And the Wallpaper Comes Crumbling Down: Pollution Exclusion Clause Relieves Insurer of Duty to Defend in Stamford Wallpaper Co. v. Tig Insurance

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POLLUTION EXCLUSION CLAUSE RELIEVES
INSURER OF DUTY TO DEFEND IN
STAMFORD WALLPAPER CO. v.
TIG INSURANCE

I. INTRODUCTION

The enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)\(^1\) has had unexpected ramifications in the business world.\(^2\) Pursuant to CERCLA, which regulates the cleanup of existing, inactive and abandoned hazardous waste disposal sites,\(^3\) potentially responsible parties (PRPs) are liable for cleanup and response costs.\(^4\) Consider-


3. See CERCLA § 102(a), 42 U.S.C. § 9602(a). Under section 102(a), the Administrator shall:

[P]romulgate and revise as may be appropriate, regulations designating as hazardous substances . . . such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment, and shall promulgate regulations establishing that quantity of any hazardous substance the release of which shall be reported pursuant to section 9003 of this title. The Administrator may determine that one single quantity shall be the reportable quantity for any hazardous substance, regardless of the medium into which the hazardous substance is released.

Id.

4. See CERCLA § 107(a), 42 U.S.C. § 9607(a). Section 107(a) defines a "covered person," or PRP, for the purposes of liability under CERCLA, as follows:

(1) the owner and operator of a vessel or a facility,
(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
(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, and (517)
ing the enormous costs associated with hazardous waste cleanup, PRPs have willingly paid colossal premiums for Comprehensive General Liability (CGL) insurance policies to shield them from CERCLA liability. Consequently, if named as a PRP for hazardous waste claims, the insureds turn to their insurance carriers to provide a legal defense during ensuing litigation. Since an insurer’s duty to defend arises only if the policy covers the conduct specifically at issue in the litigation, questions have arisen as to whether the insurance policy’s pollution exclusion clause precludes coverage, and therefore nullifies the insurer’s duty to defend.

In \textit{Stamford Wallpaper Co. v. TIG Insurance}, the United States Court of Appeals for the Second Circuit addressed an insurer’s duty to defend its insured for environmental damage claims under CERCLA. Specifically, the Second Circuit interpreted the insurance contract language, concentrating on the pollution exclusion clause and the “sudden and accidental” exception, to determine whether the insurer had a duty to defend. The \textit{Stamford Wallpaper} court

\begin{itemize}
  \item[(4)] any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for-
  \begin{itemize}
    \item[(A)] all costs of removal or remedial action incurred by the United States Government or a State . . .
    \item[(B)] any other necessary costs or response incurred by any other person consistent with the national contingency plan . . .
  \end{itemize}
\end{itemize}

\textit{Id.}

CERCLA defines “person” as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.” \textit{Id.} § 101(21), 42 U.S.C. § 9601(21).


6. \textit{See id.} PRPs also request indemnification for damages incurred for environmental cleanup of hazardous wastes. \textit{See id.} This desire to rely on insurance providers is not surprising since the costs of hazardous waste cleanup, already staggeringly high, are increasing. \textit{See id.}

7. \textit{See} Missionaries of the Co. of Mary v. Aetna Cas. & Sur. Co., 230 A.2d 21, 25 (Conn. 1967) (holding insurer breached duty to defend action which, on face of complaint, appeared within policy coverage). The determination of whether an insurer has a duty to defend depends on whether the complaint in that action states facts which appear to bring the claim of damage within the policy coverage. \textit{See id.} For a detailed discussion of the insurer’s duty to defend, see \textit{infra} notes 26-85 and accompanying text.

8. 138 F.3d 75 (2d Cir. 1998).


10. \textit{See id.}
concluded that the insurer had no duty to defend the insured because the insured’s pollution-related activities fell outside the scope of coverage of the CGL insurance policy.\(^{11}\)

This Note will discuss an insurance carrier’s duty to defend its insured for hazardous waste cleanup under CERCLA. Part II discusses the background surrounding CGL insurance policies and the relevant analysis undertaken in a duty to defend action.\(^{12}\) Part III presents the facts of *Stamford Wallpaper*.\(^{13}\) Part IV discusses the holding and reasoning of the Second Circuit Court of Appeals in *Stamford Wallpaper*.\(^{14}\) Part V presents a critical analysis of the decision of the Second Circuit.\(^{15}\) Finally, Part VI concludes with a discussion of the potentially negative impact the Second Circuit’s opinion will have on the insurance industry.\(^{16}\)

II. BACKGROUND

A. CERCLA

On December 11, 1980, President Carter signed CERCLA into law.\(^{17}\) The increase of hazardous substance leakage from abandoned waste disposal sites prompted CERCLA’s enactment.\(^{18}\) CER-
CLA's ultimate goal was to initiate a nationwide cleanup of hazardous waste sites contaminated by toxic chemical and waste disposal.19

CERCLA imposes strict liability on PRPs.20 CERCLA's liability scheme authorizes the United States Environmental Protection Agency (EPA) to recover remediation costs from PRPs, as well as to order the PRPs to cleanup hazardous sites.21 PRP liability is not limited to current site operators; past site owners, offsite waste generators and waste transporters may also be held liable.22

In 1992, Congress estimated that the cleanup costs for hazardous waste sites was approximately $500 billion.23 The cost of cleaning up a particular site could be as high as $25 million, with the cost of studies and investigations on the site amounting to an additional


19. See H.R. REP. No. 96-1016, pt. 1, at 17-21 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6119-23 (stating goal of CERCLA was to "inventory . . . 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 by such sites"). CERCLA established two mechanisms for implementing its provisions: a federal fund, and a strict liability scheme. See Hamel, supra note 17, at 1085 (discussing CERCLA's implementation mechanisms).

20. See New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (discussing that responsible parties are held strictly liable under CERCLA even though explicit provision for strict liability was not included in compromise). A PRP includes any "covered person" defined under section 107(a). CERCLA § 107(a), 42 U.S.C. § 9607(a). For the text of section 107(a), see supra note 4.

21. See CERCLA § 107, 42 U.S.C. § 9607. The amount of potential damages in a CERCLA action are set out in section 107(c)(1), which provides that:

[T]he liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed—

. . .

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

Id. § 107(c)(1), 42 U.S.C. § 9607(c)(1).

22. See id. § 107(a), 42 U.S.C. § 9607(a).

23. See Chen Min Juan, supra note 5, at 424. CERCLA was originally funded at $1.6 billion over five years. See id. This amount was increased to $8.5 billion in 1985. See id.; Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C. § 9601-75 (1994)) [hereinafter SARA].
$3 million. With the potential for such vast liability, PRPs secured insurance policies to shield themselves from CERCLA liability.25

B. Role of Insurance

Business entities purchase CGL policies from insurance carriers to offset, among other losses, potential losses from environmental cleanup liability.26 In an effort to avoid paying huge CERCLA damage claims, insurance companies asserted that CGL policies did not provide coverage for CERCLA liability.27 In 1970, insurers added the “pollution exclusion” clause to CGL policies in an attempt to limit pollution-related liability.28 Insurers incorporated pollution exclusion clauses into CGL policies in order to “eliminate

24. See Chen Min Juan, supra note 5, at 424.
26. See Grace A. Carter & Keith A. Meyer, ENVIRONMENTAL INSURANCE HANDBOOK, § 3.2.1, at 30 (1992). CGL policies provide policyholders with coverage for a variety of liabilities they may incur to third parties. See id. A CGL policy affords protection against bodily injury and property damage. See generally Barry R. Os- trager & Thomas R. Newman, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 7.01 (9th ed. 1998). The basic policy most insurers use provides that the insurance company will pay on behalf of the insured all sums to which the insured is liable as damages because of bodily injury or property damages. See id.
27. See Hamel, supra note 17, at 1089-90. Of the estimates for the total cost of cleanup for all contaminated sites in the United States, the insurance industry’s share of this bill is currently estimated between $48 and $91 billion, with a best estimate totaling $66 billion. See id. at 1090; see also Gooley, supra note 2, at 154. Because insurance companies were reluctant to provide pollution liability coverage to businesses, “CERCLA ‘set the stage for the long and ongoing battle between insurers and their insureds over whether existing liability policies should cover losses due to pollution.’” Id. (quoting Michael C. Praett, Environmental Cleanup Costs and Insurance: Seeking a Solution, 24 GA. L. REV. 705, 710 (1990)).

Coverage during the early stages of the standard CGL policy was “accident-based,” in which the policy only covered property damage and personal injury caused by an accident. See Rosenkranz, supra, at 1241. The insurance industry switched to “occurrence-based” coverage when confronted with customer demands for more extensive coverage. See id. at 1246. Courts have 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 1246-47 (citation omitted). The insurers again changed their policies with the increase in environmentally related litigation. See id. at 1251. They added the pollution exclusion clause to occurrence-based policies that applied specifically to pollution-related claims. See id.
any doubt that may have existed concerning coverage for damages caused by the emission of pollutants as a regular or continuous part of the insured's business.”29 However, an exception to these exclusions typically permitted coverage for pollution occurrences characterized as “sudden and accidental.”30 Because courts have differed in their construction of the phrase “sudden and accidental,” no national uniformity in coverage exists under these policies.31

Insurers regularly asserted that certain pollution-related claims fell within the pollution exclusion clause, and therefore refused to defend their insureds.32 In response, insureds filed claims for relief and asked courts to determine whether the insurers had a duty to defend them against environmental damage claims.33


30. See G. Van Velson Wolf, Jr., Insurance Claims and Recovery for Environmental Cleanup Costs Including Case Law in Arizona, California, Washington and Colorado, in THE IMPACT OF ENVIRONMENTAL LAW ON REAL ESTATE AND OTHER COMMERCIAL TRANSACTIONS, at 1133, 1138 (ALI-ABA Course of Study, Sept. 1997). The “sudden and accidental” exception, usually located at the end of the pollution exclusion clause, provides that the “[p]ollution exclusion does not apply if such discharge, dispersal, release or escape was sudden and accidental.” Id. For the language of a pollution exclusion clause, see infra note 55.

31. See Chen Min Juan, supra note 5, at 442. Insurance companies thought that most courts completely disregarded the meaning of “sudden.” See id. at 442. Consequently, insurers created the absolute pollution exclusion clause, in which all damages are excluded without exception for sudden and accidental releases. See id.

The typical absolute pollution exclusion clause precludes coverage for “[p]ersonal injury, bodily injury or property damage arising out of the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants into or upon land, the atmosphere or any watercourse, whether or not such discharge, dispersal, release or escape was sudden and accidental.” Id. (citing Irene A. Sullivan et al., Hazardous Waste Litigation: Comprehensive General Liability Insurance Coverage Issues, in 1 TWELFTH ANNUAL INSURANCE, EXCESS AND REINSURANCE COVERAGE DISPUTES, at 425, 564 (1995) (PLI Litig. & Admin. Practice Course Handbook Series No. 518, 1995)).

32. See Rosenkranz, supra note 28, at 1252-53. In drafting the pollution exclusion clause, insurers intended to relieve themselves of liability for pollution related claims. See id. However, courts have not always construed the pollution exclusion clause so as to effect this intent. See id. The authors listed four problems of interpretation that have contributed to this confusion:

The first has been in deciding from whose perspective to view the discharge when determining whether it was sudden and accidental. The second problem has been the courts’ inconsistency in analyzing the interplay between the occurrence limitation and the pollution exclusion. The third problem stems from the courts’ injection into the analysis of an “actual” or “active” polluter concept. The fourth problem, unique to hazardous waste disposal, has been the issue of when a hazardous waste generator might forfeit insurance coverage because of the acts of its disposer.

Id. at 1254.

33. See, e.g., New York v. Blank, 27 F.3d 783, 786 (2d Cir. 1994) (bringing action against insurer to provide defense for toxic dumping claim); Avondale In-
C. Duty to Defend

CGL policies typically provide that the insurer shall have the right and duty to defend any suit against its insured in which damages are sought for either bodily injury or property damage.34 The scope of an insurer’s duty to defend is determined by comparing the complaint with the policy language.35 If the allegations contained in the complaint “bring the claims actually, or even potentially, within the coverage of the policy,” the insurer will be obligated to defend the action.36 Generally, this approach is termed the “four corners of the complaint” test.37


An example of a standard duty to defend provision states:
The company . . . will pay on behalf of the insured all sums which the insured . . . shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of bodily injury or property damages even if any allegations of the suit are groundless, false or fraudulent.


35. See Susan Randall, Redefining the Insurer’s Duty to Defend, 3 CONN. INS. L.J. 221, 227 (1997); see also Danek v. Hommer, 100 A.2d 198, 202 (N.J. Super. Ct. App. Div. 1953) (stating complaint should be laid alongside policy and determination made as to whether insurer will be required to pay resulting judgment if allegations are sustained).

36. International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co., 522 N.E.2d 758, 761-62 (Ill. App. Ct. 1988) (citations omitted). In International Minerals, the plaintiff asserted that its insurer had a duty to defend it against CERCLA claims based on contamination at its reconditioning site. See id. at 761. The International Minerals court determined that the “duty to defend an action against an insured stems from the commitment to defend expressly undertaken in the contract of insurance.” Id. After examining the allegations and comparing them to the policy language, the court concluded that the insurer had no duty to defend since the plaintiff’s allegations did not fall within the policy coverage. See id. at 761-69. But see Aetna Life & Cas. Co. v. Barthelemy, 33 F.3d 189, 194 (3d Cir. 1994) (holding insurance company obligated to defend when claim potentially is within coverage); Carey Canada, Inc. v. California Union Ins. Co., 748 F. Supp. 8, 16 (D.D.C. 1990) (same).

37. See OSTRAGER & NEWMAN, supra note 26, § 5.02 (stating duty to defend is generally determined by allegations of complaint); see also Randall, supra note 35, at 226. The four corners of the complaint rule is also known as the “four corners rule,” the “eight corners rule,” the “exclusive pleading rule” and the “scope of the allegations test.” See id. One commentator explained that “[u]nder the complaint rule, the existence of the duty to defend is ascertained, whether by the insurer or
The relevant analysis in determining the insurer’s duty to defend an environmental contamination claim is a three-step process. First, analyze the construction of the insurance policy’s language. Second, analyze the plain language of the pollution exclusion clause. Finally, determine whether the allegations in the complaint fall even possibly within coverage, thereby triggering a duty to defend.

1. Insurance Contract Construction

State courts generally construe the terms of an insurance policy according to the rules of contract construction. In Linemaster Switch Corp. v. Aetna Life & Casualty Corp., the Superior Court of Connecticut determined that the insurer’s duty to defend is determined by the “four corners of the complaint” widely followed. The rule that the insurer’s duty to defend is determined by the “four corners of the complaint” is followed by a court in a declaratory judgment proceeding, by comparing the complaint and the policy language.”


By a court in a declaratory judgment proceeding, by comparing the complaint and the policy language.” Id. at 227.


39. See id.

40. See id.

41. See id.; see also Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. 1406 (D. Del. 1992) (analyzing canons of insurance contract interpretation under Connecticut law, applying those canons to policy, then determining if insurer has duty to defend). For a detailed discussion of the Remington Arms case, see infra notes 47-54 & 65-68 and accompanying text.


State law governs the interpretation of insurance contracts. See United States v. Kimbell Foods Inc., 440 U.S. 715, 728-29 (1979) (holding some actions, of proper nature, are to be decided under state law). Generally, when the law of the state court is uncertain or ambiguous, federal courts must predict how the highest court of the state would resolve that uncertainty or ambiguity. See New York v. Blank, 27 F.3d 783, 788 (2d Cir. 1994) (citing Minotti v. Lensink, 798 F.2d 607, 610-11 (2d Cir. 1986)). Federal courts look to the state’s constitution, statutes, and decisional law to ascertain the applicable state law. See id. When there is no decision by the state’s highest court, federal courts must apply what they find to be the state law after giving proper regard to the relevant rulings of other courts of the state. See id. (citing Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967)). Finally, federal courts may also consider relevant cases from other jurisdictions. See id.

Connecticut addressed an insurer's duty to defend its insured against environmental claims. Relying on prior Connecticut case law, the *Linemaster* court noted that the insurance policy must be viewed as a whole, and all relevant provisions must be considered in connection with one another. The *Linemaster* court stated that "'[e]very provision is to be given effect . . . and no word or clause eliminated as meaningless, or disregarded as inoperative, if any reasonable meaning consistent with the other parts of the policy can be given to it.'"

In *Remington Arms Co. v. Liberty Mutual Insurance Co.*, the District Court for the District of Delaware analyzed the three canons of insurance policy interpretation under Connecticut law. The first canon states that "'[w]here an insurer sets up a special exclusion for the purpose of withdrawing from the coverage a specific liability it was unwilling to provide indemnity for, the burden is on the insurer to prove that exception.'" The second canon states that "insurance policies are to be construed in accordance with ordinary parlance." The third canon states that an insurance policy "'must

44. See id. at *1. In *Linemaster*, the plaintiff corporation filed a partial summary judgment motion against the defendant insurance company, claiming that the defendant breached its duty to defend the plaintiff in actions brought by EPA and the Connecticut Department of Environmental Protection for groundwater contamination. See id. The plaintiff also requested the court to enter a declaratory judgment that the defendant had a duty to defend in the ongoing environmental actions. See id.

45. See id. at *4 (citing *Downs v. National Cas. Co.*, 152 A.2d 316, 319 (Conn. 1959)).

46. Id. (quoting *Downs*, 152 A.2d at 319).


48. See *Remington Arms*, 810 F. Supp. at 1409-12. In *Remington Arms*, the insured, a firearms manufacturer, sought declaratory relief and damages against its insurer regarding the insurer's duty to defend. See id. at 1408. EPA brought claims against the plaintiff for the cleanup of environmental contamination at three sites in Connecticut. See id. The defendant insurer moved for summary judgment, claiming that the pollution exclusion clause in the CGL policies removed its duty to indemnify and defend the plaintiff. See id. The Delaware district court applied Connecticut law and interpreted the pollution exclusion clauses contained in the policies issued by the defendant. See id. at 1408-12.

49. Id. at 1410 (quoting *Firestine v. Poverman*, 388 F. Supp. 948, 951 (D. Conn 1975)). See *EDO Corp. v. Newark Ins. Co.*, 898 F. Supp. 952, 961 (D. Conn. 1995) (holding that insurer must demonstrate that allegations in underlying complaint are solely and entirely within policy’s exclusionary clauses); *R.E.O., Inc. v. Travelers Cos.*, No. CV 950372522S, 1998 WL 285836, at *5 (Conn. Super. Ct. May 20, 1998) (stating that when exclusion clause is relied upon to deny coverage, burden of proof is on insurer to demonstrate that allegations of complaint place it solely and entirely within policy exclusions and are subject to no other interpretation); see also *Heintz*, *supra* note 34, at 33 (explaining that burden of proof is on insured to show exclusionary clauses do not apply).

50. *Remington Arms*, 810 F. Supp. at 1410. The language of the insurance policy "must be accorded its natural and ordinary meaning and courts cannot indulge
be construed as a whole, and all of its relevant provisions are to be considered in connection with one another."\(^51\) The Remington Arms court applied the canons of construction and determined that because the CGL policy’s exclusion clause was ambiguous, the insurer did not meet its burden of proof, and therefore had a duty to defend.\(^52\)

The canons of insurance contract interpretation are applied to the pollution exclusion clause to determine whether the policy language is clear and unambiguous.\(^53\) More specifically, the “sudden and accidental” exception, the clause that courts have found to be the most difficult to interpret, must be analyzed to determine if it is clear and unambiguous.\(^54\)

\(^51\). Remington Arms, 810 F. Supp. at 1410 (quoting Firestine v. Poverman, 388 F. Supp. 948, 951 (D. Conn. 1975)). If possible, each provision of an insurance policy is to be given effect and no word or clause eliminated as meaningless, or disregarded as inoperative, if it can be given any reasonable meaning consistent with the other parts of the policy. See id. at 1417. The district court specifically determined that the “sudden and accidental” exception to the pollution exclusion was ambiguous, and therefore, the ambiguity was to be construed against the insurer. See id. at 1460. As a result, the ambiguity created a genuine issue of material fact as to whether the claims came within the policy coverage and prevented the insurer’s claim from being decided as a matter of law. See id.

\(^52\). See id. at 1416-17. The Remington Arms court concluded that genuine issues of material fact existed as to whether the plaintiff’s claims concerning one of the sites came within the policy coverage, thus triggering the insurer’s duty to defend. See id. at 1417. The district court specifically determined that the “sudden and accidental” exception to the pollution exclusion was ambiguous, and therefore, the ambiguity was to be construed against the insurer. See id. at 1460. As a result, the ambiguity created a genuine issue of material fact as to whether the claims came within the policy coverage and prevented the insurer’s claim from being decided as a matter of law. See id.

\(^53\). For a discussion of the canons of insurance contract interpretation, see supra notes 48-51 and accompanying text.

\(^54\). See Linemaster, 1995 WL 462270, at *27 (noting that because of its varied interpretations, “sudden and accidental” exception is most litigated part of pollution exclusion).
2. Pollution Exclusion Interpretation

The “sudden and accidental” exception to the pollution exclusion clause excludes coverage for pollution-related liability except when the cause of the pollution is sudden and accidental. Courts have struggled to define the terms “sudden” and “accidental.” The Linemaster court stated “[t]here has been a veritable legion of cases attempting to interpret this phrase, and it has been said that ‘the exception to the pollution exclusion for discharges that are “sudden and accidental” is easily the most often litigated part of the standard pollution exclusion.’”

Most courts, both federal and state, disagree about the proper interpretation of “sudden.” Insurers argue that the plain meaning of “sudden” 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 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.


To interpret the meaning of “sudden and accidental” some courts resort to the dictionary definitions and invariably find irreconcilable dictionary definitions of “sudden”: Webster’s Third New International Dictionary attaches a number of definitions to “sudden.” Webster’s first defines “sudden” as “happening without previous notice . . . occurring unexpectedly . . . not foreseen.” Webster’s then lists synonyms for “sudden” that include “prompt” and “immediate.” Random House Dictionary of the English Language defines the word “sudden” in a temporal sense as “happening, coming, made, or done quickly.” Black’s Law Dictionary defines “sudden” as “[h]appening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen; unprepared for.” Although “sudden” can reasonably be defined to mean abrupt or immediate, it can also reasonably be defined to mean unexpected and unintended.

Id. at 275-76 (footnotes omitted).

Due to the increasing number of lawsuits against polluters, the insurance industry first attempted to limit its pollution-related coverage by creating the pollution exclusion clause. See Rosenkranz, supra note 28, at 1239. The purpose was to limit insurance coverage to occurrences that were sudden and accidental. See id. at 1240. Surprisingly, the courts have uniformly ignored the insurers’ intent and distorted the phrase “sudden and accidental” beyond recognition. See id.

A small majority of courts conclude that the phrase “sudden and accidental” is clear and unambiguous. See id. at 332. A large number of courts interpret “sudden” as having a tempo-
ing of the word "sudden" includes a temporal element, meaning "abrupt" or "of short duration." See id. Some courts conclude "sudden" is ambiguous, meaning both "unexpected or unintended" and "abrupt," and therefore construe the ambiguity against the insurer. See id. at 333. A few courts refuse to apply the "sudden and accidental" exception as a matter of law, holding that factual issues remained as to whether the pollution occurred in a manner which was "sudden and accidental." See id. at 334.

Policyholders, however, argue that "sudden" is ambiguous. See id. at 333. Insurers point out that the plain meaning rule is a canon of insurance contract construction. See id. According to the rule, words are to be given their plain, everyday meaning if they are unambiguous on their face. See id. The insurers also rely on the canon that all terms are to be given meaning and effect. See id. at 1093. They argue that since "accidental" already connotes unexpectedness, a definition of "sudden" without a temporal component would render "accidental" redundant, and therefore superfluous. See id.

For opinions that find "sudden and accidental" unambiguous, and preclude coverage if the damage-producing pollution is not instantaneous, see infra note 60. For cases that hold "sudden" is ambiguous, and do not exclude gradual discharges from coverage, see infra note 63.

59. See Hamel, supra note 17, at 1092. Insurers point out that the plain meaning rule is a canon of insurance contract construction. See id. According to the rule, words are to be given their plain, everyday meaning if they are unambiguous on their face. See id. The insurers also rely on the canon that all terms are to be given meaning and effect. See id. at 1093. They argue that since "accidental" already connotes unexpectedness, a definition of "sudden" without a temporal component would render "accidental" redundant, and therefore superfluous. See id.

60. See Mesa Oil, Inc. v. Insurance Co. of N. Am., 123 F.3d 1333, 1340 (10th Cir. 1997) (applying New Mexico law to find that ongoing oil spillage could not be sudden and accidental so pollution exclusion applied); Snyder Gen. Corp. v. Century Indem. Co., 113 F.3d 536, 539 (5th Cir. 1997) (applying Texas law and holding that "sudden," as used in pollution exclusion exception, contained temporal component); Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc., 40 F.3d 146, 152 (7th Cir. 1994) (applying Missouri law and holding that "sudden" unambiguously means abrupt, quick or immediate as well as unexpected and unintended); United States Fidelity & Guar. Co. v. Morrison Grain Co., 992 F.2d 489, 493 (10th Cir. 1993) (applying Kansas law to define "sudden" as quick and without warning, and holding property damage caused by improper pesticide storage ineligible for coverage); Hartford Accident & Indem. Co. v. United States Fidelity & Guar., Co., 962 F.2d 1484, 1491 (10th Cir. 1992) (applying Utah law and holding that dumping condensed liquid waste in unlined earthen pit for fifteen years was not sudden and accidental because "sudden" cannot mean gradual, routine or continuous); Hyde Athletic Indus., Inc. v. Continental Cas. Co., 969 F. Supp. 289, 299 (E.D. Pa. 1997) (stating that process of pollution occurring over period of years did not constitute "sudden and accidental" releases); North Pac. Ins. Co. v. Mai, 939 P.2d 570, 572 (Idaho 1997) (holding that "sudden and accidental" unambiguously refers to unintended happenings that take place over short period of time); Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Farmland Mut. Ins. Co., 568 N.W.2d 815 (Iowa 1997) (ruling that "sudden" requires abrupt event and leak occurring over ten years did not fall within exception).

61. See Hamel, supra note 17, at 1092. The definitions of "sudden" in some standard dictionaries include a temporal element such as "abruptness," while others focus exclusively on unexpectedness. See id. at 1092-93. Policyholders therefore argue that because ambiguities in an insurance contract are to be construed against the insurer, courts should adopt the construction that favors coverage. See id. Also, policyholders point out that redundancies are common in

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and accidental" in the context of the pollution exclusion clause. Some courts have agreed, holding that the term "sudden" is ambiguous, does not necessarily imply a temporal element and that gradual discharges are not excluded from coverage.

The Connecticut Supreme Court has yet to address the interpretation of the “sudden and accidental” exception to the pollution exclusion clause. In Remington Arms, however, the District Court for the District of Delaware considered how the Connecticut Supreme Court would interpret the “sudden and accidental” exception. The Remington Arms court examined other relevant opinions and determined that “sudden” meant only “unexpected,” and did not possess a temporal element. Under this interpretation of “sudden,” coverage would not be barred for discharges merely because those discharges occurred over an extended period of time. Therefore, the Remington Arms court concluded that “for the pollution exclusion [clause] to remove coverage under Connecticut law there must be a deliberate discharge of a substance . . . .”

insurance policy terminology and point to strings of terms in the pollution exclusion itself, such as "smoke, vapors, fumes, chemicals, and gases." See id.

62. See id. For dictionary definitions of the term “sudden,” see supra note 56.

63. See Patz v. St. Paul Fire & Marine Ins. Co., 15 F.3d 699, 704 (7th Cir. 1994) (applying Wisconsin law and holding that "sudden and accidental" can be read broadly to mean unintended or unexpected); Broderick Inv. Co. v. Hartford Accident & Indem. Co., 954 F.2d 601, 607 (10th Cir. 1992) (applying Colorado law and holding that "sudden and accidental" is ambiguous and therefore precludes summary judgment for insurer); Hutchinson Oil Co. v. Federated Serv. Ins. Co., 851 F. Supp. 1546, 1557 (D. Wyo. 1994) (applying Wyoming law and holding that leaking oil at insured’s plant over 20 years may be sudden and accidental, triggering insurer’s duty to defend); MAPCO Alaska Petroleum, Inc. v. Central Nat'l Ins. Co., 784 F. Supp. 1454, 1458-60 (D. Alaska 1991) (applying Alaska law and holding that focus of “sudden and accidental” is on unexpected or unforeseen nature of event); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1218 (Ill. 1992) (holding "sudden" means only unexpected or unintended, not abrupt).

64. See Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. 1406, 1408 (D. Del. 1992). The Remington Arms court stated that “[n]either the parties nor the Court could discover any Connecticut case law concerning the proper construction to be given the pollution exclusion clauses.” Id. Thus, the insurer’s motion presented an issue of first impression under Connecticut law. See id. For the facts of Remington Arms, see supra note 48 and accompanying text.


66. See id. at 1410-11. In reaching this conclusion, the Remington Arms court looked to the decisions of the Third Circuit in New Castle County v. Hartford Accident & Idem. Co., 933 F.2d 1162 (3d Cir. 1991) and New Castle County v. Hartford Accident & Idem. Co., 970 F.2d 1267 (3d Cir. 1992). See Remington Arms, 810 F. Supp. at 1410. Since “sudden” was reasonably capable of two widely different interpretations, the Remington Arms court found the term ambiguous. See id. at 1410-11. According to the canons of insurance contract interpretation, ambiguity over the meaning of the terms must be resolved in favor of the insured. See id. at 1411.

67. See Remington Arms, 810 F. Supp. at 1411.

68. Id. at 1412.
The Superior Court of Connecticut, however, reached a different result in *Linemaster*.69 In determining the scope of the “sudden and accidental” exception, the superior court began by examining the public policy and historical background of the clause.70 The *Linemaster* court determined that under a plain reading of the policy language, the term “sudden” necessarily includes a temporal element and could not cover pollution that did not occur somewhat instantaneously.71 The court refused to look beyond the unambiguous contract language and, therefore, concluded that “sudden and accidental” did not cover discharges that gradually occurred over a period of time.72

3. Four Corners of the Complaint Analysis

Given the relevant insurance policy language, a court must next consider whether an insurance company has a duty to defend.73 To make this determination, a court must analyze the com-


70. See *id.* at *28-29. By inserting the pollution exclusion clause into the CGL policy, insurance companies attempted to limit their liability. See *id.* at *28. By introducing the “sudden and accidental” language into the policy, the insurers hoped to even further limit the once broad extent of coverage. See *id.* at *29.

The *Linemaster* court found it important to foster environmental protection as a matter of public policy. See *id.* In order to promote environmental protection, insurers must be willing to assume some of the risks. See *id.* Therefore, in order for insurers to keep functioning in this area, it is important that they write policies that do not provide coverage for gradual pollution. See *id.* If an insured knew that his policy covered gradual pollution, the insured would be more likely to intentionally engage in such conduct. See *id.* at *28.

71. See *id.* at *30. The *Linemaster* court noted that insurers included the term “sudden” to impose a temporal element, and considerations of public policy beyond the short-term financial interests of the insurance industry support such a result. See *id.*

72. See *id.* The *Linemaster* court rejected the *Remington Arms* decision, finding that by examining the pollution exclusion clause and its “sudden and accidental” language in isolation from the whole contract, the *Remington Arms* court ignored the third canon of insurance contract construction. See *id.* at 31. For a discussion of the canons of contract interpretation in the *Remington Arms* case, see *supra* notes 48-51 and accompanying text.

73. See, e.g., *Linemaster*, 1995 WL 462270, at *5 (analyzing policy’s language and then considering language of complaint). For a discussion of the duty to defend analysis, see *supra* notes 39-41 and accompanying text. Most states hold that the duty to defend is broader than the duty to indemnify. See Liberty Mut. Ins. Co. v. SCA Serv., Inc., 588 N.E.2d 1346 (Mass. 1992). In *SCA Services*, a CGL insurer brought an action seeking declaration that it was not obligated to defend or indemnify its insured in an action brought for damages caused by hazardous waste leaking out of a landfill in which its insured disposed of waste. See *id.* at 1346. The *SCA Services* court explained that the duty to defend is broader than the duty to indemnify and liability ultimately depends upon the true facts. See *id.* at 1349; see
plaint filed against the insured to determine whether it states facts that appear to bring the alleged injury within the coverage of the policy.\textsuperscript{74} Connecticut courts have held that "[i]f an allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured."\textsuperscript{75}

In \textit{New York v. Blank},\textsuperscript{76} the Second Circuit considered whether insurance companies have a duty to defend their insured, under New York law, for claims brought pursuant to CERCLA.\textsuperscript{77} The

\begin{itemize}
\item \textit{also} Horace Mann Ins. Co. v. Barbara B., 846 P.2d 792, 795 (Cal. 1993) (holding duty to defend is broader than duty to indemnify); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1212 (Ill. 1992) (same). \textit{But see} Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 483 A.2d 402 (N.J. 1984). In \textit{Hartford Accident}, the New Jersey Supreme Court examined an insurer's duty to defend and concluded that the insurer's duty to defend is a contractual undertaking of the insurer. \textit{See id.} at 403, 405. As such, it can be as limited or as broad as the insurer sees fit to provide through its policy. \textit{See id.} at 405; \textit{see also} Burd v. Sussex Mut. Ins. Co., 267 A.2d 7, 9-10 (N.J. 1970) (holding that duty to defend and duty to indemnify are equally broad).

Although a suit against an insured may be groundless, CGL policies establish the insurer's duty to defend the insured for pollution-related injuries and damages. \textit{See} Chen Min Juan, \textit{supra} note 5, at 435 (discussing insurer's duty to defend insured for pollution damages under CGL policy); \textit{see also} Missionaries of the Co. of Mary, Inc. v. Aetna Cas. & Sur. Co., 230 A.2d 21, 24 (Conn. 1967) (holding that duty to defend does not depend on whether injured party will prevail against insured).

\begin{itemize}
\item 76. 27 F.3d 783 (2d Cir. 1994).
\item 77. \textit{See id.} In \textit{Blank}, the State of New York commenced suit against Abalene Pest Control Service, Inc., Walter Blank, the sole shareholder and president of Avalene, and Orkin Exterminating Co., for contamination of a waste disposal site by buried pesticides. \textit{See id.} at 786. Abalene and Blank brought a third-party action against DEC, their waste removal contractor. \textit{See id.} at 787. Abalene and Blank also sought to hold their insurance companies, Capital Mutual Insurance Company, New York Mutual Underwriters and National Union Fire Insurance Company, liable for the cost of their defense and for indemnification of any damages imposed in the underlying action. \textit{See id.}
\end{itemize}

A case applying New York law is relevant to this inquiry since the law governing interpretation of insurance contracts is believed to be identical in New York and Connecticut. \textit{See} EDO Corp. v. Newark Ins. Co., 878 F. Supp. 366 (D. Conn. 1995). The District Court for the District of Connecticut explained this reasoning as follows:

Two considerations support this conclusion. First, there are no reported Connecticut cases construing a pollution exclusion clause. As such, this Court may presume that Connecticut law is the same as that of New York, especially since the view of the New York court seems to represent the emerging majority view on the interpretation of pollution exclusion clauses. Second, . . . the Court finds the language of the pollution exclusion clause to be plain and unambiguous. This rule in Connecticut, as in New York, is that courts are to apply the plain meaning of the words in a contract provision where the words are clear and unambiguous.
Blank court approached the duty to defend analysis by examining the CGL policy’s pollution exclusion clause. The Second Circuit held that the policy language in the pollution exclusion clause and its exception for “sudden and accidental” discharges was clear and unambiguous.

Next, the Blank court looked to the complaint’s allegations to determine whether the pollution exclusion applied to the alleged facts. The Second Circuit concluded that the allegations of the complaint did not preclude the possibility that unintentional discharges occurred during a short period of time. Since the insurers failed to meet their burden of demonstrating that there was no reasonable possibility of coverage, the Blank court determined that the insurers were obligated to defend their insured.

In Linemaster, the Superior Court of Connecticut reached the opposite result. The Linemaster court analyzed the language of the “sudden and accidental” exception included in the insured’s CGL policy, and determined that the plain language of the clause

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78. See Blank, 27 F.3d at 788. The insurers argued that the alleged discharge of pesticides at the site was not “sudden and accidental,” and therefore the allegations fell within the pollution exclusion clauses contained in the policies. See id. Thus, the insurers asserted that they had neither a duty to defend nor to indemnify Abalene and Blank. See id.

79. See id. at 789. The Blank court found the language of the exclusion subject to no reasonable interpretation other than that intentional discharges are generally excluded from coverage. See id.

80. See id. at 789-90. Under the law, the question of the insurer’s duty to defend “rests solely on whether the underlying complaint alleges any facts or grounds which bring the action within the protection purchased.” Id. at 790 (quoting Seaboard Sur. Co. v. Gillette Co., 476 N.E.2d 272, 275 (N.Y. 1984)). The insurer’s duty to defend will be triggered unless it can demonstrate that all of the complaint’s allegations fall entirely within the exclusion and are subject to no other interpretation. See id. Therefore, any evidence extrinsic to the complaint is irrelevant. See id.

81. See id. at 791. The Blank court stated that “although the complaint is framed in general terms and embraces conduct occurring over a period of several years, the complaint is by no means limited to allegations of continuous discharge.” Id. The general and broad allegations of the complaint did not preclude the possibility that property damage was caused, if even in part, by the “sudden and accidental” discharge of pesticides. See id.

82. See id.; see also Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1205 (2d Cir. 1989) (holding that pollution exclusion clause merely excludes coverage for intentional pollution under New York law).

was clear and unambiguous. The *Linemaster* court concluded that since none of the discharges were "sudden and accidental" the allegations of the complaint did not fall within the policy coverage, and therefore the insurer had no duty to defend the plaintiff's environmental contamination claims.

### III. FACTS

In *Stamford Wallpaper Co. v. TIG Insurance*, the Second Circuit examined whether the plaintiff's CGL policy, issued by the defendant insurance company, covered environmental damage claims, thereby imposing a duty to defend upon the defendant. As part of its wallpaper manufacturing process, Stamford, a Connecticut corporation, used liquid mineral spirits which generated waste solvents. In 1974, Stamford contracted with hazardous waste removal companies (carters) to remove these waste solvents.

Stamford purchased CGL insurance from TIG Insurance (TIG), a New York insurance corporation. From 1974 until 1983, the period relevant to this action, the CGL policy terms remained constant. According to the policy, TIG has the "right and duty to defend any suit against the insured seeking damages on account of . . . bodily injury or property damage, even if any of the allegations of the suit are groundless, false, or fraudulent." The policy also contained a standard pollution exclusion clause, with a "sudden and accidental" exception.

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84. See *id.* at *30. Specifically, the *Linemaster* court determined that a plain reading of the policy language supports the notion that "sudden" is to be given a temporal definition. See *id.* For a discussion of the *Linemaster* court's analysis of the "sudden and accidental" exception, see supra notes 69-72 and accompanying text.

85. See *id.* at *33. The court held that the pollutant discharges occurred over a period of time and were the result of regular business operations. See *id.*

86. *Stamford Wallpaper*, 138 F.3d at 75.

87. See *id.* at 77. Stamford used the mineral spirits from 1970 until 1983. See *id.*

88. See *id.* at 77-78. Specifically, Stamford contracted with Drum Automation, Inc., Chemical Waste Removal Service, Inc. and Solvents Recovery Service of New England to dispose of its waste. See *id.* The carters recycled these waste materials and sold them back to both Stamford and third parties. See *id.* at 78.

89. See *id.* TIG Insurance (TIG) is headquartered in Texas. See *id.*

90. See *id.*

91. *Stamford Wallpaper*, 138 F.3d at 78.

92. See *id.* The specific pollution exclusion clause at issue in *Stamford Wallpaper* excludes from coverage any liability for the following: 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 land, the atmosphere or any water course or body...
Each carter that Stamford retained was alleged to be a source of hazardous waste at sites EPA designated as hazardous landfills. EPA notified Stamford that it was potentially liable under CERCLA for response action costs. Consequently, Stamford was included as a third-party defendant in an action against the landfill owners and the carters for the costs of the hazardous waste cleanups.

Stamford notified TIG of the claims filed against it as a third-party defendant. TIG, invoking the policy's pollution exclusion clause, disclaimed any duty to either defend or indemnify Stamford for these claims. In response, Stamford filed an action against TIG seeking damages for breach of contract.

In an unpublished decision, the district court held that the claims against Stamford all fell within the scope of the policy's pollution exclusion clause, and that none of the allegations brought the claims within the "sudden and accidental" exception. The district court also concluded that none of the CERCLA claims were for bodily injury or property damage, and absent such claims, TIG had

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*Id.*

93. See id. The landfills designated as hazardous included the Davis Landfill in Smithville, Rhode Island; the Gallups Quarry in Plainfield, Connecticut; and Solvents Recovery Service of New England in Southington. See id. Stamford argued that "none of the residual by-products of its waste were commingled with other waste materials or deposited at any of these three sites." *Id.*

94. See id. EPA notified Stamford by PRP letter on June 12, 1992, that it was potentially liable for costs of $3.35 million at the Solvents Recovery Service in Southington, Connecticut. See id. On April 1, 1993, Stamford received another notification from EPA that it was potentially liable for response action costs of $257,441 in connection with the Gallups Quarry cleanup in Plainfield, Connecticut. See id.

95. See id. at 78. Stamford was named as a third-party defendant in *United States v. Davis*, filed on Feb. 22, 1993. See id. This was a CERCLA cost-recovery action arising from the cleanup of the Davis Landfill in Rhode Island. See id.

96. See *Stamford Wallpaper*, 138 F.3d at 78. Stamford notified TIG of the claims on June 16, 1993. See id.

97. See id. On December 14, 1993, TIG asserted it had no duty to defend Stamford for claims arising from any of the three sites, relying on the pollution exclusion clause found in its CGL policy. See id.

98. See id. On December 8, 1994, Stamford filed suit against TIG in Connecticut state court. See id. However, TIG removed the case to the United States District Court for the District of Connecticut. See id. Stamford moved for partial summary judgment on the question of TIG's duty to defend Stamford against the environmental damages claims. See id.

99. See id.
no duty to defend. Accordingly, the district court dismissed Stamford’s claim for breach of contract.

Stamford appealed the district court’s decision regarding the applicability of the pollution exclusion clause. TIG cross-appealed, arguing that the district court’s decision should be affirmed regardless of any exclusion. The Second Circuit held that the policy’s pollution exclusion clause excluded claims brought against Stamford seeking to impose liability for environmental loss caused by the disposal of waste Stamford generated, and the carters disposed of, at other sites. The Stamford Wallpaper court also held that none of the claims against Stamford fell within the “sudden and accidental” exception to the pollution exclusion clause. Thus, the Second Circuit affirmed the district court’s dismissal of Stamford’s breach of contract claim and held that TIG had no duty to defend Stamford against these environmental claims.

IV. NARRATIVE ANALYSIS

The Second Circuit began its analysis in Stamford Wallpaper by discussing the lower court’s application of substantive Connecticut law. The Stamford Wallpaper court determined that an insurer’s duty to defend is broader than its duty to indemnify under Connecticut state law. The court stated that “‘[w]here a complaint...” See id. at 77. Because the holding was limited to the pollution exclusion clause, the court declined to reach these issues. See id. Therefore, the Second Circuit assumed that the underlying claims constituted “suits” seeking “damages.” See id. The Second Circuit, therefore, dismissed TIG’s cross appeal as moot. See id.

For a discussion of the applicable law applied in a duty to defend claim, see supra note 42 and accompanying text.
in an action . . . states a cause of action against the insured which appears to bring the claimed injury within the policy coverage, it is the contractual duty of the insurer to defend the insured in that action . . . regardless of the duty of the insurer to indemnify." 109

The Stamford Wallpaper court further explained that the existence of a duty to defend is determined according to the language found within the four corners of the complaint. 110 Additionally, the court determined that the nature of the duty to defend is purely contractual, circumscribed by the language of the insurance contract. 111

Next, the Second Circuit examined the scope of the TIG insurance policy's coverage. 112 The court addressed whether any of the claims against Stamford included an allegation that fell "even possibly" within the scope of the policy, as limited by the pollution exclusion and the "sudden and accidental" exception to that exclusion. 113 The Second Circuit agreed with the district court's determination that none of the claims against Stamford contained such an allegation. 114

The Second Circuit then determined that the burden of proving the applicability of a contract term falls upon the insurer. 115 According to the Stamford Wallpaper court, TIG demonstrated that the CERCLA claims sought to impose liability upon Stamford for environmental loss that was caused by the discharge of "waste


110. See id. The court stated that the existence of a duty is "'not affected by facts disclosed by independent investigation, including those that undermine or contradict the injured party's claim.'" Id. (quoting Cole v. East Hartford Estates Ltd. Partnership, No. CV950547179S, 1996 WL 292135, at *2 (Conn. Super. May 15, 1996)). For a discussion of the "four corners of the complaint test," see supra notes 35-37 & 73-85 and accompanying text.

111. See Stamford Wallpaper, 138 F.3d at 79. The Stamford Wallpaper court stated, "'[t]here is no common law duty as to which the courts are free to devise rules.'" Id. (quoting Linemaster Switch Corp. v. Aetna Life & Cas. Corp., No. CV91-0396432S, 1995 WL 462270, at *5 (Conn. Super. July 25, 1995)).

112. See id. The TIG policy extended to "any suit seeking damages on account of . . . property damage." Id. The Stamford Wallpaper court stated, however, that "the pollution exclusion carves out suits arising from the 'discharge, dispersal, release or escape' of 'pollutants into or upon land, the atmosphere or any water course or body of water,' except where 'such discharge, dispersal, release or escape is sudden and accidental.'" Id.

113. See id.

114. See id.

115. See id. The Stamford Wallpaper court stated that the insurer bears the burden of proof that a contract term, such as the pollution exclusion clause, withdraws a specific type of liability from coverage. See id. (citing Firestine v. Poverman, 388 F. Supp. 948, 951 (D. Conn. 1975)).
materials . . . into or upon land." The court concluded that neither the PRP letters nor the third-party complaint alleged or contemplated that Stamford’s liability under CERCLA arose from any activity other than the carters deposit of waste materials in the ordinary course of Stamford’s business. The Second Circuit next considered Stamford’s argument that the claims fell outside of the scope of the pollution exclusion clause. According to the Stamford Wallpaper court, the language of the pollution exclusion clause focused not on the nature of the insured’s conduct or activities, but rather on the nature of the property damage. The Second Circuit concluded that because Stamford’s potential liability under CERCLA arose from discharges of hazardous waste materials into or upon land, namely that Stamford generated waste which ultimately resulted in the hazardous discharges, the claims fell within the pollution exclusion.

The Stamford Wallpaper court stressed the general rule that ambiguity in the language of an insurance policy is construed in favor of coverage. However, the court held that regardless of the nature of the discharge and regardless of whether or not the actual polluter was Stamford, TIG clearly intended to exclude from coverage damages arising from the discharge of pollutants onto land which were not “sudden and accidental.”

116. Stamford Wallpaper, 138 F.3d at 79. In so concluding, the Second Circuit relied upon the PRP letter to Stamford regarding the Gallups Quarry site, which informed Stamford that:

EPA has reason to believe that you arranged by contract, agreement or otherwise for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances found at the site. By this letter, EPA notifies you of your potential liability with regard to this matter . . . .

Id.

117. See id. at 79-80.

118. See id. at 80. Stamford argued that “disposal and treatment” are not equivalent to “discharge, dispersal, release or escape,” as the pollution exclusion describes. Id. In the alternative, Stamford argued that even if the clause was construed to include “disposal and treatment,” it did not apply to the act of arranging for the transport, treatment or disposal of hazardous materials. See id.

119. See id. The court stated that “[t]he policy excludes coverage for damages arising from the discharge of waste materials; it does not specify the manner in which such discharge is carried out, or that it be executed by Stamford directly as opposed to its carters or anyone else.” Id.

120. See id.

121. See Stamford Wallpaper, 138 F.3d at 80. However, this rule does not require the court to “‘indulge in a forced construction[,] ignoring provisions or so distorting them as to accord a meaning other than that evidently intended by the parties.’” Id. (quoting Heyman Associates No. 1 v. Insurance Co. of Pennsylvania, 653 A.2d 122, 130 (Conn. 1995)).

122. See id.
The Second Circuit also considered whether EPA's allegations fell within the "sudden and accidental" exception to the pollution exclusion clause. The court stated that "[i]n order for the 'sudden and accidental' exception to apply, the allegations within the four corners of the complaint must raise the possibility that the event which caused the pollution-related property damage was sudden and accidental." The Stamford Wallpaper court noted that the CERCLA claims in the PRP letters and third-party complaint alleged that Stamford disposed of waste through carters, who deposited portions of this waste in the various landfills. According to the Second Circuit, "[t]here is nothing accidental about such an arrangement." Moreover, the court recognized that under Connecticut law, "sudden" has a temporal element. Therefore, based upon the PRP letters and the third-party complaint, the Stamford Wallpaper court concluded that there was nothing to suggest that Stamford's liability resulted from anything other than disposal of waste over an extended period of time, which clearly did not fall within the "sudden and accidental" exception.

The Stamford Wallpaper court next discussed the rule of New York v. Blank, that if there is a possibility that the allegations were caused by a sudden and accidental event, then coverage is not precluded. The Second Circuit refused to hypothesize or imagine

123. See id. Stamford argued that the "sudden and accidental" exception to the pollution exclusion clause obligated TIG to provide a defense. See id. The Supreme Court of Connecticut has not addressed the question of who shoulders the burden of proving the applicability of an exception to an exclusion. See id. In this case, the Second Circuit did not need to decide this issue since TIG had met the burden. See id.


125. See id. (stating that "[e]ach CERCLA claim references Stamford's disposal of waste through the carters, who deposited portions of this waste in the various landfills").

126. Stamford Wallpaper, 138 F.3d at 80. The Stamford Wallpaper court characterized this arrangement as being in the "ordinary course of business." Id.

127. See id. The Stamford Wallpaper court stated that "case law instructs that releases of pollutants, occurring not as the result of a sudden event but . . . as a matter of course in the daily operation of [a] plant' are not 'sudden' within the meaning of the 'sudden and accidental' exception." Id. (quoting EDO, 878 F. Supp. at 376).

128. See id. at 80-81.

129. See id. at 81. Stamford urged the court to adopt the approach taken by the court in New York v. Blank. See id. Stamford claimed that the "sudden and accidental" exception "saves its coverage because the claims 'do not rule out the possibility' that the contamination was caused by a sudden and accidental event." Id. The Second Circuit, however, refused to look beyond the four corners of the complaint to consider hypothetical circumstances that might defeat coverage. See id. For a discussion of Blank, see supra notes 76-82 and accompanying text.
episodes or events that could not be found among the allegations and could not reasonably be deduced from them. The court held that neither the third-party complaint nor the PRP letters stated or supported the inference that the cause of the property damage was sudden and accidental.

The Second Circuit therefore affirmed the judgment of the district court and denied Stamford's motion for partial summary judgment, dismissing its breach of contract claim.

V. CRITICAL ANALYSIS

While the Second Circuit's conclusions were legally sound, the Stamford Wallpaper court neglected to clearly delineate the steps taken in a duty to defend analysis. In addition, the court's analysis would have benefitted from additional support for its conclusions.

A. Insurance Contract Construction

Although the Second Circuit properly determined that it need not indulge in a forced construction of the CGL policy, thereby ignoring provisions so as to accord the policy a new meaning, the court failed to specifically address the canons of insurance policy construction. In making its determination, the court applied Connecticut's second canon of insurance contract interpretation: that insurance policies are to be construed in accordance with ordinary parlance. However, the Stamford Wallpaper court neglected to recognize and apply the other two canons of insurance contract construction as laid out in Remington Arms Co. v. Liberty Mutual Ins.

130. See id. The Stamford Wallpaper court explained that the purpose and force of a pollution exclusion clause depends on the courts not defeating that clause by imagining any sudden accident that is not actually foreclosed by the allegation found in the underlying complaint. See id.

131. See Stamford Wallpaper, 138 F.3d at 81. For argument's sake, the Stamford Wallpaper court considered the PRP letters to be "suits" for "damages." See id.

132. See id.

133. For a discussion of Connecticut's three-step process used in a duty to defend analysis, see supra notes 34-85 and accompanying text.

134. See Stamford Wallpaper, 138 F.3d at 80.

surance Co., which would have provided additional support for the Second Circuit's interpretation of CGL policy language.136

B. Analysis of the Plain Language of the Pollution Exclusion Clause and “Sudden and Accidental” Exception

1. Pollution Exclusion Clause

The Stamford Wallpaper court correctly determined that Stamford's allegations fell outside of the pollution exclusion clause, however, its reasoning for this conclusion was unpersuasive.137 The Second Circuit reasoned that the language of the exclusion focused on the nature of the property damage, not on the nature of the insured's conduct or activities.138 However, most courts, in determining whether the pollution exclusion clause bars coverage, have concluded that the focus of the pollution exclusion clause is on the nature of the discharge, not the nature of the resulting damage.139 While it is true that whether the insured's conduct was intended or unintended is not dispositive, the nature of the conduct that results in the discharge is paramount in determining whether the pollution exclusion applies.140 Therefore, the Stamford Wallpaper court should have focused on the nature of Stamford's conduct, not the resulting damage, to determine whether the pollution exclusion applied.


137. See Stamford Wallpaper, 138 F.3d at 80.

138. See id. (stating that the “policy excludes coverage for damages arising from the discharge of waste materials; it does not specify the manner in which such discharge is carried out, or that it be executed by Stamford directly as opposed to its carters or anyone else”).


140. See Olin Corp., 762 F. Supp. at 561; see also Technicon Elecs., 544 N.Y.S.2d at 583-34 (stating that “the pollution exclusion clause, by its own terms, does not distinguish between intended or unintended consequences of intentional discharges; rather, it excludes from coverage liability based on all intentional discharges of waste whether consequential damages were intended or unintended”); Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 702 F. Supp. 1317, 1326 (E.D. Mich. 1988) (stating that “[t]he focus of the pollution exclusion is on discharge or release of pollutants into the environment”).
2. "Sudden and Accidental" Exception

The Second Circuit correctly ruled that the "sudden and accidental" exception includes a temporal element under Connecticut law. Although states are split on the proper construction of the "sudden and accidental" exception, the few cases that exist in Connecticut support the *Stamford Wallpaper* court's interpretation.

Since the "sudden and accidental" exception is the most litigated aspect of the standard pollution exclusion clause, and a split exists among jurisdictions in defining this clause, the *Stamford Wallpaper* court's opinion could have benefitted from a more detailed analysis. For example, in the lengthy *Linemaster* opinion, the Superior Court of Connecticut carefully detailed the steps taken in a duty to defend analysis. The *Linemaster* court provided the history and public policy concerns surrounding the "sudden and accidental" clause to provide the necessary context and background for a discussion of the case and of the policy language. The

141. See *Stamford Wallpaper*, 138 F.3d at 80. For a discussion of the *Stamford Wallpaper* court's reasoning in holding that "sudden" includes a temporal element, see *supra* note 127 and accompanying text.

142. See *Carrier Corp. v. Home Ins. Co.*, No. CV-88-352383-S, 1994 WL 547736, at *1 (Conn. Super. Ct. Sept. 21, 1994) (discussing "sudden" as containing temporal element under Connecticut law). In analyzing the pollution exclusion clause and the "sudden and accidental" exception, Connecticut law mirrors New York law, which defines "sudden" with a temporal connotation. *See Olin Corp.*, 762 F. Supp. at 560 (stating that "sudden" could not include events which happened gradually under both Connecticut and New York law and asserting that interpretation of "sudden" as having temporal element is emerging as majority view); *see also* *EDO Corp. v. Newark Ins. Co.*, 878 F. Supp. 366, 373-74 (D. Conn. 1995) (noting that under both Connecticut and New York law, "sudden" has temporal connotation and is opposite of gradual). For a discussion of the split among the courts in defining the "sudden and accidental" exception, see *supra* notes 55-63 and accompanying text.

143. For a detailed discussion of the history surrounding the "sudden and accidental" exception, see *supra* notes 55-72 and accompanying text.


145. See *Linemaster*, 1995 WL 462270, at *28-30. In stressing the importance of the suddenness requirement, the *Linemaster* court quoted the following:

The suddenness requirement of accident-based coverage served two purposes. By limiting coverage to accidents distinct in time and place, the suddenness requirement simplified claim administration. It set discrete units to which notice requirements, policy periods, and liability limits applied. More importantly, the insurers designed the suddenness requirement to avoid the "moral hazard" that inhered in insurance coverage for gradual losses. A gradual loss, the insurers thought, could go undetected until it reached catastrophic proportions and, once manifested, often could not be traced to its source. By the time the loss was detected, the insured might long since have left the scene. Even if the insured planned on staying, he would be more likely to engage in activity that caused grad-
Linemaster court analyzed the history, policy concerns, and relevant case law, and concluded that a plain reading of the policy language supported the notion of giving a temporal definition to the word “sudden.” Thus, the Second Circuit should have supported its conclusion that “sudden” has a temporal element with additional case law.

C. Four Corners of Complaint Analysis

The Stamford Wallpaper court correctly set forth the general rule regarding the insurer’s duty to defend, and properly concluded that TIG had no duty to defend Stamford. In adopting the “four corners of the complaint” test, the Second Circuit followed the trend of refusing to look beyond the complaint to determine policy coverage. However, the Stamford Wallpaper court incorrectly distinguished New York v. Blank, the case that Stamford relied upon for finding a duty to defend.

In discussing Blank, the Stamford Wallpaper court stated that “Stamford urges us to adopt an alternative approach to construction of the ‘sudden and accidental’ exception.” Stamford argued, however, basing its position on Blank, that its claims “do not...
rule out the possibility" that the contamination was caused by a "sudden and accidental" event.\textsuperscript{150} This argument is not based on reconstructing the "sudden and accidental" exception, but instead, is a duty to defend argument, for Stamford was, in essence, contending that the claims asserted in the complaint could possibly fall within coverage.\textsuperscript{151} Although the \textit{Stamford Wallpaper} court's final conclusion was sound, it failed to recognize that its reasoning was based on a duty to defend analysis, and not on a reconstruction of the "sudden and accidental" exception.\textsuperscript{152}

The \textit{Stamford Wallpaper} court could generally have benefitted from additional case law to support its position. For example, in \textit{Linemaster}, the court went through a similar analysis and reached the same result as the \textit{Stamford Wallpaper} court, that the insurer had no duty to defend its insured in an environmental damage claim.\textsuperscript{153} In so doing, the \textit{Linemaster} court utilized an appropriate amount of case law in reaching its precise conclusion.\textsuperscript{154} Additional support would have strengthened and clarified the \textit{Stamford Wallpaper} decision.

\textsuperscript{150}. \textit{Id.} In \textit{Blank}, the Second Circuit reasoned that the insurer had a duty to defend, since the allegations of the complaint were couched in general terms and did not rule out the possibility that the pollution occurred "suddenly or accidentally." \textit{See} New York v. \textit{Blank}, 27 F.3d 783, 791 (2d Cir. 1994).

\textsuperscript{151}. To determine whether an insurer has breached its duty to defend under Connecticut law, the reviewing court must examine the claims brought against the insured, and determine if, on their face, the claims appear to come within the ambit of the insurance policy. \textit{See} Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. 1406, 1415 (D. Conn. 1992). Thus, the determination of whether TIG had a duty to defend depends on whether the complaint by Stamford stated facts that appeared to bring the claim of damage within the policy coverage. \textit{See id.} Here, Stamford alleged that the claims against it could potentially fall within the policy coverage. \textit{See id.}

\textsuperscript{152}. \textit{See id.} The \textit{Stamford Wallpaper} court refused to conjure up an event that would possibly trigger coverage. \textit{See id.} An example would be that "a carter's truck suddenly overturned at the site and accidentally spilled its contents here instead of there, or that the pollutants suddenly and accidentally escaped from some containment basin or tank, and reached some of the polluted property by that route." \textit{Id.} However, "no allegation in the third-party complaint or the PRP letters gives one a reason to think that such a thing happened." \textit{Id.} The Second Circuit completed its analysis with strict duty to defend language:

We do not look beyond the four corners of a pleading even to take account of demonstrable circumstances that might defeat coverage: by the same token, we will not hypothesize or imagine episodes or events that cannot be found among the allegations, and cannot reasonably be deduced from them. The pollution exclusion would lose all force if it could be defeated by the mere imagining of any sudden accident that is not actually foreclosed by the allegations of the underlying complaint. \textit{Id.}

\textsuperscript{153}. For a discussion of the duty to defend analysis of the \textit{Linemaster} case, see \textit{supra} notes 83-85 and accompanying text.

\textsuperscript{154}. \textit{See generally} \textit{Linemaster}, 1995 WL 462270.
VI. IMPACT

The Second Circuit's decision in Stamford Wallpaper does little to resolve whether an insurance company has a duty to defend its insured for environmental claims brought under CERCLA, and may even confuse the issue. This holds true even though the Second Circuit reached the proper result in resolving the duty to defend action. By failing to provide a detailed and structured analysis, the Second Circuit essentially made it more difficult for litigants bringing duty to defend claims under Connecticut law to understand exactly what they need to prove in order to prevail.

This confusion is by no means confined to Connecticut. The difficulty faced by courts in resolving these disputes is due to the fact that when insurers were writing CGL policies, they did not anticipate that a statute, such as CERCLA, would be enacted that would create retroactive strict liability with enormous costs for pollution cleanup. In the aftermath of CERCLA's enactment, courts provide the only possible forum to resolve these uncertainties. With its imprecise analysis, the Stamford Wallpaper decision will only foster this industry-wide uncertainty that currently exists.

The Second Circuit, by construing "sudden" as containing a temporal element, added an element of consistency in the interpretation of the "sudden and accidental" exception to the pollution exclusion clause. Connecticut litigants will have a clearer picture
of what types of claims could potentially fall within the "sudden and accidental" exception.160

In sum, the Stamford Wallpaper court failed to adhere to the analyses provided by existing precedent. Without the existence of industry-wide understandings between insureds and insurers on how to decide these issues, the courts are heavily relied on to provide consistency.161 Ideally, the Supreme Court of Connecticut will soon rule on the issue of insurance policy interpretation to help resolve the inconsistencies and lack of guidelines that currently exist in Connecticut surrounding the duty to defend environmental claims.

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160. See Gooley, supra note 2, at 161-62 (discussing varying judicial interpretations and applications of insurance policy language contributing to insurers’ and insureds’ uncertainty about liability).

161. See Linemaster, 1995 WL 462270, at *2. The Linemaster court stated that industry-wide agreements are not feasible because disputing parties would have to come to an agreement while enormous claims remained an issue between them. See id. Additionally, the nature of CERCLA remedies does not provide a particular time of accounting for prior environmental damage that has not yet come to light. See id.