, the Pennsylvania Superior Court was asked to decide whether a twenty-five year practice of dumping trichloroethylene (TCE) was a "sudden" event. In holding that the term "sudden" had a temporal meaning and barred coverage for that long-term dumping, the court expressly recognized that the policyholder offered "no alternative interpretation of 'sudden and accidental' which would render it ambiguous." Id. at 15 (emphasis added).[2] Thus, Pennsylvania law on the "sudden and accidental" pollution exclusion is a house of cards built on the weakest of foundations -- an interpretation of "sudden and accidental" premised on only an interpretation offered by an insurer and without the benefit of any alternative interpretation offered by the policyholder.

(See, e.g., Debevec Affidavit submitted in support of Plaintiffs Simon Policyholders' Motion for Summary Judgment, Ex. 2 at SMW 00231) (emphasis added).

[2] The policyholder's legal counsel in Techalloy was the law firm Drinker, Biddle & Reath, well known for its regular representation of insurance companies. Indeed, Drinker Biddle's website proudly boasts: "The Drinker Biddle insurance practice represents the leaders of the insurance industry, including property and casualty and life, health and accident families of companies as well as agents, brokers, and reinsurers." Available at http://www.drinkerbiddle.com/services/ServiceDetail.aspx?service=46.

The Pennsylvania Superior Court next considered the "sudden and accidental" pollution exclusion five years later, in Lower Paxton Township v. United States Fidelity and Guaranty Co., 557 A.2d 393 (Pa. Super. 1989). Notwithstanding the fact that the Techalloy policyholder failed to offer any alternative interpretation of the "sudden and accidental" pollution exclusion, the Lower Paxton court considered itself bound to adopt the Techalloy holding:

> We do not consider ourselves free to disregard the clear import of Techalloy on the legal question of the meaning of the pollution exclusion. We are bound by the prior decisions of this court.

Id. at 401 (emphasis added).

Specifically, the Lower Paxton court refused to consider the drafting and regulatory history that was at the heart of Sunbeam, and which is now before this Court. Id. at 402 n.5.

The Lower Paxton court also relied on a number of authorities that have since been reversed. For example, the decision by the United States District Court for the Southern District of Georgia in Claussen v. Aetna Cas. & Sur. Co., 380 S.E.2d 686, 689 (Ga. 1989), was reversed upon certification to the Georgia Supreme Court, with the court holding that the "sudden and accidental" pollution exclusion "was intended to exclude only intentional polluters." Likewise, the Illinois appellate court holding in International Minerals & Chemical Corp. v. Liberty Mutual Insurance Co., 522 N.E.2d 758 (Ill. Ct. App. 1988), is no longer good law in light of the Illinois Supreme Court decision in Outboard Marine Corp. v. Liberty Mutual Insurance Co., 607 N.E.2d 1204, 1217-22 (Ill. 1992) (pollution exclusion found to be ambiguous because of divergent dictionary definitions of "sudden").

Moreover, Professor Abraham, upon whose law review article the Lower Paxton court placed substantial reliance, see Lower Paxton, 557 A.2d at 402 (citing K.S. Abraham, Environmental Liability and the Limits of Insurance, 88 Col. L. Rev. 942 (1988)), has recanted

his prior view that the term "sudden" has a single definition meaning "abrupt." Professor Abraham now concludes:

> Finally, having considered the meaning of the language alone and seen its elusiveness, the interpreter may not wish to reach any of the foregoing conclusions, but may instead find it necessary to look outside the language of the pollution exclusion to determine its meaning.

K.S. Abraham, Environmental Liability Insurance Law ("Abraham") at 150 (1991). Seeking guidance outside the language of the exclusion, Professor Abraham has examined the very same drafting and regulatory history that the Lower Paxton court refused to examine and concluded that history supports the view that gradual, unintentional pollution was not intended to be excluded:

> Whatever the actual motive behind and explanation for the industry's representations - and they probably will never be known with certainty - the history of what led to regulatory approval of the pollution exclusion in some jurisdictions is more than enough to give the interpreter pause. These representations would at least support the conclusion that the industry was more concerned that discharges be unintentional than that they be violent, visible, explosive occurrences.

Abraham, at 160 (emphasis added). Clearly, much of the authority that originally supported the Lower Paxton court's decision no longer exists.

The Lower Paxton court's rejection of the policyholder's alternative reasonable interpretation because the court considered itself "bound" by Techalloy, improperly prevented the Lower Paxton policyholder, and, indeed, all Pennsylvania policyholders from demonstrating alternative reasonable interpretations of the "sudden and accidental" pollution exclusion for claims involving gradual, unintentional pollution. Nevertheless, the Lower Paxton decision, as it relates to gradual environmental pollution claims, has been followed by several panels of the Pennsylvania Superior Court with virtually no additional analysis. See, e.g., Graham v.

Harleysville Ins. Co., 632 A.2d 939 (Pa. Super. 1993); O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 629 A.2d 957 (Pa. Super. 1993).[3]

The holding in Sunbeam, however, has resulted in a seismic shift in the way courts interpret the "sudden and accidental" pollution exclusion. To date, courts applying Pennsylvania law have either been denied an opportunity for considering, or have refused consideration of, the drafting and regulatory history of the exclusion. Now, courts applying Pennsylvania law are directed to consider that compelling evidence. Accordingly, existing Pennsylvania law on the meaning of the "sudden and accidental" pollution exclusion is of limited or no value.

B. In Predicting How The Pennsylvania Supreme Court Would Interpret And Apply The "Sudden And Accidental" Pollution Exclusion This Court Should Consider The Full Evidentiary Record

This Court, sitting in diversity, is not bound to follow the limited holdings in Techalloy and Lower Paxton. Rather, this Court must predict how the Pennsylvania Supreme Court would interpret the "sudden and accidental" pollution exclusion after consideration of all of the materials reflecting the common and special meanings of the word "sudden" and the phrase "sudden and accidental." A federal court sitting in diversity is free to reach a result contrary to the result reached by an intermediate state appellate court if, by analyzing "other persuasive data," it predicts that the state Supreme Court would hold otherwise. See, e.g., National Surety Corp. v. Midland Bank, 551 F.2d 21, 30 (3d Cir. 1977) (quotation omitted).

With regard to the proper analysis of the "other persuasive data" concerning the common and special meanings of the "sudden and accidental" pollution exclusion, the Third Circuit's decision in New Castle County v. Hartford Accident and Indemnity Company, 933 F.2d 1162 (3d Cir. 1991), provides an authoritative roadmap. In New Castle County, the Third Circuit,

[3] Federal courts, applying Pennsylvania law prior to Sunbeam, have likewise followed the holdings in Techalloy and Lower Paxton without any independent interpretation of the "sudden and accidental" pollution exclusion. See, e.g., Northern Ins. Co. of N.Y. v. Aardvark Associates, Inc., 942 F.2d 189 (3d Cir. 1991).

writing on a clean slate, predicted how the Delaware Supreme Court would interpret the "sudden and accidental" pollution exclusion. In so doing, the Third Circuit considered: (1) the multiple dictionary definitions of the word "sudden;" (2) the existence of judicial disagreement over the meanings of "sudden" and "sudden and accidental;" (3) the prior use of the phrase "sudden and accidental" in boiler and machinery policies; and (4) the drafting and regulatory history of the "sudden and accidental" pollution exclusion. New Castle County, 933 F.2d at 1193-99. After consideration of all of that material, the Third Circuit concluded as follows:

> When first confronted with this issue, the reader's initial reaction is likely to be that "sudden" means "abrupt." Upon considering the foregoing factors, however, we now are convinced that the County's alternative interpretation of "sudden" (as meaning "unexpected") "reflect[s] a reasonable reading of the contractual language." Kenner, 570 A.2d at 1174. Our dictionaries, like the district court's, define "sudden" both with and without a temporal element, thus lending considerable weight to the County's assertion that either interpretation is reasonable. We also are impressed by the profound judicial disagreement over the meaning of the phrase "sudden and accidental." That so many learned jurists throughout the nation differ on the construction of this phrase is, in our view, additional proof that the phrase admits of two reasonable constructions. Lastly, we think that the history of the pollution exclusion clause quells all remaining doubts that the phrase "sudden and accidental," in the context of post-1970 CGL policies, can reasonably be construed to mean "unexpected and unintended." Not only is that the meaning that was ascribed to the phrase when it first appeared in boiler and machinery policies, but it also is consistent with the insurance industry's contemporaneous representations to state insurance commissioners.

New Castle County, 933 F.2d at 1198 (emphasis added).

It is reasonable to assume that if the Techalloy court had been presented with an alternative, reasonable interpretation of "sudden and accidental," supported by the wealth of evidence presented to the Third Circuit in New Castle County and to this Court in this case, it never would have concluded that "sudden" can only be defined in a single fashion as "abrupt." This Court is not bound to, and should not, follow the truncated holdings in Techalloy and the Pennsylvania cases that have followed. Instead, this Court should exercise its responsibility to

interpret the "sudden and accidental" pollution exclusion in accordance with Pennsylvania law. When the Pennsylvania rules of insurance policy interpretation are applied, including those set down in Sunbeam, it is clear that the word "sudden" and the phrase "sudden and accidental" are susceptible to more than one reasonable interpretation. As such, the "sudden and accidental" pollution exclusion is ambiguous and must be interpreted in favor of coverage.

II. The "Sudden And Accidental" Pollution Exclusion Is Ambiguous And Accordingly Should Be Interpreted In Favor Of Coverage

As reaffirmed recently by the Pennsylvania Supreme Court, "'[w]here a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement.'" Prudential Prop. and Cas. Ins. Co. v. Sartno, 903 A.2d 1170, 1174 (Pa. 2006) (quoting Standard Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983)). "Contractual language is ambiguous 'if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.'" Id. (quotation omitted). Importantly, the determination of whether policy language is ambiguous cannot be made in a vacuum: "'Rather, contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts.'" Id. (quoting Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999)).[4]

As the Third Circuit has concluded, the "sudden and accidental" pollution exclusion is subject to more than one reasonable interpretation and is, therefore, ambiguous. New Castle County, 933 F.2d at 1198. Indeed, even if the interpretation offered by CNA and its *amicus curiae* is deemed reasonable, the alternative, reasonable interpretation presented to this Court confirms the ambiguity of the "sudden and accidental" pollution exclusion. Sartno, 903 A.2d at

[4] Another reason why the prior Pennsylvania cases on the "sudden and accidental" pollution exclusion are of limited value is because the determination of ambiguity can only be made in the context of a particular set of facts.

1174. Consistent with Pennsylvania law, that ambiguity must be interpreted in favor of the insured. As aptly stated by the Pennsylvania Supreme Court, "[r]egardless of which [interpretation] is 'right' or 'wrong,' the fact is that because each interpretation is reasonable, the exclusionary term is ambiguous, and we must construe it in favor of the insured." Id. at 1177.

In this case, the ambiguity of the "sudden and accidental" pollution exclusion is established by:

- the drafting and regulatory history of the exclusion;
- the previous use of the phrase "sudden and accidental" in boiler and machinery policies;
- the multiple dictionary definitions of the word "sudden;"
- the divergent court interpretations of the exclusion; and
- the insurance industry's failure to use more precise language.

Each of these indicia of ambiguity is discussed, in turn, immediately below.

A. The Drafting And Regulatory History Of The "Sudden and Accidental" Pollution Exclusion Proves That The Exclusion Was Promulgated As A "Clarification," Not A Reduction Of Existing Coverage For Gradual, Unintentional Pollution

"[A] page of history is worth a volume of logic."[5]

As reflected in Sunbeam, the policyholders' claim that the phrase "sudden and accidental" has a special meaning in the custom and usage in the insurance industry is grounded in an explanatory memorandum filed by the insurance industry with state insurance regulators in 1970. That explanatory memorandum provided, in pertinent part, as follows:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and

[5] Justice Oliver Wendell Holmes in New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

> thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident * * *.

(See CNA Motion for Summary Judgment, Ex. 3 at SWUP7419). The effect of the memorandum, according to policyholders, "was to make a public statement that in the insurance industry the words 'sudden and accidental' have a special meaning -- that they mean the same thing as the words 'unexpected and unintended' and the two phrases are interchangeable." Sunbeam, 781 A.2d at 1194-95.

With regard to custom and usage, the Supreme Court in Sunbeam directed the trial court to "determine whether the emphasized portion of the memorandum - *'coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident'* - means what appellants claim it means." Sunbeam, 281 A.2d at 1195 (italics added). In response to this directive, CNA and its insurance industry *amicus curiae*, CICLA, argue that in 1970 the word "accident" was understood to mean only a "boom" event. (See CICLA Br. at 9-12; CNA Br. at 46). For example, CICLA argues: "There is no basis, however, for concluding that the term 'accident' would have been understood as referring to anything other than a 'sudden' or 'boom' event when the Explanation was filed in 1970." (CICLA Br. at 9).

The position advanced by CNA and its *amicus curiae* that the word "accident" was understood to mean only a "boom" event is categorically false. Indeed, the Third Circuit long ago acknowledged that the judiciary "roundly rejected" the same exact insurer argument:

> The district court record reveals that, prior to 1966, the standard CGL policy covered bodily injury and property damage "caused by accident." Although these early policies did not define the word "accident," insurers, hoping to limit coverage to brief catastrophic events, argued that the term did not embrace gradual damage. This argument, however, was roundly rejected by the judiciary, which instead held that "accident" policies covered unintended injury or damage resulting from, among other things, extended exposure to pollutants.

New Castle County, 933 F.2d at 1196 (citing Moffat v. Metropolitan Cas. Ins. Co., 238 F.Supp. 165, 172-73 (M.D.Pa. 1964)). That the insurance industry continues to this day to advance the same false argument is unconscionable and should be sanctioned.

Moreover, Pennsylvania courts have held consistently that "caused by accident" policies cover liability arising out of gradual pollution. Lancaster Area Refuse Auth. v. Transamerica Ins. Co., 263 A.2d 368 (Pa. 1970) (operation of a landfill which led to pollution of neighboring water wells was insured pursuant to an insurance policy that promised coverage for damage "caused by an accident"); see also Moffat v. Metropolitan Cas. Ins. Co. of New York, 238 F.Supp. 165 (M.D. Pa. 1964) (property damage resulting from the release of destructive gases from culm banks covered under a "caused by accident" policy). As early as 1955, the Third Circuit, in finding coverage for a series of exposures to beryllium, held as follows:

> In the present state of the Pennsylvania law we would be unjustified in assuming that the Pennsylvania courts when confronted ... with an insurance contract which indemnifies the insured for damages paid for 'bodily injury, sickness or disease *** caused by accident,' would restrict such broad language to only those injuries caused by an identifiable event, particularly in view of the well-established principle, applied in Pennsylvania as elsewhere, that an ambiguity must be construed against the insurer.

Beryllium Corp. v. American Mut. Liab. Ins. Co., 223 F.2d 71, 76 (3d Cir. 1955).

Thus, when the insurance industry represented to the Pennsylvania Commissioner of Insurance that coverage is continued "when the pollution or contamination results from an accident...," the term "accident" had a special meaning and was well understood to include liability arising out of gradual pollution. The insurance industry's utilization of the word "accident" in explaining the sudden and accidental pollution exclusion must be read in light of that custom and usage. See New Castle County, 933 F.2d at 1197 ("The judicial construction placed upon particular words or phrases made prior to the issuance of a policy employing them

will be presumed to have been the construction intended to be adopted by the parties.") (quoting Couch on Insurance § 15:20 at 195-96 (2d ed. 1984)). Indeed, less than two months after the Pennsylvania Supreme Court decided in Lancaster Area Refuse Authority that an "accident" included liability arising out of gradual pollution, the insurance industry represented that "coverage is continued...when the pollution results from an **accident**...." (See CNA Motion, Ex. 3 at SWUP7419) (emphasis added).

The reliance by CICLA on Casper v. American Guarantee & Liability Insurance Co., 184 A.2d 247 (Pa. 1962), is completely misplaced. In 1962, the Pennsylvania Supreme Court rendered the misguided holding in Casper that damage resulting from negligence was not "caused by accident." That holding was effectively reversed in 1970 when the Pennsylvania Supreme Court held in Lancaster Refuse Authority that "harm which is caused by negligence may still be harm 'caused by accident' within the meaning of the insurance contract." Lancaster Area Refuse Authority, 263 A.2d at 369.[6] As discussed above, the Pennsylvania Supreme Court in Lancaster Area Refuse Authority held that the policyholder was entitled to coverage for damage caused by gradual pollution emanating from a landfill.[7]

Most recently, the Pennsylvania Supreme Court interpreted the word "accident" without any temporal connotation. Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 908 A.2d 888 (Pa. 2006). In Kvaerner, the Court stated:

> Webster's II New College Dictionary 6 (2001) defines "accident" as "[a]n unexpected and undesirable event," or "something that occurs unexpectedly or

---

[6] The Casper holding was also directly distinguished in Moffat, wherein the court held that a claim for gradual pollution was insured under a "caused by accident" policy. Moffat, 238 F.Supp at 172.

[7] CICLA's reliance on Casper and the earlier-decided cases, Loudon v. H. W. Shaull & Sons, 13 A.2d 129 (Pa. Super 1940), and Ciabattoni v. Birdsboro Steel Foundry & Mach. Co., 125 A.2d 365 (Pa. 1956), in arguing that "trade usage of the word 'accident' included a temporal element" is entirely misplaced. (See CICLA Br. at 12 n.6). Pennsylvania law developed after the cases relied on by CICLA, clearly provides that the word "accident" may be interpreted without a temporal element and includes events that occur gradually over time like gradual pollution. See Lancaster Area Refuse Authority.

> unintentionally." The key term in the ordinary definition of "accident" is "unexpected."

Id. at 897-98 (alteration in original) (emphasis added). Thus, any contention by CNA and its *amicus curiae*, that the word "accident" is understood to mean only a "boom" event is as wrong today as it was in 1970. The reliance by CNA and CICLA on USX Corporation v. Liberty Mutual Insurance Company, 444 F.3d 192 (3d Cir. 2006), for any contrary argument is also misplaced. As reaffirmed by the Pennsylvania Supreme Court in the later decided Kvaerner case, "[t]he key term in the ordinary definition of 'accident' is 'unexpected.'" Id. at 898.

Rather than continuing to fight a losing battle over the meaning of "accident," the insurance industry increased premiums and switched from "accident-based" to "occurrence-based" coverage in 1966. New Castle County, 933 F.2d at 1196. The standard general liability policy defined "occurrence" as:

> an accident, including continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

Id. at 1196-97 (quoting Note, The Pollution Exclusion Clause Through The Looking Glass, 74 Geo. L.J. 1237, 1246-47 (1986)). As held by the Third Circuit, the standard "occurrence-based" policy covered property damage resulting from gradual pollution: "So long as the ultimate loss was neither expected nor intended, courts generally extended coverage to all pollution-related damage, even if it arose from the intentional discharge of pollutants." Id. at 1197 (citation omitted). It was generally recognized that the pre-1970 "occurrence-based" policy was "tailor-made" to cover liability arising out of gradual pollution. Note, 74 Geo. L.J. at 1251. See also Morton Int'l Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831, 849-850 (N.J. 1993); New Castle County, 933 F.2d at 1197; Alabama Plating Co. v. United States Fidelity and Guar. Co., 690 So.2d 331, 335 (Ala. 1996); Joy Technologies, Inc. v. Liberty Mutual Ins. Co., 421 S.E.2d

493, 499 (W. Va. 1992); United States Fidelity and Guar. Co. v. Specialty Coatings Co., 535 N.E.2d 1071, 1077 (Ill. Ct. App. 1989).

Courts within this circuit have held as a matter of course that pre-pollution exclusion "occurrence-based" policies cover claims arising from gradual pollution. For example, the United States District for the Middle District of Pennsylvania held that, "the earlier [pre-pollution exclusion] policies would provide coverage for all of [the policyholder's] response costs liabilities regardless of the presence of the pollution exclusion in later policies." Federal Ins. Co. v. Susquehanna Broadcasting Co., 727 F.Supp. 169, 175 (M.D. Pa. 1989), aff'd, 928 F.2d 1131 (3d Cir. 1991). See also Koppers Co. v. Aetna Cas. and Sur. Co., 98 F.3d 1440 (3d Cir. 1996) (pre-pollution exclusion "occurrence-based" excess policies in force between 1953 and 1960 covered claims for gradual pollution). It is simply disingenuous for CNA and CICLA to argue that "occurrence-based" pre-pollution exclusion policies did not cover gradual pollution.

Quite frankly, the insurance industry's very definition of "occurrence" proves that the word "accident" had a special meaning that includes events that take place gradually over time, and not just "boom" events. The insurers defined "occurrence" to mean "an accident, including continuous or repeated exposure to conditions...." New Castle County, 933 F.2d at 1196-97.[8] Accordingly, when the insurers explained that "[c]overage is continued...where the pollution or contamination results from an accident...," they well understood that an "accident" included gradual events resulting from the "continuous or repeated exposure to conditions." The "occurrence" definition and the explanatory memorandum cannot be read reasonably in any other manner.

[8] The same definition of "occurrence" is at issue in this case. (See Debevec Aff., Ex. 3 at SMW 00290).

Thus, in 1970, the term "accident" had a well-defined and understood special meaning when the insurance industry represented to state insurance regulators that "[c]overage is continued...where the pollution or contamination results from an accident...." As reflected in Pennsylvania cases, like Lancaster Area Refuse Authority, Beryllium Corp. and Moffat, and in the definition of "occurrence," so widely used in standard form commercial liability policies, the word "accident" included events that occurred gradually over time such as gradual pollution and its meaning was certainly not confined to "boom" events.

B. At The Time The "Sudden And Accidental" Pollution Exclusion Was Drafted, The Phrase "Sudden And Accidental" Had Been Judicially Construed To Mean "Unexpected And Unintended"

As with the word "accident," the phrase "sudden and accidental" had also been judicially interpreted at the time when the "sudden and accidental" pollution exclusion was promulgated in 1970.

The insurance industry first used the phrase "sudden and accidental"-- without any temporal connotation -- in boiler and machinery policies, long before the "sudden and accidental" pollution exclusion was drafted. Courts in Pennsylvania and elsewhere uniformly interpreted the phrase to mean "unexpected and unintended." For instance, in Anderson & Middleton Lumber Co. v. Lumbermen's Mutual Casualty Co., 333 P.2d 938, 940 (Wash. 1959), the Washington Supreme Court construed the word "sudden" in a boiler and machinery policy as follows:

> The purpose of the contract was to insure the respondent [policyholder] against an accidental breakdown of the equipment covered by the policy. The word "sudden" was, of course, placed in the contract for a purpose. Is it more reasonable . . . to exclude coverage of a break which did not happen instantaneously, or to exclude coverage of a break which was [foreseen] and therefore [avoidable]? It seems to us that the risk to the insurer would be the same, whether a break was instantaneous or began with a crack which developed

over a period of time until the final cleavage occurred, as long as its progress was undetectible [sic].

This same construction of the "sudden and accidental" phrase in boiler and machinery policies was adopted by the federal court for the Western District of Pennsylvania in, perhaps, the only case to decide this issue under Pennsylvania law. See Cyclops Corp. v. Home Ins. Co., 352 F. Supp. 931, 934-35, 937 (W.D. Pa. 1973).[9]

Indeed, numerous courts faced with the revisionist interpretation espoused recently by insurance companies have found this previous construction of "sudden and accidental" to be persuasive evidence of ambiguity. The Third Circuit's opinion in New Castle County contains a thorough review of the language and historical background of the "sudden and accidental" pollution exclusion. There, the court concluded that the exclusion is inherently ambiguous, relying, in part, on a finding that the insurance industry was most likely aware of the construction of the phrase "sudden and accidental" in boiler and machinery policies when it used this phrase in the "sudden and accidental" pollution exclusion. New Castle County, 933 F.2d at 1197. The Third Circuit noted that "[t]he judicial construction placed upon particular words or phrases made prior to the issuance of a policy employing them will be presumed to have been the construction intended to be adopted by the parties." Id. (quoting Couch on Insurance § 15:20, at

---

[9] See also Julius Hyman & Co. v. American Motorists Ins. Co., 136 F. Supp. 830 (D. Colo. 1955) (leak in pipe resulting from gradual weakening over time was "sudden and accidental"); New England Gas & Elec. Ass'n v. Ocean Accident & Guarantee Corp., 116 N.E.2d 671, 679 (Mass. 1953) (cracking of turbine spindle was an accident within the meaning of insurance policy even if the cracking resulted from a latent defect present for a considerable period of time; "[t]he term accident, unlimited except by the word sudden, should be given its ordinary meaning as denoting an unexpected, undesigned, and unintended happening or a mishap") (citations omitted); Canadian Radium & Uranium Corp. v. Indemnity Ins. Co. of N. Am., 104 N.E.2d 250 (Ill. 1952) (seven months was sudden enough to invoke coverage for "accident"); City of Detroit Lakes v. Travelers Indem. Co., 275 N.W. 371 (Minn. 1937) (steam engine rupture that occurred because of gradually ensuing deterioration was "sudden and accidental"); George J. Couch, Couch On Insurance § 42.396, at 505 (2d ed. 1982) ("[w]hen coverage is limited to a sudden 'breaking' of machinery the word 'sudden' should be given its primary meaning as a happening without previous notice, or as something coming or occurring unexpectedly, as unforeseen or unprepared for .... 'Sudden' is not to be construed as synonymous with instantaneous"); Steven A. Cozen, Insuring Real Property § 5.03(2)(a) (1992) ("[u]tilizing the 'common meaning' doctrine, the courts have uniformly held that the dictionary definition of the terms 'sudden and accidental' as 'unforeseen, unexpected and unintentional' is controlling").

195-96 (2d ed. 1984)); see Alabama Plating, 690 So.2d at 336;[10] Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha, 882 P.2d 703, 725 (Wash. 1994) (both citing Couch); John Alan Appleman, 13 Insurance Law and Practice § 7404 (1976) (footnotes omitted) ("[I]f an insurance company continues to employ clauses which have been construed unfavorably to its contention by the courts, it may well be considered to have issued the policy with that construction placed on it and cannot be heard to insist that the loss is not covered.").

In light of the meaning already accorded by courts to the operative phrase "sudden and accidental" at the time that the "sudden and accidental" pollution exclusion was drafted, a construction of the phrase to mean "unexpected and unintended" is certainly a reasonable one.

C. In Everyday Usage, The Word "Sudden" Means "Unexpected"

The interpretation of the "sudden and accidental" pollution exclusion proffered by CNA and its *amicus curaie* rests on the assertion that the word "sudden" means temporally "quick" or "instantaneous." While that interpretation may be reasonable, it is not the only reasonable interpretation of the word "sudden."

An examination of the plain and ordinary meaning of "sudden," as set forth in numerous dictionaries, confirms this fact: the definition of "sudden" is not restricted to "instantaneous" and, indeed, does not necessarily include any temporal element at all. Numerous other courts have held that "instantaneous" is neither the primary, nor the only, meaning of "sudden."[11] In

---

[10] The Alabama Supreme Court reported that one of the members of the committee that drafted the "sudden and accidental" policy exclusion testified at deposition that the drafters "actually looked to the 'sudden and accidental' language in boiler and machinery policies for the 'analogous concept.'" Alabama Plating, 690 So.2d at 336 n.8 (quoting Carl A. Salisbury, "Pollution Liability Insurance Coverage, the Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia," 21 Envtl. L. 357, 382 (1991)).

[11] See, e.g., United States Fidelity and Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139, 1158 (W.D. Mich. 1988), vacated on other grounds upon reconsideration, 683 F. Supp. 1139 (W.D. Mich. 1988); Greenville County v. Insurance Reserve Fund, 443 S.E.2d 552, 553 (S.C. 1994); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1218 (Ill. 1992); Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1091-92 (Colo. 1991); Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 573 (Wis. 1990); see also St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co., 923 P.2d 1200, 1217 (Or. 1996).

fact, dictionaries almost uniformly define "sudden" to emphasize the element of unforseeability rather than that of speed or rapidity.[12]

For example, Webster's Third New International Dictionary (3d ed. 1986) defines "sudden," in part, as follows:

> happening without previous notice or with very brief notice: coming or occurring unexpectedly: not foreseen or prepared for . . . .

Other standard dictionaries similarly define the term "sudden:"

> Websters' New Universal Unabridged Dictionary (2d Deluxe 1983 3d.): (1) happening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen; unprepared for; as a sudden emergency . . . .
>
> Oxford Reference Dictionary (1976 ed.) happening, coming, performed, taking place, etc., without warning or unexpectedly . . . .
>
> American Heritage Illustrated Encyclopedia Dictionary (1987 ed.) (1) happening without warning: unforeseen . . . .

Perhaps the most insightful judicial discussion of the meaning of the term "sudden" is contained in the opinion of the Georgia Supreme Court in Claussen. There, the court observed:

> [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. . . [t]hus, it appears that "sudden" has more than one reasonable

---

[12] See N. Ballard & P. Manus, Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion, 75 Cornell L. Rev. 610, 613-15 (1990). Citing to numerous dictionaries for authority, the authors conclude:

> Dictionaries list the primary definitions of "sudden" as "happening without warning," "unforeseen" "not prepared for," "unexpected," and, in some cases, "abrupt." The word "sudden" is derived from the past participle of the Latin word "subire," meaning "to come up, occur unexpectedly." Thus, the root meaning of the word implies nothing about the duration of an event. Some dictionaries do not define "sudden" in terms of duration at all; others list duration-related definitions as secondary.

Id. at 614.

> meaning. And, under the pertinent rule of construction the meaning favoring the insured must be applied, that is, "unexpected."

Claussen, 380 S.E. 2d at 688.

These widely accepted definitions of "sudden" as "unexpected" establish the policyholders' position as a reasonable construction of the operative language of the "sudden and accidental" exclusion. The fact that "sudden" has a widely accepted definition that contrasts so sharply with CNA's interpretation of the same word demonstrates clearly that, at a minimum, the phrase "sudden and accidental" is ambiguous. Other courts have agreed on this point. See Alabama Plating, 690 So. 2d at 335; Greenville County v. Insurance Reserve Fund, 443 S.E.2d 552, 553 (S.C. 1994); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1218 (Ill. 1992); Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1092 (Colo. 1991); Claussen, 380 S.E.2d at 688; Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 573 (Wis. 1990).

D. The Ambiguity Of The "Sudden And Accidental" Pollution Exclusion Is Reflected In The Divergence Of Judicial Authority On Its Meaning

The divergence of judicial authority on the meaning of the "sudden and accidental" pollution exclusion, evidences the exclusion's ambiguity. As held recently by the Pennsylvania Supreme Court, this Court should not resolve the dispute over the meaning of the exclusion by determining which of these divergent interpretations is "'right' or 'wrong.'" Sartno, 903 A.2d at 1177. The fact that courts interpret policy language in divergent ways establishes that the language is susceptible to more than one reasonable interpretation:

> [I]t is clear that if we adopted such an approach, and chose one line of case decisions as opposed to the other, we would be engaged in a procedure yielding a result contrary to the prevailing Pennsylvania precedent noted earlier concerning the manner in which insurance contracts must be construed in our Commonwealth. The mere fact that several appellate courts have ruled in favor of a construction denying coverage, and several others have reached directly contrary conclusions, viewing almost identical policy provisions, itself creates the inescapable conclusion that the provision in issue is susceptible to more than one

> interpretation . . . . The very existence of two contrary schools of thought . . . is convincing in the conclusion that the clause in issue is ambiguous as to whether coverage is to be afforded under the fact situation presented. Such ambiguity, by itself, requires that we resolve the issue in favor of . . . the insured driver.

Cohen v. Erie Idem. Co., 432 A.2d 596, 599 (Pa. Super. 1981) (emphasis added); see also New Castle County, 933 F.2d at 1198 ("That so many learned jurists throughout the nation differ on the construction of this phrase is, in our view, additional proof that the phrase admits of two reasonable constructions.").

Indeed, reliance on divergent court authority to establish ambiguity is based squarely on a fundamental tenet of insurance policy interpretation in Pennsylvania: "A provision of a contract of insurance is ambiguous if reasonably intelligent persons, considering it in the context of the whole policy, would differ regarding its meaning." Musisko v. Equitable Life Assurance Soc'y, 496 A.2d 28, 31 (Pa. Super. 1985) (citation omitted); see also DiFabio v. Centaur Ins. Co., 531 A.2d 1141, 1143 (Pa. Super. 1987) (same); Celley v. Mutual Benefit Health and Accident Ass'n, 324 A.2d 430, 434 (Pa. Super. 1974) (policy provision is ambiguous, "if reasonably intelligent men . . . would honestly differ as to its meaning.") (citations omitted). State and federal judges are, to say the least, reasonably intelligent persons.[13] As understood by the Cohen court, when a judge interprets a contract by choosing one line of cases over another, or by reference to his or her own subjective understanding, the judge effectively ignores the objective proof of ambiguity present when reasonably intelligent persons, including judges, disagree, and violates a primary rule of Pennsylvania insurance policy interpretation. Cohen, 432 A.2d at 599; see also Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1011 n.12 (3d Cir. 1980) ("It is the parties' linguistic reference that is relevant, not the judges'.").

---

[13] "[O]ne cannot expect a mere layman to understand the meaning of a clause respecting the meaning of which fine judicial minds are at variance." Charles C. Marvel, "Division of Opinion Among Judges on Same Court or Among Courts of Other Jurisdictions Considering Same Question, As Evidence That Particular Clause of Insurance Policy Is Ambiguous," 4 A.L.R. 4th 1253 (1995).

Moreover, even Judge Beck, the author of the Lower Paxton opinion, wherein the court failed to recognize the effect of divergent judicial authority, has since recognized that the existence of divergent judicial authority is evidence that policy language is ambiguous. In Gamble Farm Inn, Inc. v. Selective Insurance Co., 656 A.2d 142, 146 (Pa. Super. 1995), upon considering a subsequent form of the pollution exclusion, Judge Beck noted that "[m]ore important than the actual holdings by other courts is the fact that their [divergent] decisions demonstrate the existence of an ambiguity in the crucial term 'atmosphere.'" [14]

For all of these reasons, the standards governing insurance policy interpretation require adherence to the accepted doctrine that a split of judicial authority on the meaning of insurance policy language evidences ambiguity, and indeed, creates the "inescapable conclusion" that the language is ambiguous. See Cohen, 432 A.2d at 599 (emphasis added).

There is clearly divergent judicial authority on the meaning of the "sudden and accidental" pollution exclusion. Those state highest courts that have addressed the issue are almost equally divided. (See Appendix 1 to Affidavit of Luke E. Debevec in Support Of Plaintiffs Simon Policyholders Memorandum Of Law In Opposition To Continental Casualty Company And Transportation Insurance Company's Motion For Summary Judgment, listing cases construing the "sudden and accidental" pollution from states' highest courts). Obviously, with so many courts in disagreement, the language of the "sudden and accidental" pollution exclusion is ambiguous and should be interpreted in the policyholders' favor.

---

[14] Having found an ambiguity, the Court ruled that it "must construe the term against the drafter/insurer and in favor of the insured" and affirmed summary judgment in favor of the policyholder. Gamble Farm, 656 A.2d at 146 (citations omitted).

E. Insurers Could Have Avoided The Ambiguity Inherent In The "Sudden and Accidental" Pollution Exclusion By Using More Precise Language

It is well-established in Pennsylvania that "in determining whether an ambiguity exists, the court may consider 'whether alternative or more precise language, if used, would have put the matter beyond reasonable question.'" Celley, 324 A.2d at 434 (quotation and citation omitted); see also McMillan v. State Mut. Life Assurance Co. of Am., 922 F.2d 1073, 1077 (3d Cir. 1990) ("An insurer's failure to utilize more distinct language which is available reinforces a conclusion of ambiguity under Pennsylvania law.") (citation omitted).[15] In Sartno, the Pennsylvania Supreme Court recently concluded that an exclusion was ambiguous based, in part, on the insurer's failure to use more precise language. Sartno, 903 A.2d at 1177 n.7 ("Appellants correctly note that 'the insurance industry has already drafted a broader exclusion that [the insurer] could have used, but chose not to.'") (quotation omitted).

It is obvious that the insurance industry failed to use precise language, in light of the facts that: (1) the interpretation of the "sudden and accidental" pollution exclusion advocated by the policyholders is consistent with the insurance industry's own contemporaneous representations; (2) a primary definition of the word "sudden" is "unexpected;" (3) the phrase "sudden and accidental" in boiler and machinery insurance policies was judicially construed to mean "unexpected and unintended;" (4) insurance companies now argue a distinctly different position than the one taken at the time of the exclusion's enactment; and (5) courts throughout the

[15] Moreover, "[w]here one party [to a contract] has special expertise in the subject matter of the contract, silence in the contract will be construed against him or her in order to prevent overreaching of the less-knowledgeable party." Hertzog v. Jung, 526 A.2d 425, 429 (Pa. Super. 1987) (citation omitted). To the extent that the ambiguity in the "sudden and accidental" pollution exclusion is the result of the insurance industry's decision not to define the term in the policy, the exclusion must be construed against the insurance industry, which obviously has special expertise in the area of insurance.

country have split completely on the meaning of the exclusion.[16] See, e.g., Just, 456 N.W.2d at 578 ("We agree that more precise wording, or a definition of 'sudden and accidental,' if used by the insurers in drafting the policy, would have put the matter beyond reasonable question.")

If the insurance industry intended the word "sudden" to have a meaning different from its dictionary definition, and the phrase "sudden and accidental" to have a meaning at variance with the meaning previously ascribed to it by courts, it should have precisely worded its insurance policies to achieve that result. Moreover, the fact that the insurance industry was forced to revise and clarify the pollution exclusion is also indicative of its ambiguity. See, e.g., Gamble Farm, 656 A.2d at 143; Madison Constr. Co., 735 A.2d at 102-03 (both addressing various forms of subsequently drafted so-called "absolute" pollution exclusions). The insurance industry drafters of the "sudden and accidental" pollution exclusion should bear the costs of failing to use precise language, rather than policyholders.

III. Insurance Companies Should Be Estopped From Applying the "Sudden and Accidental" Pollution Exclusion In Any Manner Inconsistent With Representations Made To The Pennsylvania Insurance Commissioner At The Time Regulatory Approval For The Exclusion Was Sought

In Sunbeam, the Pennsylvania Supreme Court equated the policyholder's regulatory estoppel claim with judicial estoppel:

> Furthermore, even without pleading or proving reliance by the insurance department, the allegation of estoppel should not have been dismissed. Judicial estoppel is an equitable, judicially-created doctrine designed to protect the integrity of the courts by preventing litigants from "playing fast and loose" with the judicial system by adopting whatever position suits the moment. Gross v. City of Pittsburgh, 686 A.2d 864, 867 (Pa.Cmwlth. 1996). Unlike collateral estoppel or res judicata, it does not depend on relationships between parties, but rather on the relationship of one party to one or more tribunals. In essence, the doctrine prohibits parties from switching legal positions to suit their own ends.

[16] In discussing a later-drafted form of a pollution exclusion, the Superior Court recently hypothesized that the insurance industry sought a subsequent, broader application of the pollution exclusion as an afterthought. See Gamble Farm, 656 A.2d at 147 (the insurance company's interpretation "appears to be an afterthought, based upon ambiguous language, rather than the express purpose for which the exclusion was drafted").

> Id. Thus, having represented to the insurance department, a regulatory agency, that the new language in the 1970 policies - "sudden and accidental" - did not involve a significant decrease in coverage from the prior language, the insurance industry will not be heard to assert the opposite position when claims are made by the insured policyholders.

Sunbeam, 781 A.2d 1192-93 (emphasis added). On remand, the trial court in Sunbeam was directed to "determine whether the purpose of the memorandum was to assure the department that there was no change or reduction in the risks covered by the policy...." Id. at 1195.

This Court will have no difficulty in determining that the purpose of that explanatory memorandum was to assure state insurance regulators that the "sudden and accidental" pollution exclusion did not change or reduce coverage for the risks that were otherwise covered under existing policies. CNA and its *amicus curiae* freely admit that fact. CNA states: "In short, at the time it was introduced, the pollution exclusion did not effect a dramatic reduction in existing coverage." (CNA Br. at 37). CICLA echoes CNA's candid admission: "the practical effect of the exclusion was considered relatively modest at the time," and the exclusion "was not considered a drastic reduction in insurance...." (CICLA Br. at 6). The insurers argue that the "sudden and accidental" pollution exclusion did not effect a reduction in coverage because there was no coverage for gradual pollution under existing policies. (CNA Br. at 28-33; CICLA Br. at 14-15).

Thus, CNA and its *amicus curiae* are continuing to play as "fast and loose" with this Court today as it did in 1970 with state insurance regulators. The insurance industry's representation, in 1970 and now, that the "sudden and accidental" pollution exclusion did not effect a reduction in coverage is premised on the undeniably false premise that then-existing general liability policies did not cover gradual pollution. As discussed above at Argument § II.A., that argument "was roundly rejected by the judiciary, which instead held that 'accident'

policies covered unintended injury or damage resulting from, among other things, extended exposure to pollutants." New Castle County, 933 F.2d at 1196 (citation omitted). By the time the insurance industry filed the exclusion with the state insurance regulators, the courts of Pennsylvania had held unequivocally that gradual pollution was covered under "accident-based" policies. See Lancaster Area Refuse Authority, 263 A.2d at 369. The insurance industry's switch from "accident-based" to "occurrence-based" policies served only to reinforce the availability of coverage for gradual pollution. New Castle County, 933 F.2d at 1197 ("So long as the ultimate loss was neither expected nor intended, courts generally extended coverage to all pollution-related damage, even if it arose from the intentional discharge of pollutants.").

Consistent with the holding in New Castle County, this Court should "roundly reject" the argument by CNA and its *amicus curiae* that gradual pollution was not covered under pre-1970 liability insurance policies. Once that false premise is laid bare, this Court, consistent with the holding in Sunbeam, should hold CNA to the representation made in 1970 and reaffirmed in this case that the "sudden and accidental" pollution exclusion did not effect a change or a reduction in existing coverage.

CNA and its insurance industry brethren should be held to the "studied, unambiguous, official, affirmative representations" the insurance industry made about the scope of the exclusion in its 1970 filings with state regulators. Joy Technologies, 421 S.E.2d at 497. Nearly every court that has specifically considered those regulatory representations has determined that the "sudden and accidental" pollution exclusion does not bar coverage for gradual, unintentional pollution.[17] In fact, the highest courts in several states have refused to allow insurers to apply the

[17] Indeed, where the regulatory and drafting history supports insurance companies, they use it to their advantage. See, e.g., Oritani Sav. & Loan Ass'n v. Fidelity & Deposit Co. of Md., 989 F.2d 635, 639-40 (3d Cir. 1993).

exclusion in any manner inconsistent with the insurer's representations with them. See, e.g., Morton Int'l, 629 A.2d at 876; Joy Technologies, 421 S.E.2d at 498-500; see also Textron, Inc. v. Aetna Cas. and Sur. Co., No. 98-357-Appeal, 2000 WL 802927, at **10-11 (R.I. 2000); American States Ins. Co. v. Kiger, 662 N.E.2d 945, 948 (Ind. 1996); Queen City Farms, 882 P.2d at 722-23.

In their zeal to convince this Court to excuse the insurance industry's misconduct, CNA and its *amicus curiae* advance a remarkable argument; they argue that insurance regulators were not misled because they believed, and continue to believe, that pre-1970 insurance policies did not cover gradual pollution. The insurers proffer affidavit after affidavit in which insurance regulators state their misunderstanding that pre-1970 liability insurance policies did not cover gradual pollution. (See, e.g., CNA Br. at 41-43; CICLA Br. at 14-15).

Those regulator affidavits, however, serve only to prove that the insurance industry misled the regulators. Notwithstanding the facts that, (1) the judiciary "roundly rejected" the insurer argument that "accident-based" policies did not embrace gradual damage; (2) the insurance industry switched from "accident-based" to "occurrence-based" coverage for the precise purpose of covering claims arising from gradual damage; and (3) pre-1970 "occurrence-based" policies were "tailor-made" to cover gradual pollution, the regulators were so completely duped that years later they signed affidavits stating that pre-1970 liability policies did not cover gradual pollution and, accordingly, the "sudden and accidental" pollution exclusion did not impose a reduction in coverage. There can be no better evidence as to how successful the insurance industry was in its attempt to mislead the regulators and the insurance buying public.

Moreover, the insurers' argument that gradual pollution did not constitute an otherwise covered occurrence and, therefore, the "sudden and accidental" pollution exclusion did not effect

a reduction in coverage is belied by black letter law. It is axiomatic that, "[e]xclusions, by their very nature, are designed to operate to deny coverage that otherwise would be provided under the definition of an occurrence." Donegal Mut. Ins. Co. v. Baumhammers, 893 A.2d 797, 819 (Pa. Super. 2006), appeal granted, 908 A.2d 265 (Pa. 2006).[18] Insurers obviously promulgated the "sudden and accidental" pollution exclusion to preclude coverage for liabilities that were otherwise covered. Yet, in seeking to secure regulatory approval of the exclusion, the insurance industry falsely represented that (1) then-existing "occurrence-based" policies did not cover gradual pollution and (2) the exclusion did not further reduce or change that coverage. The industry's duplicity must not be rewarded.

One can only speculate as to the motives behind the insurance industry's misrepresentations. Some courts and commentators have ascribed a nefarious motive to the insurance industry. The New Jersey Supreme Court pointed out that the insurance industry's representation that the "sudden and accidental" pollution exclusion was a mere clarification of existing coverage avoided "a significant rate reduction" in premiums that would have resulted if the insurance industry had then contended, as they do now, that the clause limits sharply the coverage for gradual, unintentional pollution. Morton International, 629 A.2d at 872. For that

---

[18] "The reason for or purpose of an exclusion clause in a policy is to eliminate from coverage specified losses ... which except for the exclusion clause would remain under the coverage." [10 G. Couch, Insurance (Rhodes 2d Ed.)] § 41:380. "In an insurance policy, an exclusion is a provision which eliminates coverage where, were it not for the exclusion, coverage would have existed." Kansas-Nebraska Natural Gas Co. v. Hawkeye-Security Ins. Co., 240 N.W.2d 28 (1976); Modern Sounds & Systems, Inc. v. Federated Mutual Ins. Co., 200 Neb. 46, 50, 262 N.W.2d 183 (1978); Bortz v. Merrimac Mutual Ins. Co., 92 Wis.2d 865, 871, 286 N.W.2d 16 (1979); see also 3 R. Long, Law of Liability Insurance § 17.15. "[T]he word 'exclusion' signifies subject matter or circumstances in which the insurance company will not assume liability for a specific risk or hazard that otherwise would be included within the general scope of the policy. See Keeton, Basic Text of Insurance Law 307 (1971)." Idea Mutual Ins. Co. v. Lucas, 593 F.Supp. 466, 468 (N.D.Ga. 1983). "It is apparent, then, that before the need for an exclusion arises, there must first be coverage within the defined scope of the policy." McMahon v. Boston Old Colony Ins. Co., 67 App.Div.2d 757, 758, 412 N.Y.S.2d 465 (1979).

Hammer v. Lumberman's Mut. Cas. Co., 573 A.2d 699, 706 (Conn. 1990).

reason and others, the New Jersey Supreme Court concluded that the "lack of clarity" in the explanatory memorandum filed by the IRB was "deliberate." Id. at 853. One commentator observed that, "[v]iewed in the light of the pollution programs existing in the early 1970's and the state of the relevant case law, the insurance industry's use of the terms 'sudden and accidental' suggests a calculated effort to assure ambiguity." R. Chesler, et al., Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Liability, 18 Rutgers L.J. 9, 70 (1986).[19]

Regardless of intent or motive, the current interpretation of the "sudden and accidental" pollution exclusion now favored by the insurance industry must be rejected. Pennsylvania has a long standing public policy of regulating the insurance business in order to protect the insurance-buying public. See, e.g., Commonwealth v. Vrooman, 30 A. 217, 219 (Pa. 1894); Collister v. Nationwide Life Ins. Co., 388 A.2d 1346, 1355 (Pa. 1978). It is axiomatic that Pennsylvania has a strong interest in upholding the integrity of the insurance regulatory process. See Long v. Sakleson, 195 A. 416, 421 (Pa. 1937). This Court has recognized that insurance "is a business affected with vital public concern, and the state has full power to protect its citizens from the conduct of the business by those engaging in it irresponsibly or fraudulently." Id. (citation omitted).[20]

---

[19] The author of the above-referenced article is a member of a law firm that regularly represents policyholders in insurance coverage disputes.

[20] It is a well established canon of contractual interpretation in Pennsylvania that "where a public interest is affected, an interpretation is preferred which favors the public." City of Philadelphia v. Philadelphia Transp. Co., 26 A.2d 909, 912 (Pa. 1942) (citations omitted).

Since 1947 it has been an unfair and deceptive act in Pennsylvania to misrepresent "the terms of any policy issued, or to be issued, or the benefits or advantages promised thereby." 1947 Pa. Laws 202.[21] This Court has held that:

> A promise or other term of an agreement is unenforceable on grounds of public policy if... the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

Central Dauphin Sch. Dist. v. American Cas. Co., 426 A.2d 94, 96 (Pa. 1981) (quoting Restatement (Second) of Contracts § 320(1)).

Even clear and unambiguous insurance policy provisions may be voided if they violate public policy. See, e.g., Jeffrey v. Erie Ins. Exch., 621 A.2d 635, 638 (Pa. Super. 1993). Indeed, Pennsylvania courts have not hesitated to invalidate insurance policy provisions based on public policy grounds. See Burne v. Franklin Life Ins. Co., 301 A.2d 799, 801 (Pa. 1973) (life insurance policy provision that accidental, double indemnity, death benefits would be payable only if death occurred within ninety days from date of accident was contrary to public policy and unenforceable); Brader v. Nationwide Mut. Ins. Co., 411 A.2d 516, 519 (Pa. Super. 1979) (uninsured motorist provision allowing set-off of no-fault benefits was invalid and contrary to public policy and legislative intent); Rempel v. Nationwide Life Ins. Co., 323 A.2d 193, 196 (Pa. Super. 1974), aff'd, 370 A.2d 366 (Pa. 1977) (clause in insurance contract which seeks to exculpate insurance company for torts committed by its agent while acting within the scope of his employment is void as against public policy).

This Court can, and should, prevent insurance companies from providing one explanation of the "sudden and accidental" pollution exclusion to regulators (designed to obtain approval for the provision and to avoid a downward adjustment in premium rates that would accompany a

---

[21] This statute, which was effective in 1970, has since been revised and incorporated into the Pennsylvania Unfair Insurance Practices Act. See 40 P.S. §1171.5(a)(10)(i) (West 1992).

decrease in coverage), and then subsequently adopting an entirely contradictory position in litigation, designed to avoid their responsibilities under the insurance policies they sold. This Court is fully empowered to end this abuse of Pennsylvania insurance regulatory laws, the integrity of the judicial system, and the public policy of this Commonwealth. In light of the insurance industry's express and unequivocal regulatory representations that the "sudden and accidental" pollution exclusion was a mere "clarification," and not a reduction, of existing coverage, the public policy of Pennsylvania demands that the "sudden and accidental" pollution exclusion be construed so as not to prevent insurance coverage for liabilities resulting from unintentional, gradual pollution.

IV. CICLA's Public Policy Argument Should Be Rejected

In further support of the insurers' interpretation of the "sudden and accidental" pollution exclusion, CICLA reverts to an all too typical scare tactic. It argues that, "the policyholders' theories concerning 'regulatory estoppel' and 'trade usage' seek to undermine the certainty of clear and unambiguous language, which only disserves the public interest by destabilizing the insurance system." (CICLA Br. at 30). CICLA, thereby, invites this Court to ignore (1) the special meaning of "sudden and accidental" as developed in the custom and usage in the insurance industry and (2) the representations made to state insurance regulators that are inconsistent with the insurance industry's current interpretation of the exclusion. In reality, CICLA invites this court to ignore Sunbeam, which mandates consideration of that evidence.

CICLA's argument is also based on the false premise that the "sudden and accidental" pollution exclusion is clear and unambiguous. As discussed above, the exclusion is undeniably ambiguous (i.e., subject to more than reasonable interpretation) when all of the objective evidence is considered. Indeed, the fact that the insurance industry has redrafted the pollution

exclusion over and over again proves that the industry's first foray into this arena with the "sudden and accidental" pollution exclusion failed miserably. See, e.g., Gamble Farm, 656 A.2d at 143; Madison Construction, 735 A.2d at 102-03; Reliance Ins. Co. v. Moessner, 121 F.3d 895, 899-900 (3d Cir. 1997) (each addressing later-revised forms of pollution exclusions).

CICLA argues nevertheless that Pennsylvania policyholders, not the insurance industry, should bear the burden created by the industry's failure to draft a clear and unambiguous exclusion. Again, however, CICLA's argument is belied by Pennsylvania law. It is the insurer, not the policyholder, that must bear the consequences arising from ambiguous policy language.

> [The Insurer] certainly would have been free to exclude the types of activities described above had it crafted an exclusionary clause that addressed those scenarios. However, in the instant case, it wrote an ambiguous clause susceptible of more than one meaning. As a result, we construe the clause in favor of the insured, and against the drafter of the policy.

Sartno, 903 A.2d at 1178 (citation omitted).

Likewise here, the insurance industry was free to limit coverage to pollution that resulted from a "boom" event. Instead, it wrote an exclusion that is, at best, ambiguous and, at worst, deceptive. Even assuming that a ruling by this Court in favor of policyholders could have a "destabilizing" effect on the insurance system, a result that is highly unlikely given the multitude of pro-policyholder decisions already on the books,[22] the insurance industry has only itself to blame.

---

[22] See Appendix 1 to Affidavit of Luke E. Debevec In Support Of Plaintiffs' Opposition To Continental Casualty Company And Transportation Insurance Company's Motion For Summary Judgment.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* United Policyholders respectfully requests this Court to interpret the "sudden and accidental" pollution exclusion in favor of coverage, estop CNA from applying the exclusion in any manner inconsistent with its representations to state insurance regulators in 1970, grant the Simon Policyholders' motion for summary judgment and deny CNA's cross-motion for summary judgment.

Respectfully submitted,

Dated: October 12, 2007

LEE M. EPSTEIN (I.D. No. 61762)
FRIED & EPSTEIN LLP
325 Chestnut Street
Suite 900
Philadelphia, PA 19106
(215) 625-0123

AMY BACH
LAW OFFICE OF AMY BACH
42 Miller Avenue
Mill Valley, CA 94941
(415) 381-7627

Attorneys for *Amicus Curiae*,
United Policyholders