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REASON AND POLLUTION: CORRECTLY CONSTRUING THE "ABSOLUTE" EXCLUSION IN CONTEXT AND IN ACCORD WITH ITS PURPOSE AND PARTY EXPECTATIONS

Jeffrey W. Stempel

I. INTRODUCTION

Responding to the flurry of environmental coverage litigation over the application of the "sudden and accidental" pollution exclusion,¹ the insurance industry during the

1. The "sudden and accidental" pollution exclusion came into wide use in 1970 and was then contained in a popular endorsement to the standard form Commercial General Liability (CGL) policy. This qualified exclusion was formally made part of the basic CGL in 1973. Prior to 1966, CGLs covered claims of injury resulting from an "accident." In 1966 "accident" was changed to "occurrence." Under both basic policies, however, environmental degradation and toxic tort claims were considered within coverage absent special exclusionary language.

The 1973 form of the sudden and accidental pollution exclusion stated that pollution claims were excluded from coverage unless the discharge of the pollutant was "sudden and accidental." See JEFFREY W. STEMPEL, INTERPRETATION OF INSURANCE CONTRACTS § T1.1 (1994). Prior to the 1973 CGL form, the "sudden and accidental" pollution exclusion was usually made a part of the policy by endorsement. The meaning and application of the sudden and accidental exclusion was widely litigated beginning during the late 1970s and into the 1990s as policyholders sought coverage for environmental liability claims and insurers resisted. Policyholders generally took the position that the exclusion denied coverage only for intentional pollution while insurers argued that coverage was available only if the pollution event was abrupt as well as unintended.

Courts divided roughly in half on the issue. See BARRY R. OSTRAGER AND THOMAS R. NEWMAN, HANDBOOK OF INSURANCE COVERAGE DISPUTES § 10.02[c] and [d] (9th ed. 1998); EUGENE R. ANDERSON, JORDAN S. STANZLER & LORELEI S. MASTERS, INSURANCE COVERAGE LITIGATION § 15.17 (1997); STEMPEL, INTERPRETATION OF INSURANCE CONTRACTS, *supra*, § T1.1.

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mid-1980s largely adopted new standard pollution exclusion language for commercial general liability (CGL) policies. Since the mid-1980s, the standard form CGL has included the so-called absolute pollution exclusion, which provides that the insurance does not apply to bodily injury or property damage "arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants."² A "pollutant" is defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Waste includes materials to be recycled, reconditioned or reclaimed."³

2. See Insurance Services Office, Inc., CGL Form CG 00 02 11 88 (1988), reprinted in ALLIANCE OF AMERICAN INSURERS, THE INSURANCE PROFESSIONALS POLICY KIT (1997-98 ed.). The full exclusion today reads:

- (1) [This insurance does not apply to] "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
- (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;
 - (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
 - (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or
 - (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:
 - (i) If the pollutants are brought on or in the premises, site or location in connection with such operations by such insured contractor or subcontractor; or
 - (ii) If the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effect of pollutants.

Subparagraph (d)(i) does not apply to bodily injury or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the fuels, lubricants or other operating fluids are intentionally discharged, dispersed or released, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent to be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor.

Subparagraphs (a) and (d)(i) do not apply to "bodily injury" or "property damage" arising out of heat, smoke or fumes from a hostile fire. As used in this exclusion, a hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.

- (2) any loss, cost or expense arising out of any:
- (a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or
 - (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effect of pollutants.
- Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

3. Despite the ISO form, many insurers use slightly different versions of the absolute pollution exclusion and its definition. All versions are, however, broader than the 1973 version of the exclusion and studiously avoid using the terms *sudden* and *accidental*. A commercial general liability (CGL) is the standard liability insurance policy sold to businesses at risk of being sued should the negligence of the business or its agents cause injury. The CGL obligates an insurer both to defend claims against the

The broad language used in the current pollution exclusion has, like its predecessor, spurred heated litigation as to the meaning and application of the exclusion. To date, courts found the exclusion applicable to preclude coverage for what might be termed "classic" pollution claims involving widespread discharge of contaminants giving rise to claims of environmental degradation.⁴ Courts have divided roughly equally, however, regarding the applicability of the exclusion to so-called toxic torts or other claims in which chemicals or irritants are involved.⁵ The issue continues to be hotly litigated and debated. In late 1997, the Illinois and Massachusetts Supreme Courts refused to bar coverage for claims arising out of carbon monoxide poisoning⁶ while in early 1998 the Florida Supreme Court read the exclusion broadly and literally to bar coverage for claims arising out of an ammonia spill in the office and a crop-spraying mishap that caused immediate harm to two bystanders.⁷

Policyholder attorneys support the decisions refusing to bar coverage for workplace or home accidents as excluded pollution.⁸ Insurer attorneys have taken the opposite view and argued vigorously that the exclusion is clear and was intended to bar coverage for any claim in which a "pollutant" contributed to the injury.⁹ Some insurers have even argued that claims in which a pollutant is merely present are barred from coverage, even where the pollutant's irritating properties did not cause the injury in question.¹⁰ Academic writers have been less clear in their views,

policyholder (even if the allegations are not substantiated) and to pay liability judgments against the policyholder (or other insured under the policy). See generally DONALD S. MALECKI AND ARTHUR L. FLITNER, *COMMERCIAL GENERAL LIABILITY* (5th ed. 1994); STEMPPEL, *supra* note 1, ch. 31 and §§ T1.1-1.6 (1994 and Supp. 1998).

4. See ANDERSON, STANZLER & MASTERS, *supra* note 1, § 15.27 at 343, n.299 and cases cited therein.

5. See William P. Shelley and Richard C. Mason, *Application of the Absolute Pollution Exclusion to Toxic Tort Claims: Will Courts Choose Policy Construction or Deconstruction?*, 33 *TORT & INS. L.J.* 749-50 (1998) at n.2 (listing cases finding exclusion not to apply to "toxic tort" claims) and n.3 (listing cases finding exclusion to bar coverage for such claims).

6. See *Western Alliance Ins. Co. v. Gill*, 686 N.E.2d 997 (Mass. 1997) (pollution exclusion does not bar claim for carbon monoxide poisoning from defective installation and maintenance of equipment); *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 78 (Ill. 1997) (same; also noting that judicial divergence as to "proper interpretation" of pollution exclusion).

7. See *Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.* (damages claims stemming from ammonia spill during office move excluded from coverage by CGL pollution exclusion) and *E.C. Fogg III v. Florida Farm Bureau Mut. Ins. Co.*, 711 So. 2d 1135 (Fla. 1998) (petition for rehearing denied June 11, 1998) (claims stemming from errant crop spraying excluded from coverage by pollution exclusion).

8. See, e.g., John A. MacDonald, *Decades of Deceit: The Insurance Industry Incursion into the Regulatory and Judicial Systems*, 7 *COVERAGE* 6 (Nov./Dec. 1997); Thomas H. Sear and A. Thomas Southwick, *Hardly Accidental: The Insurance Industry's Attempt to Employ Pollution Exclusions to Deny Non-Pollution Claims*, 33 *MEALEY'S LITIG. REP.: INS.*, at 14-18 (July 5, 1994).

9. See, e.g., Shelley and Mason, *supra* note 5; Edward Zampino, Richard C. Cavo & Victor C. Harwood III, *The Sobbist's Maze: The Polluters' Revision of the History of the "Total" Pollution Exclusion*, *MEALEY'S LITIG. REP.: INS.* at 14 (Sept. 27, 1994).

10. This statement was made by State Farm's counsel at oral argument before the Florida Supreme Court in the *Deni* case, cited in full at note 7 *supra* and discussed at length in text and accompanying notes 70-122 *infra*.

although it appears that prevailing scholarly opinion favors a more constrained reading of the scope of the exclusion.¹¹

Although insurers have on occasion succeeded in persuading some courts that the pollution exclusion denies coverage to commercial policyholders for such tragic but common business hazards as carbon monoxide claims, product liability, construction and moving mishaps, and similar claims arising from ordinary business activities not normally viewed as "pollution," these victories are undeserved. As a matter of standard contract law, insurance law, and basic equity, cases applying the exclusion only to claims fairly characterizable as "pollution" are more persuasive.

Insurers have attempted to discredit these better-reasoned cases by labeling them misguided, result-oriented, or untrue to historical notions of contract law and textual meaning. Two recent commentators cleverly labeled these better decisions as the product of "deconstruction,"¹² invoking the vocabulary of leftist intellectuals (alleged at times to be nihilists)¹³ in an attempt to convince the reader that interpretation of the pollution exclusion at odds with that of the insurance industry must be the doctrinal equivalent of the Red Menace. Other insurer attorneys commenting on the issue have labeled the policyholder's position "sophist."¹⁴

11. See STEMPER, *supra* note 1, § T1.6 (1994 and 1998 Supp.) (strongly critical of broad reading of pollution exclusion). Of the major insurance law or insurance coverage treatises, this author's treatise appears to be the only one written by a nonpractitioner that takes a definitive position on the proper application of the exclusion (a position Shelley and Mason, *supra* note 5, at 772, regard as shocking in its narrow reading of the exclusion) but more on that below (see text and accompanying notes 218-21 *infra*).

Several leading works such as Robert Jerry's *Understanding Insurance Law* (2d ed. 1996) and Robert E. Keeton and Alan I. Widiss's *Insurance Law* (2d ed. 1988) do not discuss the exclusion. Although Prof. Kenneth Abraham has engaged in substantial scholarship regarding environmental liability and insurance, he does not stake out a definitive position on this contract construction issue. See KENNETH S. ABRAHAM, *ENVIRONMENTAL LIABILITY INSURANCE LAW* (1991). See also KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION: CASES AND MATERIALS* 548 (2d ed. 1995) (court decisions finding coverage despite insurers' invocation of former qualified "sudden and accidental" pollution exclusion may not have "done policyholders a favor" in view of broad language and potential effect of absolute exclusion that took its place; implies language of current pollution provision is broadly exclusionary but does not endorse this reading of exclusion).

A leading treatise authored by insurer counsel discusses the exclusion but does not comment on the varying case law. See OSTRAGER AND NEWMAN, *supra* note 1, § 10.02[e] (9th ed. 1998). Another practitioner treatise, whose author has been an expert for both policyholders and insurers, makes observations but takes no position on the exclusion's construction. See ALLAN D. WINDT, *INSURANCE CLAIMS AND DISPUTES* § 11.11 (3d ed. 1995).

Two recent treatises authored by policyholder attorneys address the exclusion and can be fairly read as supporting the constrained reading of the exclusion. See ANDERSON, STANZLER & MASTERS, *supra* note 1, §§ 15.24-15.30; PETER J. KALIS, THOMAS R. REITER & JAMES R. SEGERDAHL, *POLICYHOLDER'S GUIDE TO THE LAW OF INSURANCE COVERAGE* § 10.04[C] at 10-47 (1997) (absolute pollution exclusion "neither 'absolute' nor without ambiguity" and does not apply to toxic tort claims, product liability claims, or nonenvironmental losses).

12. See Shelley and Mason, *supra* note 5.

13. See Daniel N.K. Chow, *Trashing Nihilism*, 65 *TULANE L. REV.* 221 (1990) (characterizing much of the critical legal studies and literary deconstruction movements as nihilist and urging rejection of their values—or nonvalues); Paul D. Carrington, *Of Law and the River*, 34 *J. LEGAL EDUC.* 222 (1986) (making similar observation of CLS movement and suggesting that adherents may belong in philosophy or other academic departments rather than in professional law schools).

14. See Zampino et al., *supra* note 9.

On balance, however, it is insurer counsel who have strayed from the sounder history of contract law in general as well as the particular history of the pollution exclusion. Instead of reasonably reading the insurance policy in whole and in context, they have focused myopically and hyperliterally on the text of the exclusion to attempt to deny the sorts of claims that had traditionally been covered under the basic CGL. Although text is of course an important component of contract doctrine, so too is the purpose of the contract, the context of its execution and application, and the specific intent, if any, of the parties, and the objectively reasonable expectations of the parties. These factors not only refute the hyperliteral dictionary-supremacist method championed by insurers but also demand a constrained common sense reading of the exclusion.

II. THE ABSOLUTE POLLUTION EXCLUSION CONTROVERSY

As noted above, the absolute pollution exclusion was drafted during the early 1980s and was incorporated into the standard form CGL in 1986. All observers agree that the new exclusion was drafted to replace the 1973 "sudden and accidental" exclusion because insurers were distressed by judicial decisions holding that the 1973 exclusion did not preclude coverage for gradual but unintentional pollution. In addition, insurers feared that under these adverse precedents, insurers would be responsible for providing coverage for Superfund liability based on events that took place years or even decades earlier as long as the policyholder did not intentionally despoil the land or water at issue.¹⁵

Both policyholders and insurers agree on this much. The absolute exclusion was designed to bar coverage for gradual environmental degradation of any type and to preclude coverage responsibility for government-mandated cleanup such as Superfund, which was enacted in 1980.¹⁶ At this point, policyholders and insurers diverge. Policyholders maintain that there is no evidence that the insurance industry sought to do more than exclude these two classes of liability. Insurers by contrast maintain that the broadly worded language of the exclusion was not mere over-drafting but was consciously designed to take coverage for toxic torts of any sort outside the scope of the CGL.

Roughly half the courts construing the old, qualified exclusion had found coverage where the pollution was unintended but not abrupt, a result insurers contend was at variance with the intent of the former exclusion.¹⁷ Since introduction of the absolute exclusion, courts have generally found the exclusion to bar coverage for even unintended abrupt pollution but have differed to some degree as to what constitutes "pollution" as opposed to a nonpollution tort incidentally

15. See STEMPEL, *supra* note 1, § T1.1.

16. See Shelley and Mason, *supra* note 5, at 753-54; Zampino et al., *supra* note 9, at 16-21.

17. See OSTRAGER AND NEWMAN, *supra* note 1 § 10.02 (9th ed. 1998); STEMPEL, *supra* note 1, § T1.6 (1998 Supp.); Shelley and Mason, *supra* note 5, at 749-50, n.1 (listing cases limiting exclusion to "classic pollution") and n.2 (listing cases construing exclusion to preclude coverage for any injury caused by irritant, including products liability).

involving an irritant.¹⁸ The divide between the courts tends to be one of textual interpretation.

Courts that have construed the exclusion to the breadth urged by insurers have tended to focus on the broad definition of “pollutant” found in the exclusion and have concluded that the language is clear. These courts have read the definition’s synonyms for pollution literally. Finding the words of the definition clear, these courts then hold that there is no further judicial inquiry to be made: clear contract language applies and must control without regard to any inquiry into (a) whether the language was intended to be given broad literal sweep; (b) whether other contractual factors, such as the basic coverage otherwise available in the CGL, or contextual factors, such as the state of the CGL prior to the exclusion, make the exclusion ambiguous; (c) the intent underlying the redrafted exclusion; (d) the drafting history of the exclusion; (e) the overall purpose of the exclusion and of the CGL; (f) any insurer statements or conduct inducing reliance or possibly giving rise to estoppel; (g) public policy concerns; or (h) the expectations of the parties, particularly the policyholder. For reasons discussed at greater length below, the refusal of these courts to consider policyholder expectations is particularly surprising and disturbing because such limited use of expectations analysis would illuminate rather than usurp contract language.

As noted above, policyholders and insurers divide markedly in their view of the historical background of the pollution exclusion and the meaning of changes to the exclusion’s language. In brief, the divide is one over which methods of contract interpretation should take precedence over others and over the manner in which the contract construction inquiry should take place. Put simply, the gulf that divides insurers and policyholders is this: Insurers purport to desire court decisions to be based exclusively on the literal language of the exclusion alone since this accrues to their benefit in the bulk of coverage disputes over the exclusion. Policyholders want the text of the exclusion read in conjunction with other contract interpretation factors as this redounds to their benefit in the bulk of coverage disputes concerning the exclusion. Policyholders argue that the pollution exclusion should not be read in a manner that negates what has traditionally been standard CGL coverage for garden variety liability claims without some additional evidence suggesting that the broad language of the exclusion must be or was intended to be read literally.

Insurers, however, are plagued with some inconsistency in that they do urge use of certain nontextual factors deemed favorable to their cause, such as certain extrinsic evidence of the drafting history of the exclusion and use of certain canons of contract construction. Insurers place emphasis on the chronology and nature of the changes in language of the pollution exclusion.

18. See OSTRAGER AND NEWMAN, *supra* note 1, § 10.02[e] and [f] (9th ed. 1998); STEMPEL, *supra* note 1, § T1.6. Compare *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.*, 47 F.3d 34 (2d Cir. 1995) (exclusion does not apply to claim of carbon monoxide poisoning from defective furnace maintenance) with *Reliance Ins. Co. v. Moessner*, 121 F.2d 895 (3d Cir. 1997) (exclusion applies to claim of carbon monoxide poisoning from defective installation of furnace).

In addition to contract methodology in general, a point of pronounced contention between insurers and policyholders is the meaning to be drawn from the development of the drafting history of the exclusion. Insurers at a minimum argue that the exclusion was intended to apply to all events involving damage caused by a "pollutant," even if the damage occurred in a confined space and does not comport with the connotative meaning laypersons accord to pollution. Insurer counsel also at times seem to argue that the exclusion was meant to preclude coverage for product liability claims involving pollution and for broadly defined "toxic torts" in general.¹⁹ However, other insurer representatives appear to concede to policyholder arguments that the exclusion has no application to product liability or completed operations coverage that would otherwise be available under the CGL.²⁰ Policyholders also argue that the history of the exclusion suggests that insurers never intended the exclusion to bar coverage for toxic tort claims that stopped short of pollution and in fact represented to the contrary in obtaining regulatory approval for use of the absolute exclusion.²¹

III. CONTRACT LAW AND INSURANCE CONTRACT INTERPRETATION

A. *Review of Doctrine and Theory*

Insurers argue that the pollution exclusion is best construed by merely reading it and determining whether the liability claim at issue is one in which the harm to the claimant was caused in some way by the release of one of the listed "pollutants" that came into contact with the claimant, causing injury. In favor of this method of contract construction, insurers note that contracts are generally to be applied as written and that there is a general preference for restricting resort to evidence beyond the face of the document if possible.

However, mainstream contract law also recognizes the inherent limits of a "four-corners" approach and the frequent need to consult all available sources of information regarding the meaning of a disputed term. Professor Farnsworth finds that

[t]he overarching principle of contract interpretation is that the court is free to look at all the relevant circumstances surrounding the transaction. This includes all writings, oral statements, and other conduct by which the parties have manifested their assent, together with any prior negotiations between them and any applicable course of dealing, course of performance, or usage. The entire agreement, including all writings, should be read together in light of all the circumstances, even though the effect of this may be to subordinate minor points of grammar or punctuation to the sense of the agreement as a whole. Since the purpose of this inquiry is to ascertain the meaning to be given to the language, there should be no requirement that the language be ambiguous, vague, or otherwise uncertain before the inquiry is undertaken.²²

19. See, e.g., Shelley and Mason, *supra* note 5, at 751-52.

20. See, e.g., Zampino et al., *supra* note 9, at 20-21.

21. See, e.g., MacDonald, *supra* note 8, at 8-12.

22. See E. ALAN FARNSWORTH, CONTRACTS, § 7.10 at 511-12 (2d ed. 1990).

Thus, one of the nation's most distinguished contract law authorities,²³ and a mainstream contracts scholar,²⁴ implicitly rejects the methodology suggested by insurers (narrow scrutiny of a few words from one policy exclusion) and endorses a more wide-ranging inquiry into the meaning of language. This approach is not in derogation of contract language and does not constitute some impermissible "deconstruction" of contract language but instead represents the widely held view that language can be accorded legally determinative meaning only after a broad-based assessment of the factors shedding light on this meaning.

Even the sources invoked by insurers fail to justify the crabbed approach to discerning contract meaning urged by insurers. For example, in their recent article, Shelly and Mason quote Oliver Wendell Holmes's famous aphorism in favor of objective textualism ("we do not inquire what the legislature meant; we ask only what the statute means").²⁵ But in this same article Holmes observes that

[a] word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in the particular case, and very likely will see that it there has a shade of significance more refined than any given in the wordbook. But in this first step, at least, you are not troubling yourself about the idiosyncrasies of the writer, you are considering simply the general usages of speech. So when you let whatever galvanic current may come from the rest of the instrument run through the particular sentence, you still are doing the same thing.²⁶

.....

[T]he normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer. . . .²⁷

Holmes also recognized that custom, practice, course of dealing, and habit could be applied to interpret contract meaning.²⁸

23. In addition to having authored the leading modern treatise in the field and having published many articles on contract law, Columbia University law professor Farnsworth was also the Reporter for the American Law Institute's *Restatement (Second) of Contract Law* (1981).

24. Farnsworth's views of the limits of literalism are in accord with the other leading contracts scholars. See, e.g., PETER LINZER, *A CONTRACTS ANTHOLOGY* (2d ed. 1995) (particularly Part IV) (anthology of writings by leading contracts scholars, bulk of whom reject literalist, absolutist, textualist position); GORDON D. SCHABER AND CLAUDE D. ROHWER, *CONTRACTS* § 6-12 (3d ed. 1990); *Symposium on Grant Gilmore's The Death of Contract*, 90 NW. U. L. REV. 1 (1995), especially Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49 (1995) (contract law has not been exclusively focused on text and four corners of instrument, even during apogee of allegiance to objective theory of contract). Although these and other mainstream contracts authorities may differ in their relative preference for textualism and disagree in specific cases about the apt use of interpretative materials, all agree that contract interpretation is not a literalist mechanical process involving only the contract and a dictionary.

25. See Shelley and Mason, *supra* note 5, at 782, quoting Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1898).

26. See Holmes, *supra* note 25, at 417.

27. See Holmes, *supra* note 25, at 418.

28. See Holmes, *supra* note 25, at 420.

Attempts to enlist Arthur Corbin, whom insurer counsel commentators Shelley and Mason correctly identify as one commonly associated with a liberal attitude toward extrinsic evidence, fare no better. They quote Corbin's observation that extrinsic evidence cannot be used to contradict, or delete clear contract language or to substitute other language for the plain meaning of a contract term.²⁹ But in this same article, Corbin observes that the "cardinal rule" of contract interpretation is to discern the intent of the parties (and hence the intended meaning of the words at issue).

[I]t is wholly impossible to do this without being informed by extrinsic evidence of the circumstances surrounding the making of the contract. These include the character of the subject matter, the nature of the business, the antecedent offers and counter offers and the communications of the parties with each other in the process of negotiation, the purposes of the parties which they expect to realize in the performance of the contract. The court must put itself "in the shoes" of the parties.³⁰

Further, Corbin, like Farnsworth,³¹ appears to distinguish inadmissible parol evidence (oral testimony as to intended meaning that conflicts with contract text or evidence of prior negotiations at variance from the text) from more broadly receivable extrinsic evidence such as the background and context of the contract.³² As an illustration of his interpretative methodology, Corbin uses a case in which the term "chicken" was seen as sufficiently unclear to permit receipt of extrinsic evidence on the question.³³

Corbin also wrote that "no word has one true and unalterable meaning."³⁴ As more recently put by a prominent contracts scholar writing in the Corbin tradition, "[t]he very concept of plain meaning finds scant support in semantics, where one of the cardinal teachings is the fallibility of language as a means of communication."³⁵

29. See Shelley and Mason, *supra* note 5, at 781, quoting Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. REV. 161, 171 (1965).

30. See Corbin, *supra* note 29, at 162.

31. See Farnsworth, *supra* note 22, §§ 7.2, 7.3, citing CORBIN ON CONTRACTS § 574 (1960) at 469.

32. See Corbin, *supra* note 29, at 166-68, 188-89. According to Corbin:

In this process of interpretation, no relevant credible evidence is inadmissible merely because it is extrinsic; all such evidence is necessarily extrinsic. When a court makes the often repeated statement that the written words are so plain and clear and unambiguous that they need no interpretation and that evidence is not admissible, it is making an interpretation on the sole basis of the extrinsic evidence of its own linguistic experience and education, of which it merely takes judicial notice.

Id. at 189.

33. See Corbin, *supra* note 29, at 165-69, discussing *Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960), a case in which the seller delivered stewing chicken and the buyer insisted the contract called for young chickens suitable for broiling or frying. Corbin agreed that the word "chicken" was reasonably susceptible to either meaning and also agreed with the court's willingness to consider extrinsic evidence proffered by the buyer as well as the court's conclusion that in the absence of sufficiently persuasive such evidence, the preferred meaning of "chicken" was the broader connotation that included any chick, be it frying, broiling, stewing, or otherwise.

34. See 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 535 at 16 (1960).

35. See E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939, 952 (1967).

Furthermore, contract construction inherently involves more than simply extracting a linguistic definition from the contract language (even assuming reasonable readers were not in some disagreement over the semantic meaning of the words):

[A]s part of the process of interpreting whether a contract was formed and, if so the scope of contractual obligation, legal decision makers mold obligations along socially desired lines. Interpretation cannot be neutral, but must be done from some point of view. [T]he law must supply a great deal of the content of contractual obligations. No matter how detailed parties are in their planning, they will never plan for every contingency (nor is it necessarily desirable that the law encourage them to try to do so). Supplied terms reflect social views of the proper goals of contractual relations.³⁶

Writing in a similar vein, one court observed:

In truth, language is inherently ambiguous. Nevertheless, over the centuries courts have developed a variety of interpretative tools to use in resolving the ambiguities that necessarily attach when written laws must be translated into legal decisions. The reliance of courts and litigants on claimed "plain meaning" usually represents a conscious disregard of evidence that would lead to an undesired result, and not the existence of true unambiguity. To translate the words [at issue in the case] into terms of meaning requires looking to all available interpretative tools and not simply relying on the false idol of "plain meaning."³⁷

Consequently, mainstream courts routinely consider the purpose of the contract and the intent of the parties in construing contract language.³⁸

Among modern scholars, Farnsworth is particularly dismissive of any fetish for the dictionary in construing contracts, finding it questionable whether a word has a meaning at all when divorced from the circumstances in which it is used.

Dictionary definitions may be of help in showing the general use of words, but they are not necessarily dispositive. . . . [P]arties do not always use the words in accordance with their dictionary definitions. Often the meaning attached to a word by the parties must be gleaned from its context, including all the circumstances of the transaction. . . . [S]ometimes it can be demonstrated that the parties contracted with respect to a usage in their trade or even with respect to a restricted private convention or understanding.³⁹

A literal textual focus on only the pollution exclusion alone cannot be the correct manner of construing the exclusion's effect in contested cases. Contract "language is to be interpreted in light of the custom and usage in the trade or community

36. See Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 708 (1990).

37. See *Apache Nitrogen Prods., Inc. v. Harbor Ins. Co.*, 145 F.R.D. 674, 679 (D. Ariz. 1993) (citation to Corbin omitted). See also FARNSWORTH, *supra* note 22, § 7.9.

38. See, e.g., *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.*, 47 F.3d 34, 37-38 (2d Cir. 1995) (applying New York law) (pollution exclusion restricted to environmental degradation claims and does not bar coverage for carbon monoxide liability claims).

39. See Farnsworth, *supra* note 22, § 7.10 at 512 (footnotes omitted).

and in accordance with any prior course of dealing between the parties.”⁴⁰ Despite the parol evidence rule barring evidence of prior negotiations to vary the meaning of clear language, the “rule does not preclude use of extrinsic evidence offered for the purpose of lending meaning to contract terms. The use of extrinsic evidence to establish usage of trade, course of dealing, or course of performance is not barred by the parol evidence rule.”⁴¹ The modern view is that extrinsic evidence can be admitted as an aid to interpretation “so long as the evidence is being offered to prove a meaning to which the language of the writing is reasonably susceptible,”⁴² although there is substantial division of the courts on this point. However, “[i]t is one thing to accept that what is written cannot be contradicted. It is quite another to accept that what is written cannot be supplemented even by consistent terms.”⁴³

In addition, there is also the venerable canon that ambiguities in a contract are to be construed against the drafter. Farnsworth has broadly classified the categories of linguistic uncertainty as: (1) vagueness, (2) ambiguity of term; (3) ambiguity of syntax; and (4) ambiguity resulting from inconsistent or contradictory language.⁴⁴ Vague words are those not neatly bound but indicating only a general concept so that its applicability in marginal situations is uncertain. An ambiguous provision in a contract is one that may have two distinct connotations. Ambiguity of syntax involves uncertainty created by the way otherwise clear words are put together. Ambiguity from inconsistent language takes place when one provision of a contract is arguably in conflict with another provision of the contract. To this list one might add ambiguity caused by shifting context and unexpected application of the policy to unforeseen circumstances, or what is often termed “latent” rather than “patent” ambiguity. Even if one adheres to the objective theory of contract and finds no ambiguity in a term, or the syntax of the policy or conflicting provisions of a policy, there remains the issue of whether policyholder reasonable expectations might countermand clear policy language.

The comprehensive contextual approach to contract interpretation is not only well established for “ordinary” contract law but has been viewed as particularly apt for insurance contract matters.⁴⁵ In addition, mainstream contract law has

40. See SCHABER AND ROHWER, *supra* note 24, § 6 at 11.

41. *Id.* § 91 at 167.

42. *Id.* § 94 at 174, citing *Pacific Gas and Electric Co. v. G.W. Thomas Drayage and Rigging Co.*, 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968) (Cal. 1968) and RESTATEMENT (SECOND) OF CONTRACTS. *Accord*, Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 534 (1996) (citing *Thomas Drayage* approach as modern version of parol evidence rule gaining ascendancy).

43. See Farnsworth, *supra* note 22, § 7.3 at 473.

44. See FARNSWORTH, *supra* note 22, § 7.8 (2d ed. 1990); E. Alan Farnsworth, *Meaning in the Law of Contracts*, 76 YALE L.J. 939, 940-42 (1967).

45. See James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation? Text Versus Context*, 24 ARIZ. ST. L.J. 995 (1992); Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function*, 52 OHIO ST. L.J. 1037 (1990). *But see* Peter Nash Swisher, *Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach*, 57 OHIO ST. L.J. 543 (1996) (placing more interpretative emphasis on policy text but continuing to argue for construction of text based on contextual factors indicative of meaning).

long incorporated the expectations of the parties in assessing contract meaning. A half-century ago, Corbin listed as his first black letter pronouncement of the law of contracts that the “Main Purpose of Contract Law Is the Realization of Reasonable Expectations Induced by Promises.”⁴⁶ He observed:

The law does not attempt the realization of every expectation that has been induced by a promise; the expectation must be a reasonable one. Under no system of law that has ever existed are all promises enforceable. The expectation must be one that most people would have; and the promise must be one that most people would perform. This necessarily leads to a complexity in the law, to the construction of the various rules determining the circumstances under which a promise is said to be enforceable and those under which its performance will be excused.

....

reasonableness is no more absolute in character than is justice or morality.⁴⁷

Thorny questions, of course, remain regarding whose expectations should control in the event of conflict and in determining the actual content of expectations as well as the degree to which expectations are belied by or trumped by policy language and other factors surrounding a disputed term. But resolving those sorts of questions is the essence of adjudicative activity. By disputing this, the critics of comprehensive contract construction are in reality arguing that comprehensive judicial interpretation of written instruments somehow violates freedom of contract. On the contrary, the existence of volitional contracting depends upon having a court system that can resolve the inevitably arising disputes over meaning by rendering decisions that do more than look up the disputed term in a dictionary. If this were the only task required for contract construction, judges could be replaced by computer software, perhaps not even particularly sophisticated software.

Meaning can only be derived from context and with a functional view of the policy in question and its intended purpose. Logically, the parties' expectations would shed light on meaning, for both insurance and noninsurance contracts. But this potential use of expectations analysis is truncated by adverse reaction to the reasonable expectations “doctrine” per se, which Judge Keeton presented as creating “rights at variance” with the text of the policy.

However, if contract law is properly understood historically and correctly permitting substantial use of nontextual factors in resolving interpretative issues, the legitimacy and value of the reasonable expectations principle becomes apparent. Although much contract law scholarship and precedent has stressed the textual and formal,⁴⁸ an at least equally weighty and persuasive body of case law and analysis has promoted the broader view more hospitable to the reasonable

46. See ARTHUR C. CORBIN, *LAW OF CONTRACTS* § 1 at 1 (1950) (one volume edition) (boldface in original).

47. *Id.* at 2. *Accord*, Farnsworth, *supra* note 22, § 3.9 at 133 (“objective theory” of contract is today “widely and unquestioningly accepted as protecting the ‘reasonable expectations’ of the parties”).

48. See, e.g., SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACT* (original ed. 1936; 4th ed. 1990 and supplements).

expectations doctrine.⁴⁹ The broader, functionalist view, frequently associated with Professors Corbin and Farnsworth, appears to have gained ascendancy in the years after World War II and culminating in the *Second Restatement*,⁵⁰ although the 1980s and 1990s have witnessed something of a formalist revival, particularly at the Supreme Court.⁵¹ However, this formalist recidivism⁵² hardly suggests the illegitimacy of more comprehensive analysis.

49. See, e.g., Farnsworth, *supra* note 22; ARTHUR L. CORBIN, CORBIN ON CONTRACTS (1952) (one volume edition). Although frequently regarded as more formalist than Farnsworth, modern contracts scholars and treatise authors Calamari and Perillo appear to weigh in more on the Corbin/Farnsworth side of the debate and against Williston. See JOHN D. CALAMARI AND JOSEPH M. PERILLO, CONTRACTS, § 47 (1970) (discussing "Standards of Interpretation," authors state there is no "lawyers' Paradise" where "all words have a fixed, precisely ascertained meaning," (id. at 89) setting off authors' perspective from those of evidence expert James Bradley Thayer, a Harvard Law faculty contemporary of contract law formalist Samuel Williston (citing JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON THE LAW OF EVIDENCE AT COMMON LAW 428-29 (1898)).

Although the theme of his study is largely that realism did not completely supplant formalism as the dominant paradigm in American legal thought, English scholar Neil Duxbury describes the American legal community as evolving during the twentieth century toward a less text-centered jurisprudence where "word-worship" was to a large extent attacked or even belittled. See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 119-21 (1995).

50. See American Law Institute, RESTATEMENT (SECOND) OF CONTRACTS (1981); Schaber and Rohwer, *supra* note 24, § 88 at 147 (3d ed. 1990) (authors of basic contract law text designed as primer and study aid for first-year law students state that "[o]ne purpose of contract law is to protect the reasonable expectations of persons who become parties to a bargain"). The Schaber and Rohwer view is in part premised on the work of earlier scholars who identified an "expectation interest" in contract performance. See, e.g., LON FULLER AND MELVIN ARON EISENBERG, BASIC CONTRACT LAW (5th ed. 1990); FRIEDRICH KESSLER, GRANT GILMORE & ANTHONY T. FRONMAN, CONTRACTS: CASES AND MATERIALS (3d ed. 1986).

In particular, Schaber and Rohwer observe that "[t]here is nothing wrong with 'plain meaning' and it may be a satisfactory answer to interpretations questions in some cases, but the problem may be more difficult than this expression indicates." SCHABER AND ROHWER at 148. They also note that even under the purportedly formalist/textualist views of Williston and the *First Restatement*, for which Williston served as Reporter, a number of nontextual factors were proffered as interpretative tools where the contract text at issue was not indisputably clear (id. at 150-53). The approach of Corbin, Farnsworth, and the *Second Restatement* was more oriented to the parties' actual and subjective meaning and did not seek an "objective" meaning for contract terms, as had Williston.

51. See Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 58-59 (1995) (viewing recent Supreme Court decisions as formalist and rendered as if Court was "blinded by a thick fog of free market rhetoric"); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431 (1993) (finding Supreme Court contract cases of the 1980s governed by unrealistically rigid textualism, formalism, and insensitivity to pragmatic policy concerns). See Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1412-17 (1996) (criticizing Court's interpretation of arbitration clauses in contracts as adopting erroneous view of objective meaning and reasonable reach of contract language).

52. Although the standard "story" of the march of twentieth century American jurisprudence is of a trek away from formalism and toward functionalism, recent scholarship has persuasively argued that modern American legal thought has engaged in a protracted and probably perpetual tug of war between these schools of thought, but something considerably more complex than a "pendulum swing" alternating between periods of formalist and functionalist dominance. See Duxbury, *supra* note 49, at 2-5 (1995). See also id. at 10 (realist revolt against formalism was "by no means as straightforward as some commentators have cared to suggest"); 21 (even disciples of highly formalist nineteenth century Harvard Law Dean Christopher Columbus Langdell (such as Samuel Williston) found Landell's approach too narrow); 47 (progressive judges such as Benjamin Cardozo exhibited both formalist and functionalist traits); 55 (noting Harvard Law Dean Roscoe Pound's professed sociological jurisprudence attacking

Insurance counsel tacitly concede that there is a good deal more to contract interpretation than looking it up in the dictionary. For example, in arguing for a broad application of the pollution exclusion, recent commentators Shelley and Mason not only argue that the meaning of the terms is clear but also make at least limited use of arguments beyond the four corners of the current exclusion to argue for broader construction. These include canons of construction such as construing related items alike (*noscitur a sociis* or "it is known by its associates")⁵³ or invoking the canon of construction against interpreting words to be redundancies, thereby arguing that the many words in the definition of "pollutant" all must be given full breadth.⁵⁴ In particular, insurers place significant importance not only in the text of today's pollution exclusion but also upon the prior text of the qualified exclusion and attach meaning not only to the language of the current exclusion but also to language that was removed from the former exclusion.⁵⁵ These contract construction techniques are all something quite beyond merely according dictionary meaning. Consideration of the language changes over time in insurance policies; the reaction of the business community, and the endorsements offered or available are all matters of extrinsic evidence. This prompts the question insurers appear incapable of answering: If this type of extrinsic evidence of policy meaning is open for consideration, why are the insurer statements and other drafting history items proffered by policyholders not equally acceptable as indicia of meaning?

The insurer argument that cases finding coverage despite the exclusion are somehow reckless or "deconstructionist" rather than conventional in contract analysis, again falls short of persuasiveness. Mainstream contract doctrine has never been as relentlessly textualist as suggested by insurers. This is particularly true for insurance coverage disputes; there is a strong commitment to construing ambiguities favorably toward the policyholder and at least partial judicial embrace of a doctrine of reasonable expectations that in some jurisdictions and instances may override even clear contract language. As with other contracts, insurance contract law appreciates not only text but also party intent, contract purpose, background, context, expectation, reliance, equity, and public policy. Only if one unduly minimizes these aspects of contract construction can one embrace the insurance industry's view of the pollution exclusion.

In particular, the reasonable expectations principle holds substantial potential, not as a means of trumping contract "meaning" but a map for approaching and a gauge for measuring the words used in a written instrument. The reasonable expectations principle enunciated in Judge Keeton's famous article states that courts do and should construe insurance policies consistent with the objectively reasonable

as "mechanical" jurisprudence the high formalism of Langdell); 60 (but both Pound and Oliver Wendell Holmes were both formalist and antiformalist); 301-419 (modern "law and economics" movement has elements of both formalism and functionalism).

53. See Shelley and Mason, *supra* note 5, at 768.

54. See *id.* at 769.

55. See *id.* at 769-70.

expectations of the policyholder, even where those expectations are contradicted by apparently clear policy language.⁵⁶ But by focusing on this version of expectations analysis, courts have arguably overlooked the opportunity to use expectations analysis at the outset to determine if words are clear or ambiguous—and to determine the meaning of policy terms in context.

The reasonable expectations "doctrine" was not, of course, identified as a separate mode of insurance policy construction until Professor (now Judge) Robert Keeton's famous article,⁵⁷ "Insurance Law Rights at Variance with Policy Provisions."⁵⁸ He subsequently came to describe the consideration of expectations as moving from an identifiable "principle" during the 1960s to a "doctrine" in the 1970s.⁵⁹ Keeton's article was empirical as well as normative in that it examined judicial decisions and attempted to find a uniform explanation for cases that seemed to stretch or torture the notion of linguistic ambiguity. Keeton summarized his assessment in the now-famous words:

objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.⁶⁰

56. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (pt. I) (1970).

57. Substantial portions of the following discussion of the history and evolution of the reasonable expectations doctrine are derived from and developed at greater length in Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, CONN. INS. L.J. (1998) (forthcoming).

58. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (pt. I) (1970). In this first article, Keeton addressed the degree to which three factors—objectively reasonable policyholder expectations, detrimental reliance, and unconscionability—combined to give policyholders rights beyond the text of the insurance policy. In Part II of his project, Keeton discussed the legal evolution away from rigorous judicial enforcement of warranty provisions in insurance policies, which also tended to give the policyholder rights "at variance" with the policy language in that warranty provisions had historically been strictly construed in favor of the insurer rather than the policyholder. The second article also discussed insurer reservation of rights and regulatory controls on policy language and insurer practices. See Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions: Part Two*, 83 HARV. L. REV. 1281 (1970).

59. Keeton further elaborated on the distinction between doctrine and principle:

As an aid to understanding this development in insurance law, it may be useful to observe a distinction between what we might call a "principle" and a "doctrine" of honoring reasonable expectations. What has happened in the 1960s and 1970s is explicit judicial endorsement of a new ground of decision—a development connoted by the term "doctrine." The influence of the principle was apparent even earlier, and its influence during the 1960s and 1970s was considerably more pervasive than the applications of the doctrine.

.....

Principles collide in a sense beyond doctrinal conflict. Doctrines are sets of explicit rules of decision—the outcomes of accommodation among competing principles.

Robert E. Keeton, *Reasonable Expectations in the Second Decade*, 12 FORUM 275, 276-77 (1976).

60. 83 HARV. L. REV. at 967. In addition, the Keeton article posited additional principles creating policyholder rights beyond the terms of insurance policy text; most importantly limits on policy language created by insurer misconduct, estoppel, or unconscionability of terms. See 83 HARV. L. REV. at 963, 974, 977-78.

Keeton observed that expectations analysis was utilized by courts on occasion to go beyond the normal benefit accorded the policyholder when policy language was unclear (in which case any ambiguities in the policy are construed against the policyholder and in favor of the insured). When courts apply "pure" reasonable expectations theory, the court mandates coverage consistent with the policyholder's expectations even if relatively clear policy language is to the contrary.⁶¹

In the wake of the Keeton article, courts and commentators expressly identified expectations analysis as something more than ordinary equitable interpretation in which the expectations of contracting parties are considered in decoding ambiguous contract language and ensuring that literal interpretation of a contract term does not bring an absurd result. Commentary after the Keeton article focused on the rights at variance "brand" of reasonable expectations set forth by Keeton and debated the extent to which policyholder expectations should be permitted to trump "clear" contract provisions. Although the presence of a role for a "milder" version of expectations analysis is frequently acknowledged by commentators, it has not been the primary subject of scholarly or judicial explorations of the role of reasonable expectations.⁶² However, courts routinely state that insurance policy language should be interpreted consistently with the reasonable expectations of the policyholder, even if there is not a "doctrine" permitting these expectations to trump "clear" policy language.⁶³

After Judge Keeton's article, several courts accepted Keeton's analysis and overtly declared themselves to be followers of the reasonable expectations approach.⁶⁴ After its rapid initial success, however, the Keeton doctrine was subject to limitation, retrenchment, and even reversal in many states.⁶⁵ Today, by the most liberal count of two leading commentators, thirty-eight states "have recognized some variation of the reasonable expectations doctrine."⁶⁶

The Keeton formulation of the reasonable expectations principle is viewed by

61. The rationale for the approach is based on several factors: complexity of policy language; standardization of policies; the adhesion nature of most insurance policies; the contracting process, in which insured almost never see the full policy until after it is in force and seldom read it; and the need to protect unsophisticated or vulnerable insured. See Robert Keeton, *Rights at Variance*, 83 HARV. L. REV. at 963-85; Stempel, *Interpretation of Insurance Contracts*, *supra* note 1, § 11.3; Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 324-30 (1986); Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151, 1153-55 (1981); Stephen J. Ware, Note, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1463-64 (1989).

62. See generally Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 1037 (1990).

63. See, e.g., *Ace Wire and Cable Co. v. Aetna Cas. & Sur. Co.*, 60 N.Y.2d 390, 457 N.E.2d 761, 469 N.Y.S.2d 655, 658 (1983) (in construing policy, courts should consider "reasonable expectation and purpose of the ordinary businessman").

64. See STEMPEL, *supra* note 1, § 11.1 at 312 (1994); Rahdert, *supra* note 61, at 324, 345-55 (1986); *Judge Made Insurance*, *supra* note 61, at 1153, n.7 (1981) (finding more than 100 "opinions voicing the expectations principle" decided "both before and after Professor Keeton's article").

65. See STEMPEL, *supra* note 1, § 11.4.4, Rahdert, *supra* note 61 (describing state court decisions reversing or limiting earlier application of reasonable expectations doctrine).

66. See OSTRAGER AND NEWMAN, *supra* note 1, § 1.03[b] at 22.

much of the legal and political mainstream as too inconsistent with the prevailing American paradigm of judicial restraint, strict construction of disputed texts, and minimal government involvement in market activity. But properly understood, the expectations concept is consistent with judicial restraint, strict enforcement of contracts, and predictability in law.⁶⁷ The reasonable expectations doctrine, even in its strong "rights at variance" form, is actually consistent with the prevailing jurisprudential ethos because of the context of insurance coverage. Determining the "correct" meaning of an insurance policy inevitably requires consideration not only of policy text but also the reasonable expectations of *both insurer and insured*, even where those expectations to some extent run counter to the text and certainly where text is unclear, insufficiently certain, or applied to unanticipated situations.

In addition, of course, the reasonable expectations of the parties to an insurance contract can be used not only to construe ambiguous policy text or to overcome clear text violative of the insured's reasonable expectations but also to serve as a check on absurd hyperliteral interpretations of policy text. The reasonable expectations approach can assist courts in determining whether policy provisions are ambiguous or whether "painstaking" study of the policy suggests a clear meaning for problematic text. All of these varieties of the reasonable expectations approach merit more frequent, more expansive, and more self-consciously reflective use by courts.

B. *A Case Study in the Failure of Insurance Policy Literalism and Formal Textualism*

In *Deni Associates of Florida, Inc. v. State Farm Fire & Casualty Insurance Co.* and *E.C. Fogg III v. Florida Farm Bureau Mutual Insurance Co.*,⁶⁸ the Florida Supreme Court gave a broadly literal reading to the pollution exclusion. Prior to *Deni/Fogg*, Florida had never expressly ruled on the role of reasonable expectations analysis in insurance coverage. In cases involving hidden or nonobvious restrictions on coverage, Florida courts historically found oppressive language to be ambiguous or vitiated by other representations.⁶⁹ In general, Florida insurance coverage cases

67. See Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, CONN. INS. L.J. (1998) (forthcoming).

68. 711 So. 2d 1135 (Fla. 1998).

69. See, e.g., *Florida Farm Bureau Ins. Co. v. Birge*, 659 So. 2d 310 (2d Dist. Ct. App. 1994) (holding, over strong dissent, that absolute pollution exclusion does not bar coverage for damages caused by sewer backup notwithstanding obvious contaminant quality of loss).

We agree with the trial judge that the policy was ambiguous. The average homeowner's examination of the insurance contract would not reveal the applicability of these exclusions to this type of disaster.

Our conclusion is supported by the availability of clear and unambiguous language that the insurance company could have used to exclude damage resulting from a backup of raw sewage.

Id. at 311. See also *Weldon v. All American Life Ins. Co.*, 605 So. 2d 911, 915 (2d Dist. Ct. App. 1992) ("Since an insurer, as draftsman of the form policy, will not be allowed to use obscure terms to defeat the purpose for which a policy is purchased, the terms must be liberally construed in favor of coverage so that where two interpretations are available the one allowing greater indemnity will prevail."); *Bunnell Med. Clinic, P.A. v. Barrera*, 419 So. 2d 681, 683 (5th Dist. Ct. App. 1982) (finding seemingly facially clear language to have "latent" ambiguity requiring use of extrinsic information to construe policy in favor of coverage).

generally followed the traditional approach to policy interpretation and accepted the common precepts that: the meaning of a contract is a question of law;⁷⁰ the policy is to be read as a whole rather than focusing on words in isolation, with effect given to all provisions if possible;⁷¹ terms and phrases in an insurance policy are generally given their natural meaning as understood by (here it is again) a reasonable person in the position of the policyholder;⁷² and where a policy term or provision is textually clear, it will be enforced as written except where it will produce an absurd result or impose an unconscionable situation upon the policyholder.⁷³ When Florida courts find that policy language is clear, parol evidence (evidence of prior contract negotiations) and extrinsic evidence (other extratextual matter) are generally not admissible to vary or modify the textual terms.⁷⁴ Such evidence is available, however, in order to explain an unclear provision.⁷⁵

Deni Associates, an architectural and engineering firm, was in the process of moving office equipment into new quarters when a blueprint machine was jostled or knocked over, spilling ammonia contained in the machine. Ammonia is used as part of the process of making blueprints. The ammonia spill was serious enough to force evacuation of the building for six hours, breaking of a window for ventilation, and removal of affected carpeting. Other building tenants were evacuated, leading to claims against Deni. In the companion case to *Deni*, citrus farmers Fogg, Lane, and Clark retained a contractor to spray Ethion insecticide on the citrus grove. Using a helicopter, the sprayer went slightly wide of the mark, spraying two men on adjacent property, resulting in serious injuries to the bystanders and substantial personal injury claims against Fogg. Both Deni and Fogg sought defense and indemnity under their respective CGL policies.

The trial courts in both *Deni* and *Fogg* ruled that this "absolute" pollution exclusion was ambiguous as applied to the instant facts and granted summary judgment for the policyholders. The Fourth District Court of Appeal reversed.⁷⁶ The trial court in *Deni* not only employed traditional ambiguity analysis but expressly hinged its decision upon "what a reasonable person in the position of the insured would have understood the word to mean."⁷⁷ In reversing, the majority of a sharply divided en banc Fourth District disagreed and after an extensive discus-

70. See *Jones v. Utica Mut. Ins. Co.*, 463 So. 2d 1153 (Fla. 1985).

71. See *Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So. 2d 938 (Fla. 1979).

72. See *Weldon v. All American Life Ins. Co.*, 605 So. 2d 911, 914-15 (2d Dist. Ct. App. 1992); *American Mfrs. Mut. Ins. Co. v. Horn*, 353 So. 2d 565 (3d Dist. Ct. App. 1977), *cert. denied*, 366 So. 2d 885 (Fla. 1978).

73. See *Jefferson Ins. Co. of N.Y. v. Sea World of Florida, Inc.*, 586 So. 2d 95 (5th Dist. Ct. App. 1991); *United States Liability Ins. Co. v. Bove*, 347 So. 2d 678 (3d Dist. Ct. App. 1977).

74. See *Dimmitt Chevrolet Inc. v. Southeastern Fidelity Ins. Corp.*, 636 So. 2d 700, 702-03 (Fla. 1993) (refusing to consider drafting history and statements to regulators as relevant to meaning of "sudden and accidental" pollution exclusion deemed textually unambiguous by court), reversing decision in *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, 1992 Fla. LEXIS 1599, *15-*21 (Fla. 1992) (finding drafting history and regulatory estoppel relevant to determine the meaning of "sudden and accidental" language).

75. See *Dimmitt Chevrolet v. Southeastern Fidelity Ins. Corp.*, 636 So. 2d 700, 705 (Fla. 1993).

76. See 678 So. 2d at 400.

77. 678 So. 2d at 399.

sion found the pollution exclusion unambiguous and clearly applicable to the two coverage disputes.⁷⁸

Despite its view of linguistic clarity and aversion to the reasonable expectations approach, the *Deni/Fogg* majority set the stage for the Florida Supreme Court to consider in detail the reasonable expectations doctrine and the scope of the absolute pollution exclusion:

Nevertheless, we also recognize that CGL policies are widely and generally used in Florida. We perceived, as demonstrated by the two summary judgments reviewed in this decision, that there is an opinion in the bench and bar that these categorical exclusions of pollution coverage are ambiguous. Therefore, to enable the supreme court itself to decide the issue of ambiguity and consider the doctrine of reasonable expectations, we certify the following question to the court: *Where an ambiguity is shown to exist in a CGL policy, is the court limited to resolving the ambiguity in favor of coverage, or may the court apply the doctrine of reasonable expectations of the insured to resolve ambiguities in CGL policies?*⁷⁹

Despite oral argument before what then appeared to be a closely divided court, the *Deni/Fogg* opinion by the supreme court was remarkable for its simplified—arguably oversimplified—analysis of both contract doctrine and the pollution exclusion. The crabbed formalism of the eventual supreme court opinion was particularly surprising because the court appeared to have recognized the more complex aspects of the interpretative problem during oral argument.

As noted in the colloquy between insurers and Texas regulators,⁸⁰ there is a by-now well-known hypothetical designed to test the application of the pollution exclusion that asks whether a "slip-and-fall" claim against a grocer is excluded if the patron slips on spilled bleach rather than spilled ketchup.⁸¹ At the *Deni/Fogg* oral argument, the Florida Supreme Court pressed this hypothetical with interesting results. State Farm's counsel took the position that the pollution exclusion would

78. The *Deni/Fogg* majority in the court of appeal was clearly motivated by fears of judicial activism—stating that courts could not "rewrite" unambiguous contract language to reach a preferred result. Courts must be mindful not to "torture" policy language in favor of the insured. See 678 So. 2d at 401, 403. Said the court:

When a policy clearly defines a term, however, it is error for the court to engage in further construction of the defined term under the rule of plain and ordinary meaning. The purpose of defining a contractual term is to make clear that the parties intend something in addition to the plain, ordinary meaning of the defined term. Hence, by finding an ambiguity in the general toxicity versus special toxicity rationale applied, the trial court has failed to give effect to the clear meaning of the actual exclusion defined in the policy. The court's construction has effectually created a limitation on the breadth of the exclusion and added a coverage that the insurer had clearly excluded.

678 So. 2d at 403.

79. 678 So. 2d at 403-04 (emphasis in original). The Fourth District's *Deni/Fogg* majority acknowledged a role for "reasonable person" analysis in that Florida law follows the traditional rule of insurance contract interpretation "which requires that policy language be read as it would be understood by reasonable people, i.e., given its plain and ordinary meaning."

80. See text and accompanying note 152, *infra*, regarding this episode and background of the pollution exclusion generally.

81. See also STEMPER, *Interpretation of Insurance Contracts*, *supra* note 1, § T1.6 at 116-18 (1998 Supp.) for reproduction of this exchange.

bar a claim if a patron slipped on ammonia leaking from the Deni Associates' blueprint machine or any other traditional slip-and-fall claim as excluded because the absolute pollution exclusion was "intended to be broad."⁸² Farm Bureau's counsel, when presented with the hypothetical, argued that the slip claim was covered and not excluded because the injury was not caused by pollution but by wetness,⁸³ a less rigid and more reasonable response than that given by State Farm. However, the inconsistency between the State Farm and Farm Bureau positions prompted one justice to wonder aloud whether this interinsurer disagreement was not per se evidence of ambiguity.⁸⁴ Farm Bureau counsel dealt with the question as well as could be expected and suggested that the "toxic nature" of the injury should be the controlling factor in determining whether the pollution exclusion applied, a position akin to that advanced by insurer counsel in a recent article.⁸⁵

In its opinion, the court focused narrowly on the pollution exclusion language, read it extremely literally, and concluded that this literal reading was so clear as to preclude alternative meanings. The reasonable expectations principle was considered inappropriate for assisting the analysis. The court rejected reasonable expectations analysis curtly but in language that suggested the Florida Supreme Court harbored considerable misunderstanding about the doctrine similar to that held by the Fourth District Court of Appeal majority.⁸⁶ The court also refused to use ambiguity analysis, contextual construction, estoppel, or unconscionability to limit the literal reach of the language of the absolute pollution exclusion.⁸⁷

Equally surprisingly, the supreme court decision was overwhelmingly one-sided: unanimous as to the noncoverage of the crop spraying in *Fogg* and five-to-two against coverage due to the ammonia spill from the blueprint machine in *Deni*. Said the court:

We [like the Court of Appeal majority] agree that the pollution exclusion clause is clear and unambiguous.⁸⁸

. . . .

We cannot accept the conclusion reached by certain courts that because of its ambiguity the pollution exclusion clause only excludes environmental or industrial pollution.⁸⁹

. . . .

82. Oral Argument, *Deni Associates of Florida, Inc. v. State Farm Cas. Ins. Co.* (Tallahassee, Fla. Sept. 11, 1997) (Question of Hon. Ben Overton and Response of Elizabeth Russo, Esq.).

83. Oral Argument, *Deni Associates of Florida, Inc. v. State Farm Cas. Ins. Co.* (Tallahassee, Fla. Sept. 11, 1997) (Question of Hon. Ben Overton and Response of Bonita Kneeland, Esq.).

84. Oral Argument, *Deni Associates of Florida, Inc. v. State Farm Cas. Ins. Co.* (Tallahassee, Fla. Sept. 11, 1997) (Question of Hon. Harry Lee Anstead and Response of Bonita Kneeland, Esq.).

85. See Shelley and Mason, *supra* note 5.

86. For a more extensive discussion and criticism of the *Deni/Fogg* opinions, see Jeffrey W. Stempel, *Unreason in Action: A Case Study of the Wrong Approach to Construing the Liability Insurance Pollution Exclusion*, FLA. L. REV. (1998) (forthcoming).

87. See *Deni Associates of Florida, Inc. v. State Farm Fire and Cas. Ins. Co. and E.C. Fogg III v. Florida Farm Bureau Mutual Ins. Co.*, 711 So. 2d 1135, 1138-39 (Fla. 1998).

88. 711 So. 2d at 1138.

89. *Id.*

As a court, we cannot place limitations upon the plain language of a policy exclusion simply because we may think it should have been written that way. Moreover, unless we conclude that the policy language is ambiguous, it would be inappropriate for us to consider the arguments pertaining to the drafting history of the pollution exclusion clause.

We also reject the argument that because the words “irritant” and “contaminant” are not defined, the policy exclusion is ambiguous [then citing *Webster’s Third New International Dictionary Unabridged* (1981)].⁹⁰

.....

We also cannot agree [that consideration of material other than the face of the policy] can be justified as clarifying a latent ambiguity.⁹¹

As to the certified question, the court was brief and dismissive:

[The certified question] asks whether the doctrine of reasonable expectations should be applied to interpret CGL policies. Under this doctrine, *the insured’s expectations as to the scope of coverage is upheld provided that such objections are objectively reasonable.*

.....

We decline to adopt the doctrine of reasonable expectations. There is no need for it if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer. To apply the doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which the premiums are charged.

.....

Construing insurance policies upon a determination as to *whether the insured’s subjective expectations are reasonable can only lead to uncertainty and unnecessary litigation.*⁹²

But was the court serious? In the space of a few sentences, it identifies the expectations at issue as both subjective and objective. Forgiving the court’s inconsistency as a mere slip of the pen, it is difficult to see how expectations analysis will be any less predictable than the textual regime endorsed by the court. As noted above and by every commentator on the issue, different courts have divided dramatically over whether “sudden and accidental” pollution must be abrupt, whether the absolute pollution exclusion at issue in *Deni/Fogg* is ambiguous, and whether “damages” covered by liability insurance includes environmental cleanup costs.⁹³ Today, courts construing the pollution exclusion divide over whether certain items are “pollutants” or whether particular claims “arise out of” discharge of a pollutant or something else.⁹⁴

90. *Id.* at 1139 (citation omitted).

91. *Id.*

92. *Id.* at 1140 (emphasis added).

93. See STEMPER, *supra* note 1, § 1.4 (states split close to evenly regarding whether “sudden and accidental” language of qualified pollution exclusion precludes coverage for gradual discharge not expected to cause harm); § T1.6 (courts divide over whether absolute pollution exclusion precludes coverage for claim arising out of smoke, carbon monoxide), § T2.5 (courts divide nearly equally concerning whether CGL must cover as “damage” environmental cleanup costs required by government order) (1994 and 1998 Supp.). *Accord*, OSTRAGER AND NEWMAN, *supra* note 1, §§ 10.02(c)(d) 10.03(a)(c) (noting similar splits of courts on these coverage questions).

94. See notes 5-7, *supra*, and text and notes 171-221, *infra*.

To prevent possible abuses such as the denial of the slip-and-fall claim where the fall took place because of a bleach or lye spill, the court stated that despite the literalist interpretation at work in *Deni* and *Fogg*, "insurance policies will not be construed to reach an absurd result."⁹⁵ The court's assurance is cold comfort for a variety of reasons. The court suggests no principled methodology for determining what constitutes an absurd result. Most dictionaries define highly unreasonable acts or things as absurd. By dictionary definition, then, a contract construction that violates greatly the reasonable expectations of the policyholder would seem to be absurd and therefore unenforceable.⁹⁶ In both dictionary and thesaurus, absurdity is judged according to whether a position is reasonable.⁹⁷ Things insufficiently reasonable are absurd. But, paradoxically, the Florida court wants to give no consideration to the reasonable expectations of the policyholder, or any other contracting party. But, as discussed below, there is substantial historical evidence suggesting that ISO and insurers themselves never expected to refuse to cover ordinary commercial torts merely because a chemical agent was involved in the injury. Insurer representatives in fact stated this to regulators.⁹⁸ All lawyers and judges presumably agree that courts should not enforce contracts so literally as to bring about absurd results. That is the law of every jurisdiction.⁹⁹ If this is so, why may a court not depart from textual literalism to avoid a "poor" or "unwise" construction when it may do so to avoid an absurd result?

The *Deni/Fogg* court also misread precedent and judicial construction of the exclusion, probably because of a clever and effective but arguably misleading, amicus brief by insurer counsel. The *Deni/Fogg* court began its legal analysis by noting that a "substantial majority" of courts "have concluded that the pollution exclusion is clear and unambiguous so as to preclude coverage for all pollution related liability."¹⁰⁰ In the footnote accompanying this quotation, the court noted that the insurers and their amici "have cited more than 100 cases from 36 other states which have applied the plain language of the pollution exclusion clause to deny coverage."¹⁰¹

The court's invocation of the "box score" of pollution exclusion litigation reflects the success of the Insurance Environmental Litigation Association (IELA), an insurer organization represented by Washington, D.C., law firm Wiley, Rein & Fielding, which, together with Hinshaw & Culbertson in Miami, wrote the amicus brief to

95. 711 So. 2d at 1140.

96. See Stempel, *Unreason in Action*, *supra* note 86.

97. See *id.*

98. See text and accompanying notes 135-45, *infra*.

99. See FARNSWORTH, *supra* note 22, at ch. 7. This is also, of course, the law of Florida per *Deni/Fogg* and other cases. See *State Farm Mut. Automobile Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986); *Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So. 2d 938, 942 (Fla. 1979) (exclusions construed against insurer where meaning doubtful but clear exclusions will be enforced).

100. 711 So. 2d at 1137.

101. *Id.* at *6, n.2.

which the court refers.¹⁰² The approach of the IELA amicus brief is one of overwhelming the reader by numbers. As a coordinator of the insurers' national efforts to further the excluding power of the pollution exclusion, IELA has cataloged even the most obscure pollution exclusion cases, and can muster in one brief all of the industry's victories, even the unreported ones or those emanating from the most local of courts with limited jurisdiction. The resulting list of "more than 100 cases," composing a twenty-seven-page appendix to the IELA brief is impressive but should not have influenced the court to the degree it did in *Deni/Fogg*.

It is, of course, true that many courts construing the absolute pollution exclusion have deemed it a textually clear bar to pollution coverage. But this once again begs the most important question of what one means by "pollution." In addition, a similarly large number of courts have either characterized the extremely broad exclusionary language as ambiguous or in any event have failed to apply the exclusion to a variety of liability claims in cases involving irritants, chemicals, smoke, gas, and waste.¹⁰³ This fact is not only admitted but bemoaned by insurer counsel. For example, Shelley and Mason note that the box score on the pollution exclusion is almost exactly evenly divided between insurer wins and policyholder wins.¹⁰⁴ The Florida Supreme Court's apparent view that insurers are stampeding to victory in pollution exclusion cases is so wrong as to remind one of the thirteenth chime of the clock: it calls into question the very soundness of the entire clock. Similarly, the courts' gullibly credulous reading of the obviously partisan IELA brief regarding precedent on the exclusion raises questions about the soundness of the entire *Deni/Fogg* opinion.

Many of the IELA brief cases did indeed find the exclusion unambiguous—when applied to traditional environmental degradation pollution claims. As one court characterized precedent of this type:

In [the case cited by the insurer] claims were filed against the insured municipality for improper disposal of toxic material. [It was argued] that the policy was ambiguous as to coverage of these claims because there was a question as to whether the [insured] was responsible for dumping the toxic material. The [New York] Court of Appeals

102. See Brief Amicus Curiae of the Insurance Environmental Litigation Association (IELA) (Ronald L. Kammer, Hinshaw and Culberson, and Laura A. Foggan and John C. Yang, Wiley, Rein and Fielding (filed Feb. 11, 1997) in *Deni Associates of Florida, Inc. v. State Farm Fire and Casualty Ins. Co.*, No. 89,115 (Fla. S. Ct. Dkt.).

103. See generally *Atlantic Mut. Ins. Co. v. McFadden*, 595 N.E.2d 762 (Mass. 1992) (citing illustrative cases of this type). See, e.g., *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.*, 47 F.3d 34, 37 (2d Cir. 1995) (applying New York law) (absolute pollution exclusion does not bar coverage for claims arising out of carbon monoxide poisoning); *Garfield Slope Housing Corp. v. Public Service Mut. Ins.*, 973 F. Supp. 326 (E.D.N.Y. 1997) (absolute pollution exclusion ambiguous as applied to fumes given off by new carpet; coverage for claim against apartment with offending carpet); *Assoc. Wholesale Grocers, Inc. v. Americold Corp.*, 934 P.2d 65 (Kan. 1997) (coverage for claim arising out of smoke damage despite fact that smoke comes within literal meaning of absolute pollution exclusion).

104. See Shelley and Mason, *supra* note 5. Accord, OSTRAGER AND NEWMAN, *supra* note 1, § 10.02[e].

held that the language of the applicable policy's exclusion was not ambiguous on this point.

....

Thus, . . . the New York Court of Appeals did not hold that pollution exclusions are unambiguous for all purposes. It merely refused to find that the pollution exclusion at issue there was ambiguous with respect to claims arising out of the dumping of environmental waste when the identity of the party responsible for dumping was in doubt.¹⁰⁵

As more succinctly put by the New York Court of Appeals itself, the pollution exclusion "can, of course, be ambiguous in one context and not another."¹⁰⁶

Thus, for example, in the cases cited in the IELA brief and seized upon by the Florida Supreme Court, one finds the exclusion effective to bar coverage for release of petroleum from underground storage tanks,¹⁰⁷ spraying of oil by a contractor,¹⁰⁸ cleanup of groundwater contamination,¹⁰⁹ generalized spraying of pesticide throughout a municipality,¹¹⁰ countywide mosquito control spraying,¹¹¹ fumes given off by the process of "rubber denuding,"¹¹² sick building syndrome,¹¹³ movement and

105. See *Garfield Slope Housing Corp. v. Public Service Mut. Ins. Co.*, 973 F. Supp. 326, 337 (E.D.N.Y. 1997).

106. See *Continental Casualty Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 652, 593 N.Y.S.2d 966, 972, 609 N.E.2d 506, 512 (1993).

107. See, e.g., *McGuirk Sand and Gravel, Inc. v. Meridian Mut. Ins. Co.*, 220 Mich. App. 347, 559 N.W.2d 93 (Mich. Ct. App. 1996) (cited in *Deni/Fogg*, 711 So. 2d at 1135, 1137).

108. See, e.g., *Tri County Service Co., Inc. v. Nationwide Mut. Ins. Co.*, 873 S.W.2d 719 (Tex. Ct. App. 4th Dist. 1993), cited in *Deni/Fogg*, 711 So. 2d at 1137.

109. See, e.g., *Hudson Ins. Co. v. Double D Management Co., Inc.*, 768 F. Supp. 1538 (M.D. Fla. 1991), cited in *Deni/Fogg*, 711 So. 2d at 1141.

110. See, e.g., *Protective National Ins. Co. v. City of Woodhaven*, 476 N.W.2d 374 (Mich. 1991), cited in *Deni/Fogg*, 711 So. 2d at 1141.

111. See, e.g., *Federal Ins. Co. v. McNichols*, 77 So. 2d 454 (Fla. 1955) (finding no coverage because mosquito pesticide spraying company's liability policy excluded coverage for "injury or damage [that is] caused directly or indirectly by chemicals or dusting power."), cited in *Deni/Fogg*, 711 So. 2d at 1141.

112. See, e.g., *Park-Ohio Industries, Inc. v. Home Indem. Co.*, 975 F.2d 1215 (6th Cir. 1992) (applying Ohio law), cited in *Deni/Fogg*, 711 So. 2d at 1140. The Sixth Circuit was closely divided on the applicability of the exclusion despite the widely dispersed fumes from the rubber denuding operation. See 975 F.2d at 1224 (Guy, J., dissenting).

113. See, e.g., *West American Ins. Co. v. Band and Desenberg*, 925 F. Supp. 758 (M.D. Fla. 1996), *aff'd*, 138 F.3d 1428 (11th Cir. 1998) cited in *Deni/Fogg*, 711 So. 2d at 1138. In *Band and Desenberg*, as in most sick building syndrome cases, workers on the site claimed that "contaminants in the building's air caused them to suffer from a series of symptoms" because of "air-borne contaminants" in the ventilation system (925 F. Supp. at 760), an occurrence the court described as "indoor air pollution" (925 F. Supp. at 761).

The *Deni/Fogg* court also cites with approval a case that denied coverage on pollution exclusion grounds when a landlord was sued by tenant victims of carbon monoxide poisoning resulting from a negligently installed and maintained furnace. See, e.g., *Bernhardt v. Hartford Fire Ins. Co.*, 648 A.2d 1047 (Md. Ct. Spec. App. 1994), cited in *Deni/Fogg*, 711 So. 2d at 1138. Although the two situations have similarities, the loss and claims in *Bernhardt* can be said to result from improper management, supervision, or repair. By contrast, sick building syndrome is more widely dispersed, more intractably a part of the property, less isolated, and less remediable or reversible. In other words, the sick building claim is more analogous to the traditional understanding of a pollution claim.

spilling of mercury,¹¹⁴ hauling and storage of hazardous waste,¹¹⁵ and storage of nuclear waste.¹¹⁶ Many of the cases cited by IELA are largely about Superfund or similar liability¹¹⁷ and hence do not shed real light on whether ordinary commercial tort liability falls within the pollution exclusion.

Most of these insurer victories occurred in cases of what most disinterested policyholders would call genuine pollution. Other cases are more in the nature of product liability and toxic tort claims that many (including this author) would find wrongly decided, but these cases are nonetheless closer to true pollution claims than the ammonia spill in *Deni* or the farming mishap in *Fogg*. The bulk of the cases invoked by insurers in the IELA brief as proof of unambiguity look like real pollution matters in that the liability claims against the insured stemmed from widespread, serious, or long-lasting dispersal of fouling substances, often over an extended time period.¹¹⁸

114. See, e.g., *Economy Preferred Ins. Co. v. Grandadam*, 656 N.E. 2d 787 (Ill. Ct. App. 3d Dist. 1995), cited in *Deni/Fogg*, 711 So. 2d at 1137. The mercury was not commercial discharge but was released as part of a minor child's prank or carelessness. However, the mercury had been removed from the insured's home and transferred to the home of the claimant prior to the apparently dispersed release of the chemical in the claimant's home, suggesting a broad but perhaps erroneous construction of the exclusion by the *Grandadam* court.

115. See, e.g., *Northern Ins. Co. v. Aardvark Assoc., Inc.*, 942 F.2d 189, 190 (3d Cir. 1991) (applying Pennsylvania law), cited in *Deni/Fogg*, 711 So. 2d at 1137. For reasons set forth at text and notes 200-03, *infra*, this type of claim presents a close question but coverage should be available even though the claim stems from "waste" in cases where the waste was not discharged or released but merely stored.

116. See, e.g., *Constitution State Ins. Co. v. Iso-Tex, Inc.*, 61 F.3d 405 (5th Cir. 1995) (applying Texas law), cited in *Deni/Fogg*, 711 So. 2d at 1140. At text and notes 200-03, *infra*, some issue is taken with the view (deemed inarguable by Shelley and Mason) that *Iso-Tex* is clearly a pollution case since it is at best unclear whether storing waste in containers is a "release" of waste.

117. See, e.g., *High Voltage Engineering Corp. v. Federal Ins. Co.*, 981 F.2d 596 (1st Cir. 1992) (applying Massachusetts law) (suit over failure to clean up hazardous waste); *Ascon Properties, Inc. v. Illinois Union Ins. Co.*, 908 F.2d 976 (9th Cir. 1990) (applying California law) (claims of soil pollution in hazardous waste site acquired by policyholder); *Cannon Constr. Co. v. Liberty Mut. Ins. Co.*, 642 N.Y.S.2d 88 (App. Div. 1996) (seeking payment of cleanup costs for asphalt in creek); *State v. Capital Mut. Ins. Co.*, 623 N.Y.S.2d 660 (App. Div. 1995) (state seeks recovery of costs of cleaning up 500-gallon fuel oil spill into creek).

118. For example, in *American States Ins. Co. v. F.H.S., Inc.*, 843 F. Supp. 187 (S.D. Miss. 1994), cited and quoted at length in *Deni/Fogg*, the insured operated a cold storage warehouse. When ammonia "leaked from a pressure relief valve on F.H.S.'s refrigeration system at the warehouse . . . [a]s a result of this ammonia leak, a number of people in the surrounding area were treated at local hospitals and fifteen people made claims." 843 F. Supp. at 188. This factual aspect of *F.H.S.* was not quoted by the *Deni/Fogg* court, which instead opted to quote the sanctity of contract rhetoric of the *F.H.S.* court. See 711 So. 2d at 1138, 1141. Thus, although both *F.H.S.* and *Deni/Fogg* involve ammonia, the *F.H.S.* situation meets far better the average person's connotation of a "release" or "discharge" of pollutants than does the smaller, more confined, more episodic and contained spill of *Deni Associates v. State Farm*. The *Deni/Fogg* court also cited three of the IELA amicus brief cases for the proposition that the exclusion was unambiguous and included a pithy parenthetical quote referring to the judicial trend rejecting ambiguity as a matter of law for the pollution exclusion clause. See *Economy Preferred Ins. Co. v. Grandadam*, 656 N.E.2d 787, 789 (Ill. App. Ct. 1995); *McGuirk Sand and Gravel, Inc. v. Meridian Mut. Ins. Co.*, 559 N.W.2d 93, 97 (Mich. Ct. App. 1996); *Tri County Serv. Co. v. Nationwide Mut. Ins. Co.*, 873 S.W.2d 719, 721 (Tex. App. 1993). Unfortunately, each of these cases on closer examination shows those courts in those cases to have applied the exclusion to a fact situation more like conventional pollution than were the *Deni* and *Fogg* coverage matters.

According by this author's count of the state supreme court, state appellate court, and federal circuit court decisions cited in the IELA brief, two-thirds of the decisions ruling for insurers or declaring the pollution exclusion to be "unambiguous" involved what one would call "pure pollution" using a connotative common sense definition (e.g., discharge into groundwater, air fouling) or Superfund liability. Only a third of the cases cited by IELA as favorable to insurers are what one might term "toxic tort" matters. In addition, the approach of one case cited by IELA has been disapproved in a subsequent state supreme court decision.¹¹⁹ Another case cited by IELA has been reversed by the relevant state supreme court.¹²⁰ In sum, the IELA brief and pollution exclusion precedent fails to make a compelling case for hyperliteral application of the pollution exclusion.

The *Deni/Fogg* court mischaracterized cases finding coverage in the face of the pollution exclusion by stating that the court "cannot accept the conclusion reached by certain courts that because of its ambiguity the pollution exclusion clause only excludes environmental or industrial pollution,"¹²¹ citing three cases that found coverage but did so not on the basis of textual ambiguity but on the basis of the greater contextual meaning of the exclusion in light of the intent of the parties and the purpose of the CGL.¹²² The *Deni/Fogg* majority then cited a case suggesting that failure to apply the pollution exclusion literally was an improper "rewriting" of the CGL policy.¹²³

But the court's analysis begs the question of what constitutes unauthorized judicial "rewriting" of a contract. The *Deni/Fogg* court starts from the proposition that contract text is to be given strictly literal meaning without regard to the historical background of the language and other contextual factors such as specific intent of the parties, overall purpose of the contract, representations by party

119. A more recent and more authoritative Illinois case than *Economy Preferred Ins. Co. v. Grandadam*, 656 N.E.2d 787 (Ill. App. 3d 1995) rejects literalist interpretation of the pollution exclusion cause. In *American States Ins. Co. v. Koloms*, 687 N.E.2d 72 (Ill. 2d 1997), the policyholder apartment owner was sued by tenants for loss arising out of carbon monoxide poisoning from a defective furnace. Although carbon monoxide is clearly a "pollutant" as defined in the exclusion (because it is an irritant, contaminant, fume, vapor, chemical, and waste), the *Koloms* court correctly viewed the suits concerning the carbon monoxide poisoning as covered because they sounded more in the nature of a garden variety claim against the landlord for failure to maintain premises in a safe condition. The Supreme Judicial Court of Massachusetts took a similar view of carbon monoxide claims in late 1997 but this decision was not noted by the Florida court. See *Western Alliance Insurance Co. v. Gill*, 686 N.E.2d 997 (Mass. 1997).

120. See *Donaldson v. Urban Land Interests, Inc.*, 564 N.W. 2d 728 (Wis. 1997), reversing *Donaldson v. Urban Land Interests, Inc.*, 556 N.W.2d 100 (Wis. Ct. App. 1996).

121. 711 So. 2d at 1138.

122. The Florida court cited as "erroneous ambiguity" courts: *Westchester Fire Ins. Co. v. City of Pittsburg, Kansas*, 768 F. Supp. 1463 (D. Kan. 1991); *South Central Bell Tel. Co. v. Ka-Jon Food Stores*, 644 So. 2d 357 (La. 1994); *West American Ins. Co. v. Tufco Flooring East, Inc.*, 409 S.E.2d 692 (N.C. Ct. App. 1991). Reading these cases, one is hard-pressed to describe their results in favor of coverage as based upon any finding of textual ambiguity. See text and notes 169-208, *infra* for further elaboration and defense of the decisions.

123. 711 So. 2d at 1138, citing *American States Ins. Co. v. F.H.S., Inc.*, 843 F. Supp. 187, 190 (S.D. Miss. 1994).

representatives, or other matter shedding light on the meaning of the contract term. Having seized on the literalist, textualist position, the court then views any interpretation beyond a dictionary search as "rewriting." This perspective erroneously assumes that dictionary definitions of text are the "true" meaning of the contract term. If the true meaning of the term is that resulting from the more comprehensive contextual analysis, then it is the literalist who is "rewriting" the contract by seeking or mandating a narrow and literal application of the disputed term even though none was intended by contracting parties.

C. *Reexamining the Background and Purpose of the Pollution Exclusion: Policyholders Prevail in a Mixed Debate*

Insurance counsel have proffered some evidence to suggest that the drafters of the exclusion not only chose broad language in the pollution exclusion but also really intended the exclusion to reach well beyond claims commonly characterized as pollution matters.¹²⁴ Conversely, policyholder counsel have presented a good deal of evidence suggesting that insurers, policyholders, risk managers, brokers, and regulators expected the exclusion to only preclude coverage for the sort of gradual pollution claims that were slipping by the qualified "sudden and accidental" exclusion and to save insurers from the feared avalanche of Superfund-type claims. Although the information provided is not ironclad, the bulk of it supports the policyholder perspective. Insurer counsel's revisionist drafting history of the exclusion is simply not very weighty or very persuasive.

Furthermore, under the ordinary ground rules of contract construction, policyholders do not need to convincingly demonstrate the specific intent attending the exclusion. If policyholders can demonstrate, as they have, substantial evidence of the more constrained reach of the exclusion and the objectively reasonable expectation that the exclusion did nothing more than close the "loophole" in the qualified exclusion (and respond to the Superfund problem), contract interpretation methodology applied to provide a reasonable construction of the exclusion requires that the exclusion not take product claims, completed operations claims, or curbstone

124. See Shelley and Mason, *supra* note 5, at 753-56; Zampino et al. *supra* note 9. The political rhetoric of insurer counsel in the public relations campaign over the pollution exclusion is nothing short of masterful, but it is also misleading. Note that Zampino et al. not only label those taking a more restrained reading of the pollution exclusion as "sophist" but also label policyholders seeking coverage under a CGL for which insurers have invoked the exclusion to be "polluters" that are undoubtedly seeking to revise history in order to have coverage for their implicitly despicable activity. Although demonizing the opposition may be an effective political tactic for winning congressional or other elective office in the down-and-dirty world of politics, it is a bit overdone as a characterization of the very real, legitimate, and complex interpretative issues presented in many of the pollution exclusion coverage cases. For example, in the cases discussed in this article, some of them the same cases attacked by Zampino et al. and Shelley and Mason, it seems inappropriate to characterize the policyholders as "polluters" even if they are denied coverage. The cases involve insureds that applied floor covering, knocked over a blueprint machine while moving, owned property with a furnace that induced carbon monoxide poisoning of occupants, mishandled crop treatment, and similar events of tort liability. It is more than a little unfair to call these policyholders "polluters."

torts incidentally involving irritants out of basic CGL coverage. In short, any indeterminacy regarding the intent and purpose of the exclusion vitiates the insurers' background-based arguments against coverage. Just as ties go to the runner in baseball, ties—or near ties—go to the policyholder and against the insurer, that drafted the exclusion and marketed it as part of an adjustment to CGL coverage rather than a dramatic change in CGL coverage. Insurers must bear the burden of persuasion if the exclusion is to be construed as a radical change in the scope of the CGL insuring agreement. Consequently, if the drafting history is to be of use to insurers, they must do more than merely introduce some evidence in their favor. They must carry the day clearly, but they have not.

In support of their brief for breadth in the pollution exclusion, insurer counsel argue:

(1) *"The broad language deserves full literal breadth in construction in the absence of compelling evidence that the language chosen was not intended to have literal application."*¹²⁵

This argument is persuasive only if one subscribes to a particularly virulent strain of linguistic literalism. Although cases such as *Deni/Fogg* show that this virus is alive and well in part of the nation, modern contracts scholarship rejects this approach. In addition, the literalist perspective is dramatically undermined by insurer statements admitting that the exclusion's broad language was authored in the nature of a "kitchen sink"¹²⁶ or "chicken soup"¹²⁷ approach designed to achieve ridiculous linguistic overbreadth so that insurers might apply the language reasonably when responding to claims.

(2) *The change in language from the "sudden and accidental" pollution exclusion to the current exclusion further indicates a desire for breadth beyond exclusion of conventional pollution claims and suggests an intent to bar coverage for "toxic torts" as well.*

Insurers have persuasively argued that they were taken aback by decisions permitting coverage for gradual pollution in the face of the "sudden and accidental" exclusion and responded by overdrafting the current exclusion.¹²⁸ But this does not suggest that insurers intended the current exclusion to be read literally. Quite the contrary, it suggests that insurers drafted a provision that they knew was so broad as to make literal reading inappropriate.

The deletion of the "into or upon the land, the atmosphere or any water course or body of water" language in the qualified exclusion is cited by insurers as evidence

125. See Shelly and Mason, *supra* note 5, at 750-52; Zampino et al., *supra* note 9, at 14-16.

126. As in the venerable phrase, throwing in "everything but the kitchen sink," behavior one engages in packing, grocery shopping, or writing articles when one is uncertain exactly what might be needed for a trip, a meal, or a scholarly debate.

127. As in the popular notion that a little chicken soup at least "cannot hurt" the party on whom it is foisted (usually the child at the hands of a hovering parent). One can almost visualize ISO operatives as part of a situation comedy skit sitting around a table and brainstorming to drum up things that may be pollutants under some circumstances and then adding these to the list of words in the exclusion's definitions on the ground that a little more inclusiveness, like chicken soup, could not hurt in view of the mission of the insurers: overreacting to the failings of the sudden and accidental exclusion.

128. See Shelley and Mason, *supra* note 5, 752-54; Zampino et al., *supra* note 9, at 16-21.

that the absolute exclusion meant not only to eliminate coverage for even abrupt or unintended pollution but also meant to exclude coverage for toxic torts, which are less likely to involve far-flung discharges than are environmental degradation claims.¹²⁹

This argument, although significant, also fails if one reads the absolute exclusion as a whole. Approximately 85 percent of the verbiage used in the exclusion is obviously focused on excluding Superfund liability. Superfund generators or transporters of hazardous waste can be liable (and hence can have claims against them for which they desire insurance) even if the hazardous waste has not left the policyholder's facility (or worse yet, long-since abandoned facility).

When the absolute exclusion is properly understood as primarily a Superfund exclusion coupled with a provision barring coverage for classic environmental degradation pollution, the deletion of the "land, atmosphere, or water" language makes sense for what it is—a fine-tuning of the Superfund prong of the absolute exclusion—rather than drafting designed to expand the exclusion in a manner that eliminates tort claims previously conceded to be within the scope of the CGL.

(3) *Insurer statements to regulators or other indicia of intent suggest that insurers meant the exclusion to reach toxic torts as well as ordinary pollution claims.*¹³⁰

As discussed in more detail below, the "evidence" of meaning proffered by the insurers is simply not very persuasive. In the main, these supposedly convincing items merely state that the pollution exclusion is designed to exclude pollution—insurer tautologies that continue to beg the question as to what a reasonable court should deem to be excluded pollution rather than an average tort incidentally accompanied by contaminants. In the context of marshaling statements of insurance officials and other evidence of intended scope of the exclusion, policyholders have put forth a weightier brief.

(4) *The creation of the hostile fire endorsement specifying that claims arising out of hostile fire damage were within coverage notwithstanding the broad language of the exclusion tends to show that policyholders as well as insurers expected the exclusion to be read broadly.*¹³¹

Although this argument is one of the stronger insurer contentions, it, too, is not particularly persuasive. The hostile fire endorsement shows that insurers, brokers, and policyholders recognized the potential misuse of the broad language of the exclusion for a particular type of common CGL claim. It does not mean that there are no other instances of inappropriate application of the broad language of the exclusion. Some of those—carbon monoxide poisoning, lead paint, floor finishing fumes, localized pesticide spraying, and ammonia spills—simply were not anticipated as was the more obvious and common hostile fire problem.

Fire claims could be more easily anticipated because they fit more of the attributes of pollution than do these other types of claims. The fire's flames, smoke, and ash

129. See Shelley and Mason, *supra* note 5, at 752-54, 769-70.

130. See *id.* at 753-60.

131. See *id.* at 755-56.

are airborne, can be widely dispersed, and could cause substantial smoke damage as a byproduct even to those not touched by the fire itself. In many ways, collateral fire damage is more like pollution than the lead paint, fumes, and spills examples. But by the insurer's reasoning, this more pollution-like event is covered while the less pollution-like events are not merely because the more polluting event was so obvious that it resulted in an endorsement. This result is clearly unreasonable, if not absurdly bizarre. Only an interpreter with textual glaucoma can be comfortable with this result.

In addition, the actual interpretation of the exclusion when the CGL lacked a hostile fire endorsement contradicts the insurance industry position. Case law appears to have concluded that even without the hostile fire coverage endorsement, the absolute pollution exclusion did not truncate coverage for hostile fire claims.¹³² Shelley and Mason appear not to disagree with these holdings.¹³³ But this means that they implicitly accept the notion that the exclusion cannot be read literally in all cases without bringing absurd, or at least unwarranted, results. This prompts the question: If the exclusion does not apply to fire claims when read reasonably, it is not likely that other claims are covered under the CGL notwithstanding the broad language of the exclusion? In context, the fire coverage endorsement appears not to underscore the reach of the exclusion but to demonstrate its limits, which were merely codified in the case of fire damage but not with regard to other sorts of "nonpollution" claims incidentally involving pollutants.

(5) *Cases limiting the reach of the pollution exclusion have done so on the basis of analysis at odds with mainstream contract law.*¹³⁴

As noted above, contract interpretation is not a dictionary-based software program. Rather, it often involves extensive consideration of a variety of factors re-

132. See, e.g., *Associated Wholesale Grocers v. Americold Corp.*, 934 P.2d 65, 71 (Kan. 1997) (coverage available for claims arising out of smoke-contaminated food products in storage facility). Even in England, where there exists a passion for fixation on contract language to the exclusion of other interpretative factors and a warmth for dictionary literalism, arbitrators facing the issue have refused insurer efforts to avoid hostile fire coverage under the pollution exclusion. See STEMPPEL, *supra* note 1, § T1.6 at 123, n.21 (Supp. 1998). On English contract law generally, see MALCOLM CLARK, *THE CONSTRUCTION OF INSURANCE CONTRACTS* (1988) (noting great reverence for text in England but also suggesting that distinctions between English and American contract law not so large as commonly assumed).

133. See Shelley and Mason, *supra* note 5, at 755-56, discussing hostile fire issue and implying that reading pollution exclusion not to apply to hostile fire claims is reasonable.

134. See *id.* at 756-64, specifically criticizing *West American Insurance Co. v. Tufco Flooring East, Inc.*, 409 S.E.2d 692 (N.C. App. 1991); *Westchester Fire Ins. Co. v. City of Pittsburg, Kansas*, 768 F. Supp. 1463, *aff'd sub nom.* *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. City of Pittsburg*, 987 F.2d 1516 (10th Cir. 1993) (applying Kansas law); *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992) (applying Illinois law). Ironically, commentator handling of the *City of Pittsburg* case demonstrates the potential for error in text. Shelley and Mason's article incorrectly identifies the case as "*City of Pittsburg*" as though the municipality were in Pennsylvania rather than Kansas. My treatise makes the same mistake, at least in the first edition. See STEMPPEL, *supra* note 1, § T1.5 (1994 and Supp. 1998). Although no author likes typographical error, these sorts of problems are more serious for those adopting the insurance industry position. Typos confirm what we all know, at least outside of litigation: words, particularly words viewed in isolation, are not always an accurate representation of reality or meaning.

flecting the meaning of the disputed term. Where the contract language at issue is unclear, absurdly overbroad, or at odds with past practice and party expectations, consideration of nontextual interpretative factors is not only permitted, but is essential if courts are to arrive at the correct construction of contracts.

(6) *Even if the exclusion is read literally, courts by requiring the injury to stem from toxicity can avoid absurd results such as the bar for coverage in a slip-and-fall action involving bleach. Even if the exclusion is read literally, the CGL is not "vitiating" because coverage remains available for many suits against commercial insureds.*

This insurer argument is a little bit like justifying amputation as humane punishment because the defendant retains one remaining arm or leg. The interpretative question before courts in the pollution exclusion cases is not whether there is some CGL coverage left standing after the pollution exclusion is read broadly. The question is whether a broad reading of the exclusion strips the CGL of coverage that would ordinarily be expected by a reasonable reader of the English language in light of the traditional history and scope of the CGL and the insurer's own trumpeted efforts to use the absolute exclusion merely to avoid adverse "sudden and accidental" exclusion precedents and to prevent the CGL from becoming Superfund insurance.

Insurers offer some thought-provoking arguments for reading the exclusion with the enormous breadth sought by the industry. The Shelley and Mason article is particularly well done. But the insurer arguments are ultimately unsupported, refuted, or unpersuasive. Contract law has wide deference to contract language, but this does not require myopic literalism. Although it is now so often cited as to seem trite, one cannot help but recall Learned Hand's famous observation that a mature jurisprudence does not make a "fortress out of a dictionary."¹³⁵

In addition, insurers are to a large extent estopped from wrapping themselves in literalism regarding the pollution exclusion—estopped at least as a matter of common sense and consistency if not as a strict matter of judicial or equitable estoppel. Recall that under the old exclusion, insurers argued that "sudden" must mean "abrupt." But according to most dictionaries, the meaning of the word "sudden" is "unexpected."¹³⁶

Thus, a literal textualist view of the former pollution exclusion could well have ruled against insurers because the preferred meaning of sudden requires only that pollution be unintentional. At the very least, the dictionary definition of sudden is unclear and therefore subject to the venerable rule of contract and insurance law that ambiguous language is construed in favor of the party that did not write the contract, which is almost always the policyholder. Although insurers had other nonliteral arguments to make about the qualified pollution exclusion and have

135. See *Cabell v. Markam*, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd*, 326 U.S. 404 (1945) (applying New York law).

136. See, e.g., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1996) (sudden defined first as "happening or coming unexpectedly"). The second, third, and fourth definitions of "sudden" in this dictionary all invoke notions of abruptness.

succeeded in slightly more than half the disputed cases, the insurers would have lost all of these cases had courts adopted the approach that insurers today urge for application of the current pollution exclusion.¹³⁷

The insurer argument in favor of broad exclusion not only relies too heavily on linguistic literalism but ignores completely another venerable canon of insurance contract construction: Grants of coverage are to be liberally construed while exclusions are to be narrowly construed.¹³⁸ Insurer advocacy of a pumped-up pollution exclusion so overlooks this basic precept that it often appears insurers are discussing the pollution provision as though it were the insuring agreement itself rather than an exclusion to an insuring agreement.

The distinction is significant. In coverage disputes, courts are construing a CGL first and foremost. The initial question before the court is whether the CGL provides coverage for the claim at issue. The answer to that is a clear "yes." All of the hotly litigated pollution exclusion cases involve items that constitute "occurrences" under the standard CGL. Unless an exclusion applies, there is coverage. The second question before the court is whether the pollution exclusion applies. But because the court is focused on an exclusion rather than a grant of coverage, the provision at issue must be construed narrowly and in favor of coverage unless that interpretation is unreasonable.

It is a gross violation of this long-standing rule of insurance contract construction for courts to give the text of the exclusion dictionary-literal breadth in the face of countervailing factors suggesting that the exclusion was never intended to have such breadth. Rather, the available evidence most strongly suggests that the absolute pollution exclusion was designed to serve the twin purposes of eliminating coverage for gradual environmental degradation and government-mandated cleanup such as Superfund response cost reimbursement.¹³⁹

137. A strong argument of insurers under the old exclusion was that giving the term "sudden" its dictionary meaning of "unexpected" would make the term redundant with "accidental" and that contract law generally favors nonredundancy. Although this is a good argument, it is not one of strict textual literalism as is the current insurer push to find excluded from coverage any incident in which the presence of a "pollutant" contributed to the loss.

138. See *Insurance Co. v. Slaughter*, 79 U.S. (12 Wall.) 404 (1870) (apparently applying federal common law); KEETON AND WIDISS, *supra* note 11, at 63.

139. "Superfund" is the shorthand reference for the Comprehensive Environmental Response, Compensation and Liability Act of 1980, revised in part by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9675) Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-75), which permits the government to mandate cleanup of polluted property and makes all owners of the property or polluters liable. The government may attempt to require private parties to clean up affected property or may perform the cleanup itself and then seek payment from the responsible parties. Although the CGL provides coverage for liability incurred by the policyholder "as damages" insurers were only half-successful in arguing that this provided coverage for only traditional money judgments resulting from private civil litigation. But the key cases involving whether government-sought cleanup costs reimbursement constituted "damages" were largely decided during the 1988-91 period, after adoption of the absolute exclusion, and involved pre-1986 occurrence policies. See, e.g., *Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 944 F.2d 940 (D.C. Cir. 1991) (applying Missouri law) (CERCLA response costs covered under CGL);

Under these circumstances, the apt means of contract analysis is to restrict the pollution exclusion to the confined scope of barring environmental degradation and Superfund claims. This is consistent not only with the language of the entire CGL and its history and purpose but also with the language and purpose of the pollution exclusion read in light of the expectations of the parties, particularly policyholders.

Insurers have yet to present a very compelling case for their position that they warned regulators and policyholders of the now-asserted reach of the exclusion. For example, Shelley and Mason note that risk managers expected the new pollution exclusion to exclude coverage for "sudden and accidental" incidents. To Shelley and Mason, this is some indication that policyholders expected exclusion of toxic torts. Actually, it is an example of extreme extrapolation. A risk manager's view that abrupt pollution was no longer covered hardly translates into acceptance by risk managers of the notion that anything involving a pollutant was no longer covered.

Insurers have proffered relatively little evidence that anyone expected the exclusion to be so broadly invoked in an attempt to defeat coverage. Shelly and Mason and Zampino et al. take on this task with more relish and drive than most insurer counsel but their arguments are more whimper than bang. This low caliber barrage of background information is particularly damning in light of insurer counsel's presumed ability to deliver more—if there is more to deliver. The Insurance Services Office is a proprietary organization that works for the insurance industry. This author and other academics cannot waltz into the ISO offices and conduct research as we might public records such as legislative history or land title. As commentators have noted:

For obvious reasons, ISO and insurers resist turning over this so-called drafting and regulatory history. Even if a policyholder is able to obtain the information, ISO typically succeeds in obtaining a protective order precluding dissemination of the materials to third parties. Accordingly, much of this story remains hidden to the public, known only to those policyholders and their law firms that have prevailed in the requisite discovery battles.¹⁴⁰

Consequently, it is a bit surprising, and detrimental to the insurers' position, that there is so little documentation in their drafting history arguments. If the absolute exclusion was intended to reach as broadly as now contended, one would expect to see conclusive ISO memoranda and similar documents. But to date, there has been little of this nature. If insurers and counsel, who have access to such material (or at least the ability to jawbone a friendly ISO) cannot produce such

Continental Ins. Cos. v. Northeastern Pharm. and Chem. Co., 842 F.2d 977 (8th Cir. 1988) (en banc) (applying Missouri law) (CERCLA cleanup cost payments to government not "damages" covered by CGL). See STEMPEL, *supra* note 1, §§ T2.1-T2.5.

140. PETER J. KALIS, THOMAS M. REITER & JAMES R. SEGERDAHL, POLICYHOLDER'S GUIDE TO THE LAW OF INSURANCE COVERAGE § 1.02 at 1-5 (1997).

proof of intended meaning and purpose, one is left with the uneasy feeling that today's enthusiasm for the reach of the exclusion is prompted more by post hoc opportunism in the heat of coverage litigation than by any inescapable historical evidence.

And to some extent, the new insurer argument that the pollution exclusion always intended to bar coverage for toxic torts has the appearance of a house of cards architecture. For example, Shelly and Mason cite as substantial authority the article by Zampino and others and suggest it provides inarguable evidence that the drafting history is to this effect.¹⁴¹ But neither Zampino and his coauthors nor Shelley and Mason have much to show from insurers other than statements that insurers really are serious about excluding pollution coverage with the absolute exclusion. The insurer submissions at the time of the exclusion's adoption, like the insurer submissions of today, continue to beg the question about what one means by "pollution." When pressed on the point, insurers can only retreat to the hyperliteral textualist argument buttressed by arguments concerning word changes and other insurer activity (e.g., the hostile fire endorsement) that is inconclusive. Full engagement with other interpretative factors augers in favor of the policyholder position.

Indeed, a good deal of the insurer "evidence" of drafting intent is mere venom or is beside the point. For example, Zampino and his coauthors express outrage that the Mid-America Legal Foundation was a successful amicus in *South Central Bell Telephone Co. v. Ka-Jon Food Stores of Louisiana*,¹⁴² contending that Mid-America is merely a front group for self-interested policyholders.¹⁴³ Zampino describes Mid-America in terms akin to the Montana Freemen's description of a supposed international banking conspiracy.¹⁴⁴ They do not really explain why a business interest group's participation in litigation is a bad thing. Instead, the reader is expected to assume this. Perhaps unsurprisingly, they say nothing about the Insurance Environmental Litigation Association (IELA), an association of insurers vigorously participating in coverage litigation as amici, although the comparison is obvious. Although IELA's allegiance to insurers is perhaps more obvious than Mid-America's affinity for policyholders, the latter can hardly have been a secret. As noted above, IELA appears to have been highly effective in leading the Florida Supreme Court to the disastrous *Deni/Fogg* holding. However, unlike insurer counsel, this author does not find this to be self-interested sophistry that must be stamped out in litigation.

141. See Shelley and Mason, *supra* note 5, at 753, n.17 (citing Zampino citing letter to Pennsylvania regulators that absolute exclusion necessary to reverse erroneous decisions finding coverage for gradual pollution under qualified exclusion); at 755 n.29 (citing Zampino to support contention that genesis of hostile fire endorsement "proves" risk managers expected everything else involving irritants to be excluded).

142. 644 So. 2d 357 (La. 1994). See text and accompanying note 172 for further discussion of *Ka-Jon*.

143. See Zampino et al., *supra* note 9, at 14-16.

144. See *id.* at 15-16 (quoting description of Mid-America board as connected to manufacturing interests and intimating that this is in some way suspect).

It would have been preferable that the Florida court not have accepted IELA's arguments.

After this initial opening salvo, the Zampino examination of drafting history is in the main focused on the qualified pollution exclusion. Much has been written on this issue and the debate is important for those cases remaining under pre-1986 policies or environmental impairment policies providing coverage for sudden and accidental losses. But the drafting history of the qualified exclusion is not directly relevant to the background, purpose, and meaning of the absolute exclusion. As to the change from qualified to absolute exclusion, Zampino et al. are most critical of cases that under the qualified exclusion focused on the damage rather than the release of pollutants in applying the temporal standard.¹⁴⁵ But this sheds no light on the current coverage debate over the exclusion. For example, in many of the cases in which insurers oppose coverage, the release in question has been abrupt. This was undeniably true of the ammonia spill in *Deni* and the crop spraying in *Fogg* and arguably true in cases of carbon monoxide from machine malfunction or poor maintenance and fumes from just-completed work, although these claims also have aspects of gradualism as well. But since the drafting history shows only an intent to move away from the sudden and accidental criteria and a corresponding language change, this entire aspect of the exclusion's history is not helpful to understanding the proper scope of the exclusion.

Furthermore, Zampino et al. appear to agree with policyholders that the pollution exclusion "does not apply to damages arising out of products or completed operations nor to certain off-premises discharges of pollutants" although "[c]lean-up costs are specifically excluded."¹⁴⁶ For example, they quote with approval the *John Liner Letter*, an industry publication, stating that under the absolute exclusion, policyholders "will be covered if injury or damage arises out of contamination by your products or your work; or, if pollutants enter the environment because of a defect in your product or your work."¹⁴⁷ This type of coverage clearly applies to carbon monoxide poisoning and insulation or flooring fumes.

Despite their purported reverence for the "real" drafting history, Shelley and Mason do not really come to grips with this issue: If the exclusion does not curtail basic product liability coverage and coverage for completed operations, then how can the exclusion bar coverage for things like carbon monoxide poisoning and fumes from floor coating or insulation even if these injuries are capable of being characterized as toxic torts? But Shelley and Mason, despite subscribing to the Zampino view of drafting history, are silent in the face of this dilemma. The

145. See *id.* at 17-19 (citing *Jackson Township v. Harford Acc. and Indem. Co.*, 451 A.2d 990 (N.J. Super. 1982) as a primary offending case).

146. See *id.* at 20 (quoting 1985 ISO Explanatory Memorandum ("Revisions to Pollution Exclusion Endorsement . . . Explanatory Memorandum—Pollution Liability Extension Endorsement") regarding the exclusion). *Id.* at n.54.

147. See *id.* at 25 (citing THE JOHN LINER LETTER, Vol. 21, No. 10 (Sept. 1984) at 3-4).

appropriate resolution, of course, is to construe the pollution exclusion so as not to strip basic nonpollution coverage from the CGL.

Likewise, a "Notice of Reductions and Broadening" sent to the *Ka-Jon* insured and cited by Zampino et al. confirms that the exclusion does not reach completed operations or product liability and that the primary purpose of the exclusion was to preclude environmental cleanup costs and to eliminate any coverage for "[s]udden and accidental emissions of pollutants."¹⁴⁸ The notice speaks of pollutants, without emphasizing the laundry list definition of pollutants contained in the exclusion but does dwell on the handling and transportation of waste products, classic Superfund exposure potential. Thus, this piece of evidence advanced by insurers tends to support the policyholders rather than the insurers. At a minimum, notices like this to policyholders that do not mention any application of the exclusion to toxic torts prompt one to wonder why there was not insurer emphasis of such a broad exclusionary reach if the industry really intended the pollution exclusion to be a toxic tort exclusion.

The focus on environmental degradation in the absolute exclusion is confirmed as well by statements attending the new absolute exclusion that suggested that policyholders purchase environmental impairment insurance to replace the coverage for abrupt pollution that was being removed by the absolute exclusion¹⁴⁹ or complaining that it was unfair for insurers to eliminate coverage for abrupt pollution incidents.¹⁵⁰ The environmental impairment policies available then as now provide coverage for episodic pollution incidents. They do not provide product liability, completed operations, or toxic tort coverage. The fact that observers present at the time of the implementation of the absolute exclusion suggested EIL coverage as a replacement for that that was removed by the exclusion strongly suggests that the exclusion removed only the classic pollution claims of environmental degradation and Superfund cleanup.

Thus, a decade after the implementation of the exclusion, one continues to see no powerful insurer evidence supporting the current breadth claimed for the exclusion. But if the exclusion was truly designed to radically change the CGL and remove toxic torts and similar incidents from coverage, one would have expected a great deal of direct evidence to this effect. After all the insurer argument, there simply is at best weak evidence for the industry's contention. To invoke the metaphor of statutory interpretation occasionally used by the Supreme Court, it seems at least significant that "the dog didn't bark" in a situation where, according to insurers, there was so much about which to bark.¹⁵¹

148. See *id.* at 21.

149. See *id.* at 23 (citing National Association of Insurance Brokers (NAIB) *Friday Flash* newsletter edition of March 15, 1985).

150. See *id.* at 24-25 (citing various broker or agent communications).

151. This observation is most strongly associated with Justice Stevens, who has been reluctant to give sweeping effect and broad literal application to statutory language where the language operates to alter a status quo of long-standing consensus or would tend to make for an absurd or bizarre result. In such cases, Justice Stevens has looked for some express indication that the legislature meant the language seemingly commanding a bizarre result to have the sweep intended by the dictionary or plain

Furthermore, there exists at least significant evidence from insurer representatives to suggest that the exclusion was never intended to disturb basic CGL coverage except to the extent of removing coverage for gradual, traditional pollution claims and Superfund liability. For example, when the absolute pollution exclusion was debated before the Texas Insurance Board, one questioner asked an industry representative whether a carrier could invoke the exclusion against a grocery store policyholder that was sued by a customer injured by bleach that spilled at the store. The following exchange took place:

Mr. Harrel [representing Liberty Mutual]: It [the pollution exclusion] can be read that way [broadly and literally], just as today's policy [with] the [sudden and accidental] pollution exclusion can be read in context with the rest of the policy to exclude any products liability claim. You can read today's CGL policy and say that if you insure a tank manufacturer whose tank is put in the ground and leaks, that leak is a pollution loss. And the pollution exclusion if you read it literally would deny coverage for that. I don't know anybody that's reading the policy that way, and I think you can read the new policy just the way you read it [literally]. But our insured would be at the State Board . . . quicker than a New York minute if, in fact, every time a bottle of Clorox fell off a shelf at a grocery store and we denied the claim because it's a pollution loss.

Mr. Thornberry [of the Texas Insurance Board]: I have also heard the justification that if an insurance company denied the claim and you went to the courthouse, the Courts wouldn't read the policy that way.

Mr. Harrel: Nobody would read it that way.

Mr. Thornberry: I guess my problem is why do we have language that appears—if there's an ambiguity, why don't we have it cleared up rather than in the policy.

Mr. Harrel: We have overdrafted the exclusion. We'll tell you, we'll tell anybody else, we overdrafted it. But anything else puts us back where we are today [covering gradual environmental pollution].

Mr. Rinebimer [representing Travelers Insurance]: My claims people have talked about some of these claim scenarios you're talking about and they have no intention of trying to enforce the exclusion against smoke from a hostile fire, for instance.¹⁵²

meaning of the words at issue. Where there is no such contemporaneous legislative expression that it really meant what it seems to have said, Justice Stevens finds "the fact that the dog did not bark can itself be significant." See, e.g., *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 589 (1982).

The "dog didn't bark" metaphor for testing linguistic meaning is drawn from the Sherlock Holmes mystery *Silver Blaze*, in which a race horse is stolen. Mysteriously, the theft went undiscovered until morning because the farm watchdog did not bark to alert the owners to the presence of an intruder. Holmes correctly discerned that the dog's passivity meant that the theft was an inside job perpetrated by someone familiar to and friendly with the dog. See A. Conan Doyle, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* 383 (1938).

Justice Rehnquist, although he has been more inclined to give literal reading to statutory language (for example, he wrote the majority opinion in *Griffin* to which Stevens dissented), has also accepted the "dog didn't bark" approach as a legitimate means of statutory analysis. See, e.g., *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980).

152. See Texas State Board of Insurance, Transcript of Proceedings: Hearing to Consider, Discuss, and Act on Commercial General Liability Policy Forms Filed by the Insurance Services Office, Inc., Board Docket No. 1472 (Oct. 30, 1985), Vol. I at 6-10. Mr. Rinebimer's position is supported by

The Louisiana insurance department has formally considered the meaning and background of the exclusion and concluded that it was not designed to reach so-called toxic torts or product liability claims involving pollutants. Rather, the department concluded that the pollution exclusion was intended to preclude pollution coverage, as the term is commonly understood. Faced with the Louisiana department's investigation, the insurance industry was unable to present persuasive proof to support its current stance that the pollution exclusion was designed to reach anything other than pollution claims. Rather, the Louisiana department, based on the investigation of a specially appointed task force, concluded that there was substantial evidence that the current pollution exclusion was not designed to preclude coverage for product liability claims and ordinary negligence claims incidentally involving chemical irritants, even when the irritants played a role in bringing about harm.¹⁵³

The Louisiana commissioner found insurers to have invoked the exclusion "to disavow coverage even though there was no underlying pollution incident which would justify use of the exclusion"¹⁵⁴ defining a genuine "pollution incident" as one in which the liability claim arises out of the discharge of pollutants creating "environmental damage," which was defined as contamination of land, water, or atmosphere.¹⁵⁵ The department "strongly" advised insurers to consider the following factors in determining whether a claim constitutes excluded pollution liability or merely regularly covered tort liability marked by some presence of irritant matter.

(1) Does the claim involve an incident that caused an environmentally significant discharge of pollutants resulting in environmental damage?

(2) Do the policyholder's regular business activities place it in the category of an "intentional active industrial polluter"?

(3) Does the claim involve an injury alleged to have been caused by a product, including exposure to fumes, which was being used in accordance with its intended purpose?

(4) Does the claim involve an injury alleged to have been caused by exposure to asbestos or lead?

In reviewing these factors, the Louisiana department, based on the background of the pollution exclusion, determined that where the policyholder was not an

the Insurance Services Office, which in a May 15, 1986, circular stated that the exclusion does not apply to bodily injury or property damage caused by a hostile fire and drafted clarifying endorsements (Nos. CG 00 41 [ed. 5-86] and CG 28 40 [ed. 5-86]).

153. See James H. Brown, Commissioner of Insurance, Louisiana Department of Insurance, Advisory Letter No. 97-01 (June 4, 1997) (addressed to "All Property and Casualty Insurers" regarding "Use of Pollution Exclusions"); Koorosh Talieh, *Louisiana Cautions Insurance Industry Against Overuse of Pollution Exclusion*, 3 BANKING ON INSURANCE 3, at 1 (Summer 1997) (newsletter published by Anderson Kill and Olick); C. Noel Wertz, *The Role of Regulators in Environmental Claims*, 7 COVERAGE 6, at 27 (Nov./Dec. 1997) (attorney with Louisiana department describes investigation into background of absolute exclusion, task force report, department ruling, and argues that insurance departments and policyholders are entitled to rely on industry representations and conduct in assessing meaning of policy provisions).

154. See Brown, *supra* note 153, at 1-2.

155. See *id.* at 2, n.4.

industrial polluter or where the claim arose from normal product use or lead/asbestos exposure, the exclusion is inapplicable and "denial of coverage and/or refusal to provide a defense may result in administrative action."¹⁵⁶

Evidence of record such as the colloquy before the Texas court tends to refute quite dramatically the industry position. The Louisiana decision is another important development tending to refute the insurers' arguments de jure for excluding anything touching upon an "irritant." The Louisiana department embarked on an investigation widely publicized within the industry. It appointed a task force and provided insurers with an opportunity to submit materials to prove its post hoc case of clearly disclosed intended breadth of the exclusion. Ultimately, insurers did not or could not submit material sufficiently persuasive to the Louisiana department. Like the insurer attorney commentary, these developments reflect a rather wobbly historical rock on which insurers attempt to build their fortress of the pollution exclusion.

The absolute pollution exclusion, if construed to eliminate coverage for not only pollution but also toxic torts, products liability, and other negligence claims involving chemicals in part would operate to dramatically constrict the scope of coverage provided by the CGL for four prior decades. If the insurers really meant to effect this reduction in coverage, one would expect to find "smoking guns" of unquestionable probative value supporting this version of history.¹⁵⁷

Juxtaposed with this evidence of a limited reach of the exclusion and the paucity of background information favoring the insurer position, policyholder advocates have set forth substantial material demonstrating that insurers appear indeed to have minimized the intended reach of the pollution exclusion when creating it and gaining approval for its insertion into the CGL policy.¹⁵⁸ A number of ISO memoranda surrounding the current pollution exclusion and industry seminars explaining the application of the new exclusion emphasize only the exclusion's focus on eliminating coverage for unquestionable pollution incidents (e.g., groundwater contamination, oil spills, smokestack claims) and Superfund liability.¹⁵⁹ Reviewing these documents, one commentator argues with considerable force that

156. See *id.* at 153, at 4.

157. The Louisiana department, for example, has expressed the view that "[h]ad ISO presented to the DOI the same explanation of the intent and effect of the exclusion on CGL coverage that is now being advocated by the industry it is extremely unlikely that the exclusion would have been approved for use in Louisiana, particularly in the absence of any significant rate reduction." Letter from C. Noel Wertz, Senior Attorney, Louisiana Department of Insurance, to Domenick J. Yezzi, Jr., Asst. V.P., Insurance Services Office (Oct. 25, 1994), quoted in John A. MacDonald, *Decades of Deceit: The Insurance Industry IncurSION into the Regulatory and Judicial Systems*, 7 *COVERAGE* 6, at 3 (Nov./Dec. 1997).

158. See John A. MacDonald, *supra* note 157, at 3. MacDonald attacks the industry for making representations to regulators that it subsequently repudiated in actual coverage cases for both the pre-1985 "sudden and accidental" pollution exclusion and for the current pollution exclusion.

159. See MacDonald, *supra* note 157, at 8-13. MacDonald marshalls an impressive array of documents or statements to this effect, considerably more evidence—and more persuasive evidence—than one finds in the insurer advocacy articles on the issue such as those of Shelley and Mason, *supra* note 5, and Zampino, *supra* note 9. For example, MacDonald discusses statements made to the National Association of Insurance Commissioners (MacDonald, *supra* note 157, at 11-13), a 1984 ISO Explanatory memoran-

The regulatory history evidence overwhelmingly reveals that the "absolute" pollution exclusion: (1) was not "absolute"; (2) was only intended to exclude insurance coverage for a limited class of releases occurring at the named policyholder's premises or at third-party waste disposal and storage facilities; (3) was not intended to exclude insurance coverage for products or completed operations claims involving "pollutants"; (4) was not intended to apply to most off-premise discharges; and (5) was admitted by the insurance industry to be "overdrafted" and "ambiguous."¹⁶⁰

Superfund was an issue at the time of the drafting of the exclusion but the great Superfund coverage cases were not decided until the late 1980s and early 1990s. Against the backdrop of little insurer evidence of greater breadth, a holistic view of the exclusion, one that does not focus hyperliterally on a term like "arising out of" or the laundry list definition of "pollutant" seems to shout from that page that the exclusion is designed to avoid coverage for what one normally thinks of as pollution (environmental degradation) and Superfund liability.

The pollution exclusion comprises nearly a page of the standard form CGL. It initially lists four subclasses of incidents that are excluded from coverage: (1) discharge at the insured's premises; (2) discharge at premises used for processing or storage of waste; (3) pollution resulting from transport or handling of waste matter by the insured or those for whom the insured is legally responsible; and (4) pollution resulting from subcontractor activity, including cleanup or remediation operations.¹⁶¹ A second segment of the exclusion, paragraph (2) is focused specifically

dum (*id.* at 8-9), a 1985 ISO explanatory memorandum (*id.* at 10), a 1985 ISO seminar (*id.* at 9), a 1985 ISO workbook, 1986 ISO Commercial General Liability Instructions (*id.* at 9), which cannot be discussed at length in this article. Although one can argue about the inferences drawn from these documents and contest some of MacDonald's conclusions because he is a policyholder's attorney, he is of course no more subject to the criticism of bias than insurer attorneys Shelley and Mason and Zampino et al. And, whatever one thinks of the analysis of the evidence and inferences drawn, MacDonald has amassed a good deal of evidence of drafting history favorable to policyholders.

Perhaps as well there are additional ISO or insurer materials not yet produced in litigation or subject to protective order that might bear on the question of the intended meaning of the absolute exclusion. This article does not claim to have reviewed the material referenced by MacDonald and his insurer opponents, but does find on the basis of their published writings that the insurers have fallen woefully short of carrying the day on their argument for a broad intended sweep of the pollution exclusion.

At best, the insurers have raised, unpersuasively in this article's view, some issues as to intent. But unless insurers can demonstrate not only that the pollution exclusion was designed to eliminate coverage for ordinary product and tort claims *and* that this was sufficiently known to regulators and policyholders, insurers should not be permitted to prevail in coverage disputes on the basis of such a subterranean and elusive purportedly pro-insurer drafting history. By contrast, policyholders have only the burden to show that intent and disclosure is an open question, a burden easily met on the basis of information such as that cited by MacDonald. Having satisfied this burden, policyholders may be permitted to obtain coverage based on arguments regarding the purpose of the CGL, policyholder expectations, and public policy.

160. See MacDonald, *supra* note 157, at 10.

161. See Insurance Services Office, Commercial General Liability Policy, CG 00 01 01 96, reprinted in ALLIANCE OF AMERICAN INSURERS, THE INSURANCE PROFESSIONALS POLICY KIT 348 (1997-98 ed.). Although the policy quoted has replaced the ISO CGL that initially contained the absolute pollution exclusion, the portion of the exclusion referenced has not changed since the 1985 introduction of the exclusion to the CGL. See note 2 *supra*, for the full text of these portions of the exclusion. Since the original exclusionary language, however, the exclusion has been modified to state the exclusion for

on excluding coverage for testing or remediation of polluted property or for any government actions seeking cleanup or reimbursement for cleanup.¹⁶² Only after this approximately 350 words of the exclusion so heavily trained on the Superfund problem does the exclusion include its thirty-one-word laundry list definition of "pollutant."

Today, of course, insurers have asserted that any liability claim against an insurer is excluded if it involves "vapor," "fumes," or "chemicals." But if the entire exclusion is read fairly, is the insurers' position not the hyperliteral "tail" of the exclusion wagging the "dog" of the exclusion's thrust of excluding environmental damage and Superfund claims? Recall that Travelers' representative in Texas stated that the exclusion did not apply to hostile fires even though "smoke" is a listed pollutant.¹⁶³ As a matter of textual analysis, the issue is at least one of uncertainty (which would ordinarily mandate that policyholders prevail under the doctrine of *contra proferentem*) absent some powerful evidence of drafting intent and public understanding. The insurers simply have not demonstrated any such intent or purpose behind the exclusion.

D. Recalibrating Reasonable Expectations Analysis into a Comprehensive and Contextual Method of Insurance Policy Construction

Courts should take a more comprehensive look at the role of policyholder and insurer expectations and the degree to which those expectations enhance the contextual base for interpreting insurance policies. The objectively reasonable expectations of both the policyholder and the insurer (and beneficiaries and other interested parties such as a lender or guarantor) should routinely be consulted in order to provide the background context for determining the meaning of a disputed policy term. There is no compelling reason for courts to myopically focus only on policy text and to affirmatively avoid appreciating the connotation and context of the policy. Major indicators of such policy meaning are the objectively reasonable expectations of the parties and even the subjective expectations of the parties.

claims arising out of pollutants brought on premises for contractor operations (subparagraph (d)(i) of the exclusion) does not apply if the claim arises out of "the escape of fuels, lubricants or other operating fluids which are needed to perform the normal" machinery functions of the operation. But the exception further provides that it is not applicable to vitiate the exclusion if the fuels or lubricants are "intentionally discharged." *Id.* at 348.

162. The relevant provision states:

2. [Also excluded is] Any loss, cost or expense arising out of any:

(a) Request, demand or orders that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.

Id. at 349.

163. See text and accompanying note 153, *supra*.

In many cases, use of expectations analysis can assist the court in determining whether policy language can or should be read literally or whether a dictionary definition is even accurate or apt for use in gauging the meaning of a word as used by the contracting parties. For example, does a policy term disclaiming coverage for anything "related to" the "release" of a "pollutant" bar coverage for a claim by a third party whose car skids on a puddle of oil negligently left on the road by a passing truck? In this latter case, courts unwilling to give literal application to such a broad exclusion should prefer to incorporate expectations into the analysis rather than arguing at length about the degree to which the pollution exclusion should be read literally or is ambiguous.

Where courts reject the potential utility of expectations analysis, they are left with an artificially bipolar choice of either reading the language literally and broadly in the wooden manner of a dictionary or deeming it hopelessly ambiguous. In the case of the pollution exclusion, this expands the exclusion and limits coverage but in other instances (e.g., the meaning of "damages"), a dictionary-oriented approach has the effect of expanding coverage even if the parties may have intended or expected a more narrow meaning that restricted the concept of damages to judgments for monetary relief in court rather than anything that entails an expenditure of funds.

The absolute pollution exclusion is an example of exactly the type of insurance policy provision for which courts should apply evenhanded reasonable expectations analysis not so much as a counterweight to clear text *but as a prerequisite to determining the meaning of words and the possible ambiguity of words*.¹⁶⁴ This use of background context expectations would be applied as part of the process of determining whether language is clear or ambiguous—and whether language should be read literally (even hyperliterally) or with greater or less breadth. Courts would generally, however, consider not only the dictionary definition of words, but also their connotative value, particularly the connotative value in light of the purpose of the contract, the setting of the contract, and the identity of the parties to the contract. If assessment

164. Unfortunately, the Florida Department of Insurance, although supporting coverage for *Deni Associates and Fogg*, rejected this assessment and argued in its amicus brief in *Deni/Fogg* that Florida should reject reasonable expectations analysis and rely only upon the traditional *contra proferentem* rule and absurd result rules in resolving insurance coverage disputes. See *Deni/Fogg*, 711 So. 2d 1135, 1140 n.4 (according to department brief "[a]dopting the reasonable expectations doctrine will negate the traditional construction guidelines and create greater uncertainty. This Court should not resort to the reasonable expectations doctrine because it will only spawn more litigation to determine the parties' expectations.").

Like the *Deni/Fogg* court, the insurance department apparently misunderstands the reasonable expectations doctrine and erroneously believes that expectations analysis requires an adjudication as to the actual subjective expectations of the litigant insured. This is incorrect. See text and notes 92-95, *supra*. In retrospect, of course, the department's position was tactically unwise. It provided the court with the opportunity to assert that even the department charged with protecting policyholders opposed expectations analysis. Apart from its miscues in the *Deni/Fogg* case, the department's position is wrong in a greater sense. On more than a few occasions, insurance policy language is ambiguous but the insured could have no expectation of coverage. In such cases, the insurer should not lose merely because it had the misfortune to draft an unclear provision and the insured should not win when it has no expectation or clear contractual right to coverage.

of both text and context does not provide a clear meaning for the disputed term, the expectations of and consequences to both insurer and policyholder become an important factor in deciding whether to give the benefit of the doubt to the policyholder or to the insurer.¹⁶⁵

The conventional approach that refuses to consider reasonable expectations (or any extrinsic matter) unless the disputed term is ambiguous on its face has it backwards. Ambiguity can only be accurately determined to exist or not exist after the relevant nontextual factors are considered as well. "Pollution" may mean something in Setting 1 and something quite different in Setting 2. Consequently, it is not surprising that courts generally have moved away from the traditional rule and permit nontextual matter to assist the court in determining whether text is ambiguous.¹⁶⁶

Viewed from this perspective, use of the expectations inquiry to assess text is not antitextual but rather, seeks to give the text its correct meaning rather than to crucify it on the cross of hyperliteralism. Similarly, expectations analysis does not denigrate the intent of the parties or the purpose of the contract. Rather, the expectations inquiry seeks to vindicate party intent and contract purpose. Consequently, and contrary to much of the traditional wisdom, the expectations approach serves the concepts of freedom of contract and market transaction. In the cases already identified by Judge Keeton—unfair surprise or unconscionable advantage—an objective expectations assessment serves to inform the court as to what is fair and conscionable and thus fills the "gap" created by unenforceable text in a principled way.

165. Weighed along with those expectations would also be other indicia of contract meaning such as: (1) the overall purpose of the contract and whether a particular interpretation of the disputed term better serves that purpose; (2) the identity of the drafter; (3) the degree of ambiguity and whether the ambiguity was inevitable or was the result of poor drafting that could have been improved; (4) whether the term is unconscionable, unfair, or surprising if construed in a particular manner; (5) any classic "parol" or "extrinsic" evidence (and, despite frequent confusion, the two terms are not strictly synonymous) that illuminates the parties' intent or specific subjective expectations (not to be confused with the objectively reasonable expectations that will be used as part of the background context to help assess the meaning of the four corners of the policy); (6) any factors supporting promissory or equitable estoppel against one or more of the parties.

To the extent that this sort of comprehensive inquiry does not resolve the issue, a court should be permitted to make an express consideration of public policy issues (qua public policy issues) and whether those considerations compel a particular construction in close cases. Factors to consider would include not only the perceived need for defense and indemnity by the policyholder but also the impact on insurance markets. Issues of solvency, notice, and stability should be permitted consideration by the court—but only in the closest cases where standard contract principles fail to bring resolution. Given the power held by insurers over contract language and structure, public policy issues affecting the insurer or the insurance industry should not be given significant consideration unless the more traditional interpretative factors listed above fail to resolve the dispute. In short, the reasonable expectations of the parties should be expressly recognized as one of the by-now-conventional contract principles utilized by courts in deciding contract disputes, particularly insurance policy coverage actions.

166. See Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531 (1996). See also *Pacific Gas & Elec. Co v. G.W. Thomas Drayage*, 69 Cal.2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968) (case frequently cited as example of modern trend of courts considering extrinsic matter as an aid to determining whether written contract language is ambiguous).

If the courts are too reverent toward text and too hesitant to utilize “rights at variance” reasonable expectations, the courts become accomplices in enforcing illusory “bargains.” Although the standardized insurance form contract does not easily fit within the historical bargain theory,¹⁶⁷ it can be said that in purchasing the form policy (and perhaps a relatively customized pack of endorsements), the policyholder has “bargained” for a certain level of coverage, protection, and financial security. The insurer has committed to a given level of protection against fortuitous events in return for a calculated premium. The insurer’s bargain should be respected even in many cases where the insurer did a suboptimal job of drafting policy language. But the policyholder should not have long-standing coverage stripped from the CGL absent clear language consistent with the context of the change in coverage and the expectations of the policyholder and other observers. Equally important, insurers should not be able to market “stealth” exclusions that reduce ordinary coverage without warning or the offer of a premium reduction.¹⁶⁸ The reasonable expectations approach provides an alternative to simplistic application of a strong form of *contra proferentem* as well as allowing the courts a route other than simplistic enforcement of policy text whose meaning is suspect or tending toward the absurd when applied literally to the context of the dispute.¹⁶⁹

IV. APPLYING COMMON SENSE COMPREHENSIVE CONTRACT THEORY TO THE POLLUTION EXCLUSION

When comprehensive contract interpretation is conducted that utilizes party expectation and contracting context as well as considering the connotative value of words, it becomes relatively clear which type of claims ought to be classified as “pollution”

167. See Edward A. Dauer, *Contracts of Adhesion in Light of the Bargain Hypothesis*, 5 AKRON L. REV. 1 (1972) (noting the standard form contract does not meet bargain model of contract formation and that methods of interpretation developed for traditional contracts with bargained-for terms may be inapt for interpreting disputed standardized contracts).

168. Predictably, insurers and policyholders differ over whether the lack of any premium reduction at the time of enactment of the absolute exclusion indicates a more limited scope of the exclusion. Policyholders assert that this is the case, reasoning that a coverage reduction as dramatic as asserted by the industry would logically bring with it reduced premiums. See MacDonald, *supra* note 157, at 15-16. Insurers disagreed, arguing that the nature of the change and remaining exposure was such that insurers could not recalculate premium amounts to reflect the curtailment in coverage. See Zampino et al., *supra* note 9, at 26-28.

This author’s view is that policyholders have the better of this debate: if pollution exposure was a sufficiently large problem to prompt the exclusion, one would expect a premium reduction even if the exclusion did nothing more than eliminate coverage for gradual pollution. However, this was the mid-1980s, a particularly hard time in the liability insurance market and insurers may simply have wanted to keep premiums up to recoup losses from prior years. But if the exclusion not only eliminated coverage for environmental degradation claims and Superfund cleanup but also shucked toxic torts and similar coverage from the husk of the policy, one would certainly have expected some corresponding change in price. Either insurers did not expect the exclusion to reduce coverage so dramatically or the CGL market was not competitive.

169. See Laurie Kindel Fett, Note, *The Reasonable Expectations Doctrine: An Alternative to Bending and Stretching Traditional Tools of Contract Interpretation*, 18 WM. MITCHELL L. REV. 1113 (1992).

within the meaning of the CGL exclusion. This section briefly assesses several recurring areas of contention according to this method of insurance policy construction. Despite the protestations of insurers, it is clear that comprehensive contract analysis leads to determinations that the hotly contested claims are within coverage in most instances.

A. *Torts with Toxins*

Applying a correct approach to contract construction, the better view is that the pollution exclusion excludes pollution liability and cleanup and does not strip the CGL policyholder of the coverage it had prior to the revision of the exclusion. Thus, so-called toxic torts are covered unless they are also torts meeting the connotative definition of pollution. However, even if observers find Shelley and Mason's argument more persuasive and read the exclusion to bar coverage for genuine toxic torts, the exclusion should not bar coverage for claims arising from situations that only incidentally involve a substance listed in the exclusion's definition of "pollutant." These are not toxic torts in the manner of a building drenched in carcinogens. Rather, the claims are better described as torts with toxins incidentally involved.

The torts with toxins cases never were the target of the pollution exclusion and should be covered. An example involving the asbestos exclusion illustrates the rationale. In *Kimmins Industrial Service v. Reliance Insurance Co.*¹⁷⁰ the Second Circuit held that burns from the steam of a "quench tower" and other injuries from a resulting fall by a worker removing asbestos were not barred by the asbestos exclusion in the liability policy, an exclusion involving broad terminology similar to that of the pollution exclusion. The court held that the injuries did not "arise" from the asbestos removal and were not precluded. The *Kimmins* court was essentially interpreting the policy in accord with its intended purpose and the reasonable expectations of the parties regarding coverage prior to the loss incident. Worker claims from workplace mishaps were expected to be covered unless they were squarely within an applicable exclusion. It was not "deconstructing" the asbestos exclusion but merely reading it reasonably.

Cases throughout the country provide illustrations of applying the pollution exclusion in a manner more narrow than its text but consistent with the drafter's intent and fair application of the policy in question so as to fulfill its purpose and meet the expectations of the parties. For example, when gas leaking from a convenience store pump damaged underground telephone wires, the court found coverage of the phone company claim even though suit by an adjoining landowner with a pond polluted from the gasoline might not have triggered coverage.¹⁷¹

170. 19 F.3d 78 (2d Cir. 1994) (applying New York law).

171. See *South Central Bell Tel. Co. v. Ka-Jon Food Stores of Louisiana, Inc.*, 644 So. 2d 357 (La. 1994). State Farm moved for rehearing and then filed a motion to vacate and remand the case on the basis of its purported discovery that the absolute pollution exclusion was never made a part of the actual *Ka-Jon* policy at issue and that the policy in fact contained only the former qualified pollution

The facts of *Deni* and *Fogg* themselves make an excellent case for the potential for reaching unreasonable and arguably absurd results in coverage cases where the court's focus is isolated text alone. In *Deni* the insured's agents knocked over a blueprint machine, spilling ammonia. This was not so much a pollution incident but a workplace accident that simply involved chemicals. Agents of *Deni* might just as easily have caused the building's evacuation by carelessly starting a fire or backing a delivery truck into a water main or a key pillar supporting the building. The *Deni* claim does not become anything really extraordinary merely because of the presence of ammonia. By contrast, true pollution claims tend to allege long-term, widespread contamination of a wide area involving persons other than just those in immediate proximity to the commercial insured tortfeasor (as were the other office building tenants).

Despite the colder reception experienced in the supreme court, policyholder *Fogg* has no greater degree of "pollution" associated with the liability claims against it than did *Deni*. Recall that *Fogg* became liable because its agents erred in conducting crop spraying and doused two bystanders with Ethion. As in *Deni*, the presence of the chemical made things worse than would have been the case had the plane been spraying water. But the fact remains that crop dusting is what an agricultural insured frequently does as part of its business—and things can go wrong, causing injuries when small planes regularly conduct this process. The *Fogg* plane could, for example, have crashed into the bystanders, a building, or a school bus. The plane could have struck a power line, shutting down area businesses, engendering business interruption claims as in *Deni*. Is the plane crash covered but the spraying mishap uncovered merely because of the presence of the chemical? This seems unreasonable, although insurers can correctly point out that the direct application of the pesticide created the seriousness of the injury. Dousing the bystanders with smoke or water would probably not have created such a serious problem, although it could have. To adapt Mae West's famous phrase: pollutants had almost nothing to do with it.

In contrast to the *Deni/Fogg* court, the court in *Associated Wholesale Grocers, Inc. v. Americold Corporation*¹⁷² appreciated the distinction between claims arising from toxic injury and claims that are more in the nature of traditional nonpollution tort claims. In *Americold*, the court faced a CGL without a hostile fire coverage endorsement and was forced to determine whether a claim for fire and smoke

exclusion. Finding the motion to raise a serious factual question, the court vacated its earlier decision and remanded the matter to the trial court to conduct factual inquiry to determine the actual content of the policy at issue. See *South Central Bell Tel. Co. v. Ka-Jon Stores of Louisiana, Inc.*, 644 So. 2d 368 (La. 1994). There have been no further reported decisions in the matter, which appears to have quietly settled after remand. Although the court's reverence for fact-finding precision and procedure is admirable, the court's earlier decision appears to find neither the old nor the new pollution exclusion applicable to the unusual tort at issue in the case. Consequently, the remand appears to have served only the insurer cause of eliminating an unfavorable reported decision and placing additional pressure to settle on the policyholder, which was in bankruptcy proceedings.

172. 934 P.2d 65 (Kan. 1997).

damage was covered. "Smoke" was of course a part of the exclusion's definition of pollutant. Notwithstanding this provision, *Americold* correctly found that the claim in question was properly characterized as one from a fire that began in the policyholder's underground storage facility. Even without an endorsement, fire claims have historically been part of CGL coverage. Although spreading smoke was a substantial agent of damage over several months, the court recognized this as something other than a pollution or Superfund claim. Rather, it was a fire damage claim incidentally but inevitably accompanied by smoke. As the court observed: "Why would anyone seeking general liability insurance for commercial property knowingly purchase a policy that covered liability for hostile fire damage but excluded smoke damage from the fire?"¹⁷³ Excluding the claim would violate the expectations of the policyholder and the purpose of the CGL but would not address the exposure problems facing insurers that prompted the absolute pollution exclusion. Thus, coverage was both appropriate and fair to both insurer and policyholder.

B. Carbon Monoxide Cases

In *Western Alliance Insurance Co. v. Gill*¹⁷⁴ and *American States Insurance Co. v. Koloms*,¹⁷⁵ the supreme courts of Massachusetts and Illinois both determined that the absolute pollution exclusion does not bar coverage for claims related to negligence resulting in carbon monoxide poisoning simply because carbon monoxide is a dangerous gas and as such falls within the literal reach of the pollution exclusion.

The Illinois court in *Koloms* faced a situation where the claim was against an insured landlord for failure to properly maintain a building furnace that emitted the carbon monoxide fumes that caused the injuries resulting in the claim. Examining the background, history, and purpose of the exclusion, the *Koloms* court determined that the exclusion, despite its broad literal language, was intended only to bar coverage for the traditional sort of waste discharge and diffuse contamination ordinarily thought of as pollution. Claims for the type of injuries traditionally arising from nonpolluting forms of insured negligence were not to be excluded. Hence, despite the linguistic breadth of the exclusion, the Illinois court limited the reach of the exclusion in order to render a coverage determination that the court viewed as more consistent with the purpose of the CGL and the exclusion and the intent of the drafters.¹⁷⁶

Citing *Koloms* and adopting similar reasoning, the Massachusetts court stated that the absolute pollution exclusion "should not be reflexively applied to accidents arising during the course of normal business activities simply because they involve a 'discharge, dispersal, release or escape' of an 'irritant or contaminant.'" ¹⁷⁷ Follow-

173. *Id.* at 77.

174. 686 N.E.2d 997 (Mass. 1997).

175. 687 N.E.2d 72 (Ill. 1997).

176. See *American States Ins. Co. v. Koloms*, 687 N.E.2d 72 (Ill. 2d 1997).

177. *Western Alliance Ins. Co. v. Gill*, 686 N.E.2d 997, 999 (Mass. 1997).

ing this analysis and confronted with a claim by a restaurant patron who suffered carbon monoxide poisoning as a result of poor ventilation at the restaurant, the *Gill* court found coverage not to be thwarted by the exclusion or the contaminant's role in bringing about the injury.

Gill and *Koloms* demonstrate the usefulness of reasonable expectations thinking and a comprehensive, connotative approach to contract construction in fairly resolving the issue of the applicability of the pollution exclusion. A similar functional approach was used in *Stoney Run Co. v. Prudential-LMI Commercial Insurance Co.*¹⁷⁸ The policyholder, the owner of an apartment building with a defective heating and ventilation system that caused carbon monoxide poisoning of several residents, sought coverage when sued. The insurer denied coverage on the basis of the absolute pollution exclusion.

As noted above, the obviously broad language cannot be read literally without eliminating coverage for many claims that fit snugly within the traditional notion of liability insurance coverage. *Stoney Run* implicitly took a more functional approach to the problem of interpreting the exclusion and limited the absolute pollution exclusion to its intended purpose, rejecting the insurer's request for a literal application of the exclusion. The *Stoney Run* distinction between environmental pollution and carbon monoxide poisoning or other losses that only incidentally involve pollutants is supported by traditional contract doctrine and expectations analysis used not to countermand clear text but to assess the meaning of text and to determine whether literal breadth is apt for interpreting policy provisions.

Although there are cases to the contrary,¹⁷⁹ the bulk of decisions dealing with carbon monoxide reach sensible results in favor of coverage, as did *Koloms*, *Gill*, and *Stoney Run*.¹⁸⁰

C. Lead Paint Cases

Although insurers have prevailed in excluding a good number of lead poisoning claims from coverage, the comprehensive, connotative approach to the pollution exclusion suggests these holdings are in error. For example, in one case, injuries to a child from the landlord's failure to remove lead paint from apartment walls were held uncovered.¹⁸¹ But most property owners sued by tenants because of the condition of the property held a reasonable expectation that this would be covered under a CGL, a view consistent with the purpose of commercial liability insurance and the intent of insurers and policyholders alike. Although lead is a "contaminant" when ingested, the nature of the lead poisoning claims seems a world away from

178. 47 F.3d 34 (2d Cir. 1995) (applying New York law).

179. See, e.g., *Reliance Ins. Co. v. Moessner*, 121 F.3d 895 (3d Cir. 1997) (applying Pennsylvania law).

180. See, e.g., *Regional Bank of Colo., N.A. v. St. Paul Fire and Marine Ins. Co.*, 35 F.3d 494 (10th Cir. 1994) (applying Colorado law) (carbon monoxide poisoning is not excluded; pollution exclusion does not apply "to every possible irritant or contaminant imaginable"); *Motorists Mutual Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679 (Ky. App. 1996).

181. See *Oates v. State of N.Y.*, 157 Misc. 2d 618, 597 N.Y.S.2d 550, 553 (Ct. Cl. 1993).

pollution as we normally envision it. Most claims arise because of paint dust from sanding or paint chips ingested by children. This is not much of a "discharge" or "release" of the material, particularly if the child has been peeling paint chips off the wall. Furthermore, lead as a paint additive is not a "contaminant" until ingested by a human. Consequently, the lead claims are in the main claims for injury from improper operation of the property rather than "pollution" claims, as recognized by a majority of courts considering the issue.¹⁸²

Of particular interest is *Lefrak Organization, Inc. v. Chubb Customs Insurance Co.*,¹⁸³ a case where noted coverage counsel represented both the policyholder (Anderson, Kill & Olick) and the insurer (Cozen & O'Connor). Presumably, the court was presented with all the arguments pro and con set forth by both sides of this debate over the scope of the exclusion. The court sensibly found coverage based on an appreciation of the purpose of the CGL and the expectations of the parties. The court appreciated more clearly than many courts that the pollution provision is an exclusion that must be construed narrowly.¹⁸⁴ The court also noted that the background context of the exclusion as well as the connotation of the words used suggested that the exclusion be limited in some manner to something resembling traditional environmental pollution.¹⁸⁵

On the issue of party intent and actual expectation, the court permitted discovery for the insurer when it suggested that this "might show that the parties had agreed, despite the policy language, that the pollution exclusion covered lead paint claims." The court permitted discovery, but Chubb was forced to concede an absence of any such evidence.¹⁸⁶ That Chubb failed to find any evidence is not nearly so damning as that Chubb wanted discovery at all. In essence Chubb wanted to

182. See, e.g., *Sphere Drake Ins. Co., P.L.C. v. Y.L. Realty Co.*, 990 F. Supp. 240 (S.D.N.Y. 1997) (claims arising out of ingestion of flaked paint chips covered); *Lefrak Organization, Inc. v. Chubb Custom Ins. Co.*, 942 F. Supp. 949 (S.D.N.Y. 1996) (coverage for claims by infant of lead absorption from paint presence in apartment); *Weaver v. Royal Ins. Co.*, 140 N.H. 780 (1996) (coverage where worker brought lead paint dust home on clothes). Although one need not go this far to find coverage, one court concluded that only environmental claims were meant to be excluded by the absolute pollution exclusion language and that product liability claims directed against lead paint were therefore within coverage. See *Sullins v. Allstate Ins. Co.*, 667 A.2d 617 (Md. 1995).

However, where lead paint chips were the byproduct of a contractor's commercial stripping and repainting activity rather than an attractive nuisance for children, one court held that lead paint chip contamination was "pollution" within the meaning of the absolute exclusion and that coverage was barred. See *United States Liab. Ins. Co. v. Bourbeau*, 49 F.3d 786 (1st Cir. 1995) (applying Massachusetts law). This author has previously suggested that *Bourbeau* was correctly decided (see STEMPPEL, *supra* note 1, § T1.6, at 119-20, n.13 (Supp. 1998)). But it now appears that *Bourbeau* was too literal in reading lead as a pollutant and failed to see that the paint sanding, however negligent, was an ordinary business operation of a commercial policyholder that should have been covered absent a more on-point exclusion.

183. 942 F. Supp. 949 (S.D.N.Y. 1996).

184. See *id.* at 952 (citing *Ace Wire and Cable Co. v. Aetna Cas. & Sur. Co.*, 60 N.Y.2d 390, 398, 469 N.Y.S.2d 655, 658, 457 N.E.2d 761 (1983) and *McCotis v. Home Ins. Co. of Indiana*, 31 F.3d 110, 112 (2d Cir. 1994) (applying New York law)).

185. See *id.* at 955-56.

186. See *id.* at 957.

introduce extrinsic evidence to contradict the language of the insurance policy in question. In other words, insurer counsel want interpretation confined to the four corners of the policy—unless they think they will lose. Now that’s deconstruction.

D. *Business Byproducts*

Policyholders have an objectively reasonable expectation that a CGL sold to them by an insurer aware of the policyholder’s business activity will provide coverage for the foreseeable and ordinary tort claims that tend to arise out of the activity. This framework requires a constrained, common sense reading of the exclusion when insurers attempt to invoke the exclusion to deny coverage for insured business activity that is not normally referred to as pollution by laypersons. Similar analysis of word meaning, extrinsic evidence, and application of contract construction ground rules fortify this conclusion.

Courts have taken a similar view of mishaps involving substances such as gasoline that the insurer knows are used in the policyholder’s business¹⁸⁷ or where the policyholder whose business is the manufacture of pesticides applies pesticide chemicals to the ground as part of its product-testing process.¹⁸⁸ As one court observed, the pollution exclusion “cannot be read literally as it would negate virtually all coverage.” The court was “particularly troubled by [the insurer position] as it makes it appear that [the policyholder] was sold a policy that provided no coverage for a large segment of the gas station’s business operations.”¹⁸⁹

In another case of this type, a policyholder running a creative arts education center was covered for claims made by a student who became ill from exposure to photo developing chemicals used as indicated as part of darkroom processing.¹⁹⁰ Although the claim involved chemical fumes, it was in the main a negligent operation, failure to warn, and failure to ventilate claim rather than a pollution claim. Further, the pollution exclusion applied to photo developing would have operated to remove coverage from a large portion of the policyholder’s business operations.

Perhaps the classic case of an ordinary business operations tort properly avoiding the exclusion is *West American Insurance Co. v. Tufco Flooring East, Inc.*,¹⁹¹ a case attacked fiercely by Shelley and Mason largely because its reasoning has been influential.¹⁹² In *Tufco* the policyholder resurfaced floors with styrene monomer resin at a Perdue chicken plant. Shortly after completing the job, it was discovered that the fumes from the flooring job had contaminated adjacent chickens in a cooler making them unusable. In addition to characterizing the floor resurfacing as a “completed operation” outside the scope of the exclusion, the court buttressed its ruling by noting

187. See *American States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996).

188. See *Great Lakes Chem. Corp. v. International Surplus Lines Ins. Co.*, 638 N.E.2d 847 (Ind. 1994).

189. See *Kiger*, 662 N.E.2d at 948-49.

190. See *Center for Creative Studies v. Aetna Life & Cas. Co.*, 871 F. Supp. 941 (E.D. Mich. 1994).

191. 409 S.E.2d 692 (N.C. 1991).

192. See Shelley and Mason, *supra* note 5, at 757-60, 766-69.

that an interpretation of the policy excluding coverage on pollution grounds would have the effect of stripping the policyholder of coverage for an ordinary business operation and that "to deny coverage for claims arising out of Tufco's central business activity would render the policy virtually useless to Tufco."¹⁹³ In addition, the chemical in question was a useful product applied as intended and was not really "discharged" but merely used normally. The *Tufco* court properly construed the CGL in light of its purpose and reasonable party expectations to create greater insight into the process of construing policy language.¹⁹⁴

In similar fashion, use of a cleaning compound to remove floor tile mastic is not subject to the pollution exclusion, even where the floor tile is being removed because it contains asbestos.¹⁹⁵ *Sargent Construction Company, Inc. v. State Auto Insurance Co.*¹⁹⁶ also correctly found coverage where the policyholder used muriatic acid to etch a floor prior to attempting to level a steel-troweled concrete floor as part of a construction project. Fumes from the acid corroded fixtures on the job site. The court rejected application of the exclusion, finding that acid used as part of a construction project cannot properly be deemed a pollutant even if it meets the literal language of the exclusion. The court found the exclusion ambiguous as applied but also considered construction industry views in determining the reasonable expectations of the policyholder.¹⁹⁷ Despite its use of *contra proferentem*, *Sargent* is in essence a case that refuses to exclude claims against a business for damage done in the course of business merely because chemical irritants played a part in the damage.

In a Maryland case, the court found coverage for pesticide-related claims because pesticide application was the sole business of the policyholder, that obtained the CGL to provide coverage for business operations.¹⁹⁸ Claims arising out of errant paint-spraying similarly were not excluded even though paint falls technically within the laundry list of defined pollutants in the exclusion. But painting was the essence of the insured's business and was its useful commercial activity. Hence, paint so applied, even if applied negligently, did not lose its status as a commercial activity and become a "pollutant."¹⁹⁹

In like manner, *Minerva Enterprises, Inc. v. Bituminous Corp.*²⁰⁰ found coverage for a policyholder operating a mobile home park when its septic tank malfunctioned, causing sewage flooding in the home of one of the tenants. Although one agent

193. 409 S.E.2d at 697.

194. Even if Shelley and Mason were correct in their criticism of *Tufco*'s assessment of the drafting history and insurer intent underlying the exclusion (which they are not), the *Tufco* holding and basic, purpose-oriented rationale would continue to be correct.

195. See *Island Assoc., Inc. v. Eric Group Inc.*, 894 F. Supp. 200 (W.D. Pa. 1995).

196. 23 F.3d 1324 (8th Cir. 1994) (applying Missouri law).

197. 23 F.3d at 1327.

198. See *Bentz v. Mutual Fire, Marine and Inland Ins. Co.*, A.2d 795 (Md. App. 1990).

199. See *A-1 Sandblasting and Steamcleaning Co. v. Baiden*, 632 P.2d 1377 (Or. App. 1981), *aff'd*, 643 P.2d 1260 (Or. 1982).

200. 851 S.W.2d 403 (Ark. 1993).

of the damage was sewage waste, the claim was more correctly viewed as stemming from a malfunction of the landlord's infrastructure—more like a defective furnace or security system and less like a real pollution claim.

The *Deni* and *Fogg* cases fit comfortably the business operations model of pollution exclusion cases, suggesting that these losses should have been covered under a CGL designed to give policyholders protection for liability stemming from their business operations. *Deni's* insurer must have been at least constructively aware that architects use drafting machines that use ammonia and that can give off fumes as the result of an accident. Similarly, Farm Bureau constructively knew that farmers spray crops and it never expressly disclaimed coverage for crop dusting mishaps. Indeed, Farm Bureau's refusal to cover a farmer for a crop dusting tort is particularly hard to justify in light of that insurer's longtime marketing strategy of portraying itself as the farmer's friend and an insurer that understands the farmer's business.

The influential *Westchester Fire Insurance Co. v. City of Pittsburg, Kansas* case²⁰¹ criticized by Shelley and Mason,²⁰² fits within this construct. The injury claim was made by motorists injured when accidentally sprayed by a pest control truck as they were passing the truck. Although the third-party claimants were injured by the noxious qualities of the chemical, the court found coverage because the incident resulted from ordinary government activity (pest control) rather than waste discharge or other pollution activity. The court also expressed reservation as to whether a useful product in essentially its intended use could be considered a pollutant even if within the literal policy definition of pollutants. Although not willing to restrict the exclusion solely to environmental claims, it found a need for constrained construction to prevent the exclusion from slicing away coverage for clearly normal policyholder activity that might give rise to claims, citing the example of a child claiming injury from chlorine in a city pool.²⁰³ The chlorine would be an irritant placed in water, but only would assert that errant pool disinfecting or use by a hypersensitive makes this "pollution."

Applying the analysis of this article, the court thus erred in *Employers Casualty Co. v. St. Paul Fire & Marine Insurance Co.*²⁰⁴ There, the court invoked the absolute pollution exclusion to bar coverage of a claim arising out of a worker's internal injuries due to toxic fumes given off at close range from the worker's use of an acetylene torch to burn through the "Monokote" coating on the job site in order to permit conduit to be run between floors of the building. The worker sued the general contractor, who allegedly established the work scene and sprayed the offending Monokote plaster on the floors as fireproofing. In the manner of *Deni* and *Fogg*, the *Employers* court gave hyperliteral reading and broad construction to the wording of an exclusion, undermining the basic purpose of the CGL at issue.

201. 768 F. Supp. 1463 (D. Kan. 1991), *aff'd sub. nom.* Pennsylvania Nat'l Mut. Cas. Ins. Co. v. City of Pittsburg, Kansas, 987 F.2d 1516 (10th Cir. 1993).

202. See Shelley and Mason, *supra* note 5, at 760-62.

203. See 768 F. Supp. at 1469-70.

204. 44 Cal. App. 4th 545, 52 Cal. Rptr. 2d 17 (Cal. Ct. App. 1996).

Liability policies are designed to provide coverage when the policyholder (in this case, the general contractor) injures another (in this case, the worker employed by a subcontractor) through negligence. Although the current pollution exclusion is designed to bar coverage for even negligent pollution, a common sense view of commercial activity quickly suggests that contractors are not "polluting" when they mistakenly instruct workers to engage in activity that accidentally exposes the worker to toxic material. For example, if the acetylene torch in the *Employers* case had burned the worker, would the presence of fuel make the injury an uncompensated pollution claim? Most laypersons would readily realize the absurdity of such a construction. Unfortunately, many courts appear not to possess as much perspective.

Better reasoned is *Bituminous Casualty Corp. v. Advanced Adhesive Technology, Inc.*²⁰⁵ In that case, the policyholder, an adhesive manufacturer, was sued by the estate of a customer who died from inhalation of the fumes while using the product on his boat. The court found the pollution exclusion ambiguous as applied out of a view that one does not "release" or "discharge" the adhesive one is using to install carpet, the task that led to the tragic death. Although the *Advanced Adhesive* court reached the right result by construing the ambiguous pollution exclusion against the insurer, the same result is more squarely justified by realizing that a pollution exclusion is simply not applicable to product-related injuries of this type, nor should the exclusion remove CGL coverage for the ordinary business activities of the policyholder. The customer was using the product for its intended purpose. Plaintiff's theory of the case against the manufacturer was failure to warn of the danger of the fumes, a natural byproduct of the use of the adhesive compound. The decedent was not killed by pollution but by a defective product. *Contra proferentem* analysis was not necessary to resolve the coverage dispute in the policyholder's favor.

By the methodology endorsed in this article, *Pipefitters Welfare Education Fund v. Westchester Fire Insurance Co.*²⁰⁶ was both correctly decided and correct in its assessment of the issue. In *Pipefitters*, eighty gallons of oil containing polychlorinated biphenyls (PCBs) spilled from a transformer sold by the policyholder to a scrapyard when the machine was cut open for sale as scrap metal. The policyholder was sued for failure to warn and failure to dispose properly of the dangerous chemicals. Because of the amount and dispersal of the PCBs and their clear status as dangerous waste pollutants, the court found the exclusion applicable and denied coverage.

In doing so, however, the court recognized that a literal application of the exclusion held too much potential for absurd results unfairly undermining coverage. The court endorsed a "common sense approach when examining the scope of pollution exclusion clauses" and suggested that the exclusion was not applicable to "injuries resulting from everyday activities gone slightly, but not surprisingly,

205. 73 F.3d 335 (11th Cir. 1996) (applying Georgia law).

206. 976 F.2d 1037 (7th Cir. 1992) (applying Illinois law).

awry.”²⁰⁷ The exclusion should not apply where it violated the reasonable expectation of the policyholder that claims resulting from ordinary business operations were covered.²⁰⁸ Because tossing out transformers and release of waste material from such equipment was not part of everyday Fund operations and because of the nature of the chemical and its means of causing damage, the *Pipefitters Fund* claim nonetheless fell within the exclusion and outside coverage, even under a constrained construction of the exclusion.

E. Hostile Fires

As previously noted, Shelley and Mason make much of the hostile fire endorsement, clarifying that the pollution exclusion does not strip the CGL of fire liability coverage. But, as also detailed above, the use of the endorsement is a redundancy. Under the better application of contract law, the endorsement offered in the 1980s and the current exclusion language expressly keeping fire coverage are unnecessary. Fire coverage would be in under any circumstances both because of insurer representations to insured and because it is such a major part of CGL coverage that policyholders reasonably expect it and would not anticipate its absence due to a broadly worded but unread exclusion.

For example, if a fire occurs in a building's snack bar, a reasonable person would probably not consider losses caused by the resulting smoke to be a pollution claim. Similarly, a warehouse fire is not a pollution event; it is fire. We would think it bizarre if the victims of fire attributed their losses to pollution. Even broadly drafted insurance provisions should not be interpreted to produce bizarre rules, particularly where the broad provisions are contained in an exclusion.

F. Indoor Air and Sick Buildings

Courts have been more charitable to insurers in the indoor pollution cases. In similar fashion to the lead paint decisions, another court held that injury claims resulting from an ammonia leak at the policyholder's warehouse were uncovered because of the pollution exclusion.²⁰⁹ Like the *Deni* ammonia case, this decision appears to err by undermining the expectations of the parties and the purpose of the CGL, although the question is closer than in *Deni* because the loss involves relatively wider dispersion of the chemical, gradual injury to a larger group of claimants, and generally comes closer to the layperson's connotation of a pollution claim. On balance, however, such decisions excluding coverage are unwarranted. The policyholder in the ammonia case presented un rebutted expert testimony by an environmental engineer stating that the amount of ammonia giving rise to the claims was not in a sufficient atmospheric concentration to constitute “pollution”

207. See 976 F.2d at 1044.

208. See *id.*

209. *American States Ins. Co. v. F.H.S., Inc.*, 843 F. Supp. 187 (S.D. Miss. 1994).

according to those who deal in pollution problems. The court disallowed the testimony on the rationale that the offered expertise was extrinsic evidence it deemed inadmissible because the language of the absolute pollution exclusion was so clear and unambiguous. To the contrary, the offered evidence was relevant precisely because it helped to illuminate the meaning of an exclusion that by the insurance industry's own admission is superficially clear but can easily not mean what it says if read broadly.

Nonetheless, the court in the ammonia incident felt constrained by both linguistic and legal formalism, stating that it was "not free to rewrite the terms of the insurance contract."²¹⁰ Immediately, of course, the court had in fact unwittingly rewritten the insurance policy to give the insurer a stronger exclusion than it had sought from state regulators. Fortunately, a higher court applying the same state law more recently took a more reasonable view and found coverage for claims arising from containers that fell from the policyholder's truck and caused an automobile accident, despite the presence of insecticide in the containers, although this claim is not as similar to air or land pollution.²¹¹

A closer question, albeit one on which courts nonetheless err, occurs in cases involving "hockey rink pollution." Hockey rinks are resurfaced between periods by an ice-scraping and flooding machine, which has an engine that gives off fumes. Although fume buildup is not usually a problem, in poorly ventilated buildings carbon monoxide levels can rise and cause injury. Insurers have successfully invoked the pollution exclusion against claims arising under these circumstances.²¹²

The inside of an ice arena is a step closer to smokestack pollution (which was a target of the 1986 absolute pollution exclusion) than the inside of an apartment or the guest house in which former tennis star Vitas Gerulaitas died of carbon monoxide poisoning. In addition, the facts recited in these cases seem to indicate that the dangerous conditions built up over an extended time period, making the claim look more like an air pollution matter. But the indoor air pollution cases remain problematic because the hazardous conditions inside a public arena resulting from garden variety mishaps, negligence, or building defects should be covered. The traditional liability policy has always covered these conditions. Similarly, if cars crash in the parking lot and gasoline ignites, most observers would not see the resulting damage as created by the discharge of a pollutant. Where the ambiguity approach is used, it can have powerful effect in resolving these types of cases in favor of the policyholder.²¹³

210. *Id.* at 190.

211. *See* Red Panther Chem. Co. v. Insurance Co. of Pa., 43 F.3d 514 (10th Cir. 1994) (applying Mississippi law).

212. *See, e.g.,* Essex Ins. Co. v. Tri-Town Corp., 863 F. Supp. 38 (D. Mass. 1994); League of Minn. Cities Ins. Trust v. City of Coon Rapids, 446 N.W.2d 419 (Minn. Ct. App. 1989).

213. *See, e.g.,* Minnesota Mining and Mfg. Co. v. Walbrook Ins. Co., 1996 Minn. App. LEXIS 36, *rev. denied*, 1996 Minn. LEXIS 160 (1996) (not to be cited as authority, an unfortunate determination by the court in view of the significance of the decision and its potential use as illustrative analogy for

Where the substance causing injury is not as strong a chemical, the case for coverage is strengthened, as the Wisconsin Supreme Court effectively held in *Donaldson v. Urban Land Interests, Inc.*²¹⁴ In *Donaldson*, the policyholder was sued by plaintiffs who worked in a "sick building" owned by the policyholder. The source of the problem was carbon dioxide buildup due to poor ventilation. Reviewing the purpose of the CGL, the context of the claim, and the connotative value of the policy language, and the reasonable expectations of the policyholder, the court concluded that carbon dioxide buildup is simply not subject to the pollution exclusion. To the court, it was

significant that, unlike the nonexhaustive list of pollutants contained in the pollution exclusion clause, exhaled carbon dioxide is universally present and generally harmless in all but the most unusual instances. In addition, the respiration process which produces exhaled carbon dioxide is a necessary and natural part of life. We are therefore hesitant to conclude that a reasonable insured would necessarily view exhaled carbon dioxide as in the same class as "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."²¹⁵

G. *The Hypothetical Cleaning Bucket at Disneyland*

This author has previously hypothesized as to whether a liability claim resulting from a negligently left bucket of toxic cleaner at Disneyland would be excluded as pollution when the child injured by the cleaning material sues. If maintenance workers at Disneyland negligently left a bucket of turpentine on the grounds and children drank from the bucket, no reasonable person would assert that Disneyland is not covered because of the pollution exclusion. Here, a textual approach alone could bring the correct construction. If the bucket is merely sitting with no spill

subsequent cases). In *Walbrook*, the court held that a liability claim against the manufacturer of static eliminator for dislodging of radioactive beads was not "pollution" within meaning of the absolute pollution exclusion. The court's analysis was primarily textual and functional, but it also noted:

This [pollution] exclusionary clause presents a close case. We are mindful when it becomes necessary to construe policy exclusions, the exclusions are to be construed strictly in favor of the insured.

Here, rival applications rest on wafer-thin distinctions in the meaning of policy terminology.

1996 Minn. App. LEXIS 36 at *4 (citation omitted). The *Walbrook* decision is seemingly inconsistent with a case from another panel of the same court of appeals, which found coverage unavailable for claims by hockey rink patrons arising out of fumes from an ice resurfacing machine. See *League of Minn. Cities Ins. Trust v. City of Coon Rapids*, 446 N.W.2d 419 (Minn. Ct. App. 1989), discussed above. The harmonizing rationale offered by the *Walbrook* court was that the absolute pollution exclusion, despite greater breadth than the former qualified pollution exclusion, nonetheless requires that the purported pollutant mix with air, water, land, or some other additional matter of consequence and foul or despoil that material—that is, to pollute it. In *Walbrook*, the mere fact that the equipment at issue was radioactive and regulated by the Nuclear Regulatory Commission was not sufficient to make it pollution per se, and the problem with the equipment was not a release of polluting material that combined with any other matter to bring about pollution. By contrast, the fumes of the ice resurfacing machine in the *Coon Rapids* case combined with the indoor air of the ice arena and made the air worse and damaging. The Minnesota courts may be moving to a view that the location and size of the despoiled matter is not relevant and that the crucial distinction is whether contaminant material releases sufficiently to foul additional substances or things.

214. 564 N.W.2d 728 (Wis. 2d 1997).

215. See *id.* at 732-33.

of the material, the pollutant was not "released" or "discharged" but was instead simply negligently left accessible. Shelley and Mason apparently agree with this analysis.²¹⁶

Beyond this is the question of whether there is coverage if the bucket is accidentally spilled by maintenance personnel, comes in contact with a young patron, who begets a rash, or worse. Even though the spilled bucket is literally a discharge of the pollutant from the bucket, this is not what a reasonable person would think when reading the pollution exclusion. Similarly, a reasonable reader of even the broad exclusion would not expect that this type of dispersal of this type of product affecting only one or a few persons is a "pollution" claim. Further, there was no basis for viewing such claims as excluded in light of the history of the CGL and of the pollution exclusion which was aimed at more widely dispersed chemical impact and government-mandated cleanup.

H. *Mea Minima Culpa (Sine Culpa?)*

In arguing for broad reading of the pollution exclusion, Shelley and Mason assert that my reading of the pollution exclusion is so narrow as to be shocking even to policyholders.²¹⁷ As "proof" of their point, they note that I have expressed misgivings about the decision in *Constitution State Insurance Co. v. Iso-Tex, Inc.*²¹⁸ In addition to taking issue with their overall characterization of my views,²¹⁹ I am unwilling to confess error in my misgivings about *Iso-Tex*, although I agree it is a more difficult case for the policyholder than many others.

In *Iso-Tex*, the policyholder was sued by third parties who claimed injury from radioactive waste deposited too close to their residences by the policyholder's waste disposal operations. The court held these claims to be outside coverage on the basis of the absolute pollution exclusion. At first glance, this looks like a pollution claim. Nuclear waste is certainly a contaminant and its deposit near the claimants bears a resemblance to cases of groundwater pollution or fertilizer runoff causing injury to those downstream. However, at least as I read the case report, the policyholder did not discharge or release the nuclear matter as a manufacturer discharges

216. See Shelley and Mason, *supra* note 5, at 771, n.105.

217. See *id.* at 772, n.108.

218. 61 F.3d 405 (5th Cir. 1995) (applying Texas law), discussed in STEMPER, *supra* note 1, § T1.6 at 155 and n.4 (1998 Supp.).

219. According to Shelley and Mason, *supra* note 5, at 772, n.108, I "side with the policyholder on the vast majority of insurance coverage issues." I think it more accurate to say that I probably agree with the policyholder position on more of the close and difficult coverage issues of the day, although I have never stopped to count. As to coverage generally, I am on record favoring many basic insurer positions and think it inaccurate to state that I am on the policyholder "team" on the "vast" number of coverage matters. But, in any event, I have a day job and do not make my living from either policyholder or insurer payments, although I have served as an expert witness or consultant for both. Consequently, it rings a little hollow when two lawyers in a firm nationally known for its years of service to insurers suggest that I am the one with bias or blinders. Currently contested coverage issues such as pollution, CERCLA cleanup, trigger, and allocation often become hot issues because of unclear policy wording applied to new situations. In such situations, basic contract law analysis often leads to a conclusion in favor of coverage since it is the insurer that drafted the unclear contract.

effluent, overheated water, spent fuel, and the like. Rather, the policyholder was in the business of sealing and delivering nuclear waste to intended locations thought to prevent injury to the public. If, as alleged in the complaint, the policyholder erred and placed nuclear waste canisters too close to people, the policyholder was guilty of negligent operations, not "discharge" of the waste.

To follow the textual literalism preferred by Shelley and Mason, there really was never a "discharge" or "release" of the nuclear waste. It was neatly packaged and contained even if it was closer to human homes than such matter should be. The pollution exclusion does not preclude coverage for all aspects of a waste management operation. It only excludes injuries arising from release of pollutants. Thus, although *Iso-Tex* is a tough case, it to me remains one that resembles business negligence more than polluting activity. Consequently, I continue to think that *Iso-Tex* was more wrong than right. The subsequent Minnesota Supreme Court decision in *Walbrook*²²⁰ provides support for my analysis, although the decision's designation as not official for publication perhaps supports the Shelley and Mason view.

V. CONCLUSION: SO WHO'S THE SOPHIST DECONSTRUCTIONIST?

In construing contracts, dictionary literalism is a poor substitute for connotative contextual construction. Insurer counsel themselves show great appreciation for the connotative value of words and they should not be entitled to have it both ways: applying connotative word meanings when it suits them (e.g., "sudden" as meaning "abrupt" even where this is not the preferred dictionary definition) and hyperliteral word meanings when this advantages the insurer (e.g., the laundry list definition of pollutants). When the full panoply of contract construction tools is brought to bear on the pollution exclusion, the case for a constrained reading of the exclusion becomes irrefutable. On the battlefield of drafting history as well, insurers come up long on tautology and rhetoric but short on proof.

The insurer rhetoric is marvelous political theater but only serves to reveal that, when it suits them, insurer counsel embrace connotative word meaning and nuance. For example, insurer attorney Zampino is fond of referring to policyholders in coverage disputes as "polluters" at seemingly every opportunity, labeling their counsel as "polluter advocates."²²¹ Having framed the issue in this manner, insurer counsel become extremely vulnerable to a few simple questions: Was Deni Associates a "polluter" because its workers were a bit awkward in moving a blueprint machine? Are floor resurfacers and insulation installers "polluters" when their work creates temporarily strong odors? Is it fair to refer to defective machinery maintenance as "pollution" even when it gives rise to carbon monoxide poisoning?

220. See note 213, *supra*.

221. See Edward Zampino and Victor C. Harwood III, *The Pollution Exclusion: Debunking the Policyholders' Regulatory Estoppel Myth*, FOR THE DEFENSE 2 (July 1995). Presumably, Zampino as well as Shelley and Mason place me in the polluter advocacy camp as well. See text and notes 198-201 *supra*.

Did paint makers and landlords "pollute" by slapping a few coats of lead-based paint on apartment walls? If one is willing to embrace connotative and contextual word meaning in contract interpretation, these and related business torts fail the common sense test for determining what is "pollution." One hallmark of sophistry is that the elegant arguments of the sophist have a certain superficial persuasiveness that on closer examination fail the test of common sense.

In addition, if insurers want to stage a morality play, they must be willing to have their own litigation conduct judged by the standards of morality. By this yardstick the insurance industry's position on the pollution exclusion is something short of good neighborly. After either misrepresenting the scope of the exclusion or at least failing to note its arguable linguistic breadth, insurers have sought to apply the exclusion to deny coverage for the types of claims long covered by the CGL. Even if this can be justified by textual sophistry, it is hardly fair dealing. And, unlike most other contracting parties, insurers are generally viewed as having at least a semifiduciary relationship with the policyholders so often dependent upon them for protection against claims and for financial security. A sensible application of long-recognized contract principles with only some fine-tuning to better account for party expectations, context, and the connotative value of contract terms reveals insurers to be the lawless radicals in this legal argument.

