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FIRST CIRCUIT PATCHES JUDGE POSNER'S LEAK IN THE POLLUTION EXCLUSION

St. Paul Fire & Marine Insurance Co. v. Warwick Dyeing Corp.
26 F.3d 1195 (1st Cir. 1994)

Rebecca Cagle Evors

I. INTRODUCTION

In a world where its inhabitants have become increasingly concerned about environmental issues, "[o]ne of the greatest challenges facing the American [insurance] industry today deals with the major threat of pollution-related environmental liability."[1] After Congress enacted the federal Comprehensive Environmental Response, Compensation, and Liability Act [hereinafter CERCLA][2] to commence a nationwide cleanup of America's threatening hazardous waste sites, private and governmental parties began bringing actions under CERCLA against manufacturers who were responsible for creating the hazardous waste sites.[3]

In response to the escalating amount of legal disputes involving environmental liability, the insurance industry, which had provided its insureds with general liability policies prior to the enactment of CERCLA, sought to limit its liability to provide coverage to insureds who were guilty of violating CERCLA.[4] As a result, the industry drafted an exclusion which barred coverage for damage that occurred as a result of insureds' intentional acts of pollution.[5] The pollution exclusion clause became an important part of every standard general liability policy and contained only one exception – the sudden and accidental exception.[6] The standard pollution exclusion clause reads: "[I]nsurance does not apply to bodily injury or property damage arising out of the discharge . . . of . . . contaminants or pollutants into or upon land . . . ; but this exclusion does not apply if such discharge . . . is sudden and accidental."[7] It is this exclusion, together with its only exception, that has become the subject matter of an endless amount of litigation[8] and the topic of numerous articles and other published materials.

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1. EMERIC FISCHER & PETER N. SWISHER, PRINCIPLES OF INSURANCE LAW § 5.09[A], at 659 (2d ed. 1994).

2. 42 U.S.C. §§ 9601-75 (1988).

3. *See* 1A FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW §§ 4A.02, 4A-18 (1994). The "Superfund Law" provided billions of dollars necessary to clean up hazardous waste sites for which owners would not take responsibility. *Id.*

4. *See* FISCHER & SWISHER, *supra* note 1, § 5.09[A], at 660.

5. *Id.*

6. *Id.*

7. ENVIRONMENTAL LAW AND PRACTICE GUIDE: STATE AND FEDERAL LAW § 8.02[1], at 8-6 to 8-7 (Michael B. Gerrard ed., 1994) [hereinafter ENVIRONMENTAL LAW].

8. *See* FISCHER & SWISHER, *supra* note 1, § 5.09[A], at 660-61; *see also infra* note 150.

Most opinions and analyses concentrate on the interpretation of "sudden and accidental" and attempt to clear up the confusion these otherwise ordinary words have caused in the legal arena. This Note, however, will focus on a more narrow issue involving the pollution exclusion's language which until recently has not been the subject of judicial attention.

The Note will examine the most recent case, *St. Paul Fire & Marine Insurance Co. v. Warwick Dyeing Corp.*,[9] and three other judicial opinions among the federal circuit courts of appeals which have interpreted the term "discharge" as it is used in the pollution exclusion clause. Furthermore, the Note will compare the different interpretations of "discharge," specifically, the inconsistent opinions on whether or not the placement of waste materials into an unlined earthen pit is a discharge into the land; analyze other issues related to interpreting this term; and, finally, relate how different interpretations affect the industry and its insureds.

A. Terminology

Throughout the discussion in the Note, different phrases are used to describe the same action; "initial discharge," "initial placement," and "primary discharge" are all phrases which describe the first action taken by the insured to dispose of the waste. In all cases discussed in the Note, the insured placed waste materials into a pit dug in the ground. This placement was the initial (primary) discharge of pollutants. After the waste was placed into the pit, the waste leaked through the bottom of the pit and seeped into the surrounding environment causing damage. This subsequent leakage is referred to in the Note as the "secondary" or "intermediate" discharge.

II. Facts and Procedural History

Warwick Dyeing Corporation was "in the business of dyeing, finishing and coating synthetic and synthetic-natural fiber blend fabrics."[10] The processes involved in Warwick's business produced waste which contained certain hazardous substances.[11] To dispose of these waste materials, Warwick, in July of 1979, employed ACME Services, Inc. to gather the waste from Warwick's west plant and carry it away to a disposal site.[12] ACME carried Warwick's waste to a duly licensed disposal site, the L & RR Site, where ACME disposed of the waste into the landfill.[13]

Although evidence did not show that Warwick had actual knowledge of how ACME disposed of the waste, a truck driver for ACME testified that he disposed of the waste by discharging it "directly into the landfill by opening a drain valve on his truck and letting the waste pour onto the ground."[14] No private or governmen-

9. 26 F.3d 1195 (1st Cir. 1994).
10. *Id.* at 1197.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*

tal party charged Warwick or ACME with improperly discharging Warwick's waste materials.[15] The Environmental Protection Agency [hereinafter EPA], however, did notify Warwick on September 18, 1989, of resulting contamination at the L & RR Site.[16] With respect to the contamination, the EPA labeled Warwick as a " 'responsible party' " since it had contracted with ACME for ACME to haul Warwick's waste and dispose of it at the L & RR Site.[17] The EPA stated that

> [u]nder CERCLA, a person that generates hazardous substances and arranges for their disposal is *strictly liable*, regardless of whether the person was at fault or whether the substance actually caused or contributed to any damage, for all costs of remediating environmental damages at the site where the substances ultimately are disposed.[18]

On June 29 of the following year, the EPA demanded in an administrative order that Warwick and twenty-four other respondents take remedial actions to "monitor and prevent the further release of hazardous substances" at the L & RR Site.[19] Also, the EPA ordered Warwick and the other respondents to reimburse the EPA for the costs it incurred from undertaking activities first to remedy the contamination that had previously occurred at the L & RR Site and second to prevent any additional releases.[20]

Later, on July 25, 1991, a group of plaintiffs, whom the EPA had named as " 'potentially responsible part[ies]' ('PRP[s]')," "[21] sued Warwick, along with forty-six other respondents, for recovery of the costs they incurred pursuant to following the EPA's order for remedial action at the L & RR Site.[22] The group of PRPs alleged that Warwick was "jointly and severally liable for having 'arranged for the disposal of hazardous substances' at the site."[23] Subsequently, Warwick and the group settled; Warwick paid the plaintiffs $40,000 and assigned them its insurance rights under its policy with St. Paul Fire & Marine Insurance Company [hereinafter St. Paul].[24]

St. Paul, Warwick's general liability insurance carrier, denied coverage to Warwick when Warwick sought "defense costs, and possibly, indemnity coverage for the claims made by the EPA and the private plaintiffs."[25] On January 27, 1991, St. Paul brought an action seeking a declaratory judgment that it had no duty to indemnify Warwick or defend it against the private and governmental claims.[26] St.

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15. *Id.*
16. *Id.*
17. *Id.* at 1198.
18. *Id.* at 1197-98 (referring to Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75 (1988)).
19. *Id.* at 1198.
20. *Id.*
21. *Id.* at 1197.
22. *Id.* at 1198.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 1198-99.

Paul and Warwick moved for summary judgment, and the federal magistrate recommended to the district court that it should enter a judgment for St. Paul.[27] The federal magistrate held that Warwick was barred from coverage "because the discharge of pollutants at the L & RR Site was neither 'sudden' nor 'accidental' as required by the exception" to the pollution exclusion clause in Warwick's policy.[28] On March 18, 1993, the district court issued an order and adopted the magistrate's recommendation.[29] The district court later recalled its order and vacated the judgment in favor of St. Paul in response to Warwick's motion for reconsideration "in light of 'newly discovered evidence' regarding representations made to state insurance regulatory authorities about the meaning of the pollution exclusion clause."[30] However, on June 4, 1993, subsequent to additional briefing, the district court entered a judgment in favor of St. Paul pursuant to the magistrate's recommendation.[31]

III. HISTORY AND LAW

A. CERCLA and Its Interface with State Insurance Law

In 1980, Congress, acting upon its concern for the threat hazardous waste posed to the country, enacted CERCLA, also known as the " 'Superfund Law.' "[32] CERCLA provides that any person who either owns or possesses hazardous substances and arranges for the disposal or treatment of such hazardous substances is liable for "all costs of removal or remedial action incurred by the United States Government or a State . . . ; any other necessary costs of response incurred by any other person . . . ; [and] damages for injury to, destruction of, or loss of natural resources" when there is a release of the hazardous substances "or a threatened release which causes the incurrence of response costs."[33]

Before CERCLA was enacted, " 'comprehensive general liability' (CGL)" policies were sold and provided the policyholder with "broad coverage for accidental personal injury or property damage (including injuries arising from pollution incidents)."[34] However, as they later became aware of the potentially enormous amount of hazardous waste litigation, insurance companies sought to limit the

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27. *Id.* at 1199.

28. *Id.*

29. *Id.*

30. *Id.* "Warwick argue[d] [on appeal] that St. Paul should be estopped or barred from applying the pollution exclusion to the facts of this case because of alleged representations that were made by various parties to state insurance regulatory authorities." *Id.* at 1205.

31. *Id.* at 1199. On the procedural issue of regulatory estoppel, the court held that Warwick was barred from raising the estoppel issue on appeal since Warwick had neglected to raise this issue initially to the district court. *Id.* at 1205. The court could not find an exception to this rule since no " 'egregious circumstances' or 'miscarriages of justice' " or other "special circumstances" existed to allow the court the opportunity to decide the issue of estoppel initially raised on appeal. *Id.* at 1206.

32. GRAD, *supra* note 3, § 4A.02[1][a], at 4A-144.

33. 42 U.S.C. § 9607(a)(3), (a)(4)(A-C) (1988). CERCLA in its entirety is codified at 42 U.S.C. §§ 9601-75 (1988).

34. GRAD, *supra* note 3, § 4A.02[5][d], at 4A-148.4 to 4A-148.5.

coverage of their policyholders' liabilities.[35] Thus, in 1973[36] the " 'pollution exclusion' " clause became a part of the standard CGL policy and "limit[ed] coverage to sudden and accidental pollution incidents."[37] A standard pollution exclusion clause contains the following language:

> [I]t is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere, or any watercourse or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*[38]

Judicial opinions are inconsistent on whether a policyholder is barred from coverage for his liabilities arising under CERCLA.[39] Among the courts there is a split of authority since state law governs contract interpretation, and, thus, states are free to make their own decisions about issues arising under the pollution exclusion clause.[40]

B. CERCLA Litigation: Interpretation of "Sudden and Accidental" and the Focus on the Act, Not the Resulting Damage

Currently, most insurance litigation involving the issue of coverage for hazardous-waste-cleanup is centered around the interpretation of the original pollution exclusion clause, drafted in the early 1970s, and its sudden and accidental exception.[41] Insurers argue that terms "sudden" and "accidental" contain a temporal element; "[i]nsureds argue that sudden and accidental is synonymous with unintended and unexpected."[42] Among the courts, there is a split of authority as to the correct interpretation of "sudden" and "accidental."[43]

For example, in *Broderick Investment Co. v. Hartford Accident & Indemnity Co.*,[44] Broderick Investment Company [hereinafter BIC] had an insurance policy with Hartford which contained the standard pollution exclusion clause;[45] thus, BIC would be excluded from coverage if the damaging contamination at its plant property " 'ar[ose] out of the discharge, dispersal, release or escape of . . . pollutants into or upon the land.' "[46] However, if BIC fell within the "sudden and acci-

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35. *Id.* § 4A.02[5][d], at 4A-148.5.

36. ENVIRONMENTAL LAW, *supra* note 7, at 8-6.

37. GRAD, *supra* note 3, § 4A.02[5][d].

38. ENVIRONMENTAL LAW, *supra* note 7, at 8-6 to 8-7 (emphasis added). The emphasis here is added to mark the standard exception to the pollution exclusion clause.

39. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: A COURSEBOOK ON NATURE, LAW, AND SOCIETY 296 (West 1992).

40. *Id.*

41. *See* GRAD, *supra* note 3, § 4A.02[d].

42. ENVIRONMENTAL LAW, *supra* note 7, § 8.04[7], at 8-24.

43. *See id.* at 8-26; *see also infra* note 152 and accompanying text.

44. 954 F.2d 601 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 189 (1992).

45. *Broderick*, 954 F.2d at 606.

46. *See id.*

dental" exception to the pollution exclusion, Hartford would be responsible to provide BIC coverage for the damage.[47] Before making its determination of whether or not BIC should be afforded coverage under its CGL policy, the Tenth Circuit waited until the Colorado Supreme Court decided *Hecla Mining Co. v. New Hampshire Insurance Co.*,[48] a case similar to *Broderick*.[49] In *Hecla*, the Colorado Supreme Court interpreted the phrase " 'sudden and accidental' " "to mean unexpected and unintended."[50] The *Hecla* Court also asserted that the "pollution exclusion clause focuses on . . . the *discharge* of pollution" and not the damage that results from the discharge.[51] Applying the Colorado Supreme Court's interpretation of "sudden and accidental" to the insured's actions and not the resulting damage, the Tenth Circuit held that the discharge of waste materials into the pits in the land was intentional and expected; thus, BIC did not fall within the exception to the pollution exclusion.[52]

In *Hartford Accident & Indemnity Co. v. United States Fidelity & Guaranty Co.*,[53] the Tenth Circuit again reached the same result as in *Broderick*—judgment in favor of insurer—but did so by applying a different interpretation of the phrase "sudden and accidental."[54] The Tenth Circuit was able to adopt a different interpretation since it was required to follow Utah law and the Utah Supreme Court had not previously determined the meaning of "sudden and accidental" in pollution exclusion clauses.[55] After looking to Utah appellate courts, other federal courts, and other circuits, the Tenth Circuit held that " 'sudden and accidental' in the pollution exclusion means abrupt or quick and unexpected or unintended in the context of Utah law."[56] The court's holding was based on its belief that the term " 'sudden' include[d] a temporal element, and [was] joined conjunctively with 'accidental.' "[57] This method of interpretation eradicated the ambiguity that other courts believed existed in the language of the pollution exclusion clause.[58] Although there was a split of authority as to the meaning of "sudden" and "acciden-

47. *Id.*

48. 811 P.2d 1083 (Colo. 1991).

49. *Broderick*, 954 F.2d at 604.

50. *Id.* at 605 (quoting *Hecla*, 811 P.2d at 1092).

51. *Id.* at 607 (quoting *Hecla*, 811 P.2d at 1088-89 n.7) (alteration in original).

52. *Id.* at 608.

53. 962 F.2d 1484 (10th Cir.) (Hunter, District Judge, sitting by designation), *cert. denied*, 113 S. Ct. 411 (1992).

54. *See Hartford*, 962 F.2d at 1491-92.

55. *Id.* at 1487.

56. *Id.* at 1487, 1492 (emphasis omitted).

57. *Id.* at 1492. This court's interpretation is contrary to that of the Third Circuit. *Id.* at 1488-89. The Third Circuit in New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1198-99 (3d Cir. 1991), held that using the conjunctive "and" to join the words "sudden" and "accidental" did not " 'inject[ ] a temporal element, such as brevity or abruptness, into the exception to the pollution exclusion clause.' " Hartford Accident & Indem. Co. v. United States Fidelity & Guar. Co., 962 F.2d 1484, 1489 (Hunter, District Judge, sitting by designation) (quoting *New Castle*, 933 F.2d at 1194-95), *cert. denied*, 113 S. Ct. 411 (1992).

58. *Hartford*, 962 F.2d at 1489. On the issue of ambiguity, the Tenth Circuit quoted the Third Circuit's opinion in *New Castle*: " '[T]he existence of more than one dictionary definition is not the *sine qua non* of ambiguity. If it were, few words would be unambiguous.' " *Id.* at 1489 n.6 (quoting *New Castle*, 933 F.2d at 1193).

tal," almost all of the federal courts, as the Tenth Circuit noted, agreed that it is the discharge and not the resulting damage that must be sudden and accidental.[59]

In contrast to the two opinions from the Tenth Circuit, Judge Posner, writing for the Seventh Circuit, circumvented a detailed analysis of the interpretation of "sudden" and "accidental."[60] In *Patz v. St. Paul Fire & Marine Insurance Co.*,[61] Posner merely stated that the discharges of pollutants were " 'sudden and accidental' in the sense of unintended and unexpected, which is the meaning that Wisconsin's highest court [had] impressed upon those words."[62] Employing this definition of "sudden and accidental" was not the unusual aspect of Posner's opinion, for the Tenth Circuit in *Broderick*, as noted above, also interpreted these terms to mean "unintended and unexpected."[63] The interesting point of departure in Posner's opinion was that he focused the sudden and accidental exception on the discharges that occurred subsequent to insured's initial act of disposing of pollutants.[64] Posner considered the secondary (subsequent) discharges of contaminants from their containers, an unlined earthen pit and barrels buried in the ground, to be the relevant discharges: "[T]he only discharges," Posner stated, "were the unintended and unexpected consequences of the defective containers in which the pollutants had been placed."[65] By focusing on the "consequences" of the initial discharges, the placement of wastes into the containers, Chief Judge Posner entered judgment in favor of the insured.[66]

Although there was some disagreement as to the meaning of "sudden and accidental" under state law, essentially, prior to the Posner opinion, there was general agreement that the relevant discharge within the meaning of the pollution exclusion clause was the initial placement of pollutants into earthen pits.[67] As will be seen, Posner rejected this entire line of cases by finding that there was no relevant discharge until the pollutants leaked through the bottom of the pit into the surrounding environment.[68]

C. A New Front in CERCLA Litigation: Interpreting the Term "Discharge"

What constitutes the relevant discharge is a recent challenge to coverage under the pollution exclusion clause.[69] Some argue that the secondary discharge, such as the "subsequent leaching" of contaminants from a landfill, is the relevant dis-

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59. *Id.* at 1491.

60. Patz v. St. Paul Fire & Marine Ins. Co., 15 F.3d 699 (7th Cir. 1994).

61. *See id.*

62. *Id.* at 703 (citing Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 570-71 (1990)).

63. *See supra* notes 49-52 and accompanying text.

64. *Patz*, 15 F.3d at 703-05.

65. *Id.* at 705.

66. *Id.*

67. *See supra* note 59 and accompanying text.

68. *See infra* note 94 and accompanying text.

69. [Defense Research Institute, Inc.] Defense Practice Seminar, Insurance Coverage for Environmental Claims 421C, A-42 (Oct. 6-7, 1994) (on file with *Mississippi College Law Review*) [hereinafter Defense Practice Seminar].

charge, and, thus, the initial placement of wastes into the environment was not intended to be the focus of the sudden and accidental exception.[70]

In *Patz v. St. Paul Fire & Marine Insurance Co.*,[71] the Patz family manufactured farm equipment and expanded its operation to include painting the equipment before sale.[72] Painting the equipment produced two by-products: paint sludge and water contaminated by phosphate.[73] Hired consultants advised the Patzes to put the paint sludge into barrels and then carry the barrels to the town dump where they would be burned or buried.[74] The Patzes followed this advice, but when the Department of Natural Resources [hereinafter Department] ordered the Patzes to remove the barrels from the dump, the Patzes carried the barrels back to their own property where they buried them.[75] To dispose of the contaminated water, the consultants suggested that the Patzes create an evaporation pit.[76] By pouring the waste water into an open pit dug in the ground, the Patzes could easily remove the solid phosphate from the bottom of the pit once the water evaporated.[77] This was a well-accepted method in the waste-disposal community and was expected to be an effective method of waste-disposal for the Patzes.[78] It was thought that the phosphate would not contaminate the soil beneath the pit since the water would evaporate before it could penetrate the dense clay soil.[79]

The Department later investigated the Patzes' operation, whereupon it discovered that seepage of pollutants from the pit had contaminated the groundwater and the leakage of sludge from buried barrels had contaminated the soil.[80] Although the contamination had not spread beyond the Patzes' premises, the Patzes were forced to expend $400,000 to remove the barrels, along with some of the soil underneath them, and a considerable amount of soil beneath the evaporation pit.[81] The clean-up was ordered by the Department, and the Patzes sought to recover the cost from their insurance carrier, St. Paul Fire & Marine Insurance Company.[82]

St. Paul refused to reimburse the Patzes for their clean-up cost for two reasons.[83] First, St. Paul contended that the Patzes' depositing of the waste water into the pit dug in the ground and burying of the barrels containing paint sludge constituted " 'discharge[s]' of waste materials into the land";[84] thus, the pollution exclusion clause found in the Patzes' liability insurance policy excluded them from

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70. *Id.*
71. 15 F.3d 699 (7th Cir. 1994).
72. *Id.* at 701.
73. *Id.* at 701-02.
74. *Id.* at 702.
75. *Id.*
76. *Id.* at 701.
77. *Id.*
78. *Id.*
79. *Id.* at 702.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*

coverage.[85] Second, St. Paul claimed that the Patzes' discharges of waste materials did not fall within the sudden and accidental exception to the pollution exclusion clause since their discharges were intentional and not accidental.[86]

In *Patz*, the Seventh Circuit did not narrowly construe the pollution exclusion clause language to exclude from coverage only insureds who deliberately pollute and cause harm.[87] The Seventh Circuit instead used an "intermediate interpretation . . . [and] distinguish[ed] between deliberately discharging waste materials into land . . . whether or not 'harm' [was] intended, and placing those materials in a container that [was] buried in land . . . and subsequently leaks or breaks, discharging waste materials into the land or water surrounding the container."[88]

Applying this interpretation, the court viewed the barrels and, surprisingly, the evaporation pit as containers which later leaked contaminants into the surrounding land and water.[89] Chief Judge Posner, writing for the Seventh Circuit, explained why the unlined earthen pit was a container, not just a hole dug into the land; Posner reasoned that the clay soil was a "building material," and, hence, the evaporation pit was a "containing structure, despite its lack of artificial materials."[90] Seeing the barrels as containers was easier; instead of just dumping the paint sludge directly on the ground, the Patzes placed the sludge into barrels, which were not themselves contaminants, and buried the barrels under the Patz property.[91] Since the evaporation pit and barrels were containers, discharging the wastes into the unlined pit and burying the sludge barrels were not discharges into or upon land.[92] Therefore, the court considered irrelevant the Patzes' intentions at the time they initially placed their wastes into the pit and buried the barrels of sludge.[93]

Ruling out the Patzes' initial discharge of waste materials, the court held that the relevant discharges were the subsequent occurrences of waste water leaching through the bottom of the evaporation pit and sludge leaking through the barrels into the surrounding environment.[94] Consequently, the Patzes were not excluded from coverage since they fell within the sudden and accidental exception to the pollution exclusion clause: the discharge of pollutants, the leakage from defective containers (the evaporation pit and barrels), was "sudden and accidental in the special sense of unintended and unexpected."[95] The court, perhaps hinting at the

85. *Id.*
86. *Id.*
87. *Id.* at 703.
88. *Id.*
89. *Id.* at 703-04.
90. *Id.* at 704.
91. *Id.* at 703.
92. *Id.* at 704.
93. *Id.*
94. *Id.* at 703-04.
95. *Id.* at 704. The Seventh Circuit's interpretation of "sudden" and "accidental" was that of the Wisconsin Supreme Court, which gave this meaning to the terms in Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 573 (1990). Patz v. St. Paul Fire & Marine Ins. Co., 15 F.3d 699, 703 (7th Cir. 1994).

absurdity that the discharge of contaminants could be anything but "sudden and accidental," even commented that generally landowners do not intentionally pollute their own land.[96] St. Paul was held liable to reimburse the Patzes for the expenses they incurred.[97]

Distinguishable from Chief Judge Posner's interpretation of "discharge" in *Patz*, Judge Tacha, writing for the Tenth Circuit Court of Appeals, opined on the issue of what constitutes a "discharge" under the pollution exclusion clause in *Broderick Investment Co. v. Hartford Accident & Indemnity Co.*[98] In *Broderick*, BIC succeeded to the rights and obligations of Broderick Wood Products, Inc. [hereinafter BWP] after BWP dissolved in 1982.[99] Prior to its dissolution, BWP was in the business of "pressure-treating wood products such as telephone poles and railroad ties with either creosote or pentachlorophenol; steam-cleaning the impregnated wood; and disposing of the residue chemicals, oils, and water."[100] Since the residue waste materials were mostly water, BWP disposed of the waste by dumping it into "unlined pits located" on BWP's property.[101] BWP's expectation was that the water would evaporate and leave a sludge on the bottom of the pit.[102]

However, BWP's disposal method was not successful in preventing contamination: "By mid-1983, it was conclusively determined that contaminants from the pits were seeping into the soil and groundwater."[103] In 1986, the EPA sued BIC to recover costs it incurred in responding to the environmental contamination and any costs it would incur in cleaning up the BWP property.[104] BIC sought coverage from Hartford Accident & Indemnity Company [hereinafter Hartford], which had "provided BWP with CGL policy coverage from 1976 until 1982 and insured BIC from 1982 until 1984."[105] The insurance policy that BIC had obtained from Hartford contained the standard pollution exclusion clause and sudden and accidental exception to the exclusion.[106] Adopting the Colorado Supreme Court's interpretation of "sudden and accidental" as "unexpected and unintended," the Tenth Circuit was left to determine another issue arising under the pollution exclusion clause as it believed the Colorado Supreme Court would.[107]

Faced with the decision whether or not BWP's discharge of pollutants was "sudden and accidental,"[108] the Tenth Circuit first had to determine what was the rele-

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96. *Patz*, 15 F.3d at 705.

97. *See id.*

98. 954 F.2d 601 (10th Cir.) (Bratton, District Judge, sitting by designation), *cert. denied*, 113 S. Ct. 189 (1992).

99. *Broderick*, 954 F.2d at 603. Throughout this opinion, the Tenth Circuit refers to BIC making the discharge when actually it was BWP; BIC, BWP's successor, assumed the rights and obligations of BWP. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 604.

105. *Id.*

106. *Id.* at 606.

107. *Id.* at 605.

108. *Id.* at 608.

vant discharge.[109] Judge Tacha, writing for the court, noted that it was an acceptable method of interpretation under Colorado law to look to dictionary definitions of the terms "discharge, dispersal, release, or escape" in order to "construe these words according to their plain and ordinary meaning."[110] The district court had agreed with BIC's position that the relevant discharge was the seepage of the pollutants from the pits into the soil and groundwater and not BWP's initial placement of waste materials into the pits.[111] On appeal, BIC defended this position and urged "that the term 'discharge' may be interpreted reasonably to mean 'to let go,' 'release from confinement' or 'to give outlet to.' "[112] Even by employing these definitions, Judge Tacha determined that the relevant discharge was still the initial placement of waste into the pits; these pits were dug into the land, and BWP discharged pollutants "into or upon the land."[113] "[A]ny other interpretation," Tacha stated, "runs counter to common sense, plain meaning, and ordinary usage."[114]

On another point of interpretation, Judge Tacha wrote that since the conjunction "or" joined the four terms, BWP's disposal of the waste into the pits was the relevant act as long as any of the four words unambiguously described the act.[115] Judge Tacha concluded that BWP's disposal of the "residue chemicals, oil, and water"[116] into the pits was an act unequivocally described by "the phrase 'discharge . . . into or upon the land.' "[117]

Furthering its argument that the initial placement of wastes into the holding ponds was not the relevant discharge, BIC contended on appeal that the ponds were better characterized as containers since at least one pond, the main pond, was partially lined with cement and a natural clay layer formed the bottom of every pit.[118] Judge Tacha reasserted the Tenth Circuit's position that placing the waste materials into the holding ponds was a discharge " 'into or upon the land.' "[119] Moreover, Tacha noted that the court reached the same conclusion "[e]ven when [it] view[ed] the evidence in a light most favorable to BIC and adopt[ed] BIC's characterizations as true."[120]

Similarly, in response to BIC's contention that BWP intended to contain the waste in the pits and not for the pollutants to seep from the pits into the soil and groundwater,[121] Judge Tacha enunciated the Colorado Supreme Court's holding in *Hecla*: ' "[T]he pollution exclusion clause focuses on whether the *discharge* of pol-

109. *Id.* at 606-07.
110. *Id.* at 607.
111. *Id.* at 606-07.
112. *Id.* at 607.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 603.
117. *Id.* at 607.
118. *Id.* at 607 n.5 (alteration in original).
119. *Id.*
120. *Id.*
121. *Id.* at 607.

lution was unexpected and unintended.' "[122] BIC was incorrect to apply the requirement of intent to the damages that resulted from the discharge.[123] The Tenth Circuit, however, applied the Colorado Supreme Court's interpretation of "sudden and accidental" correctly to BWP's initial actions and determined that BWP intended and expected to discharge the waste materials into the pits in the land.[124] Thus, the circuit court concluded that under the terms of the CGL policy BIC did not fall within the "sudden and accidental" exception to the pollution exclusion and was, therefore, excluded from coverage.[125]

Almost four months after the Tenth Circuit had decided *Broderick*, the court again was faced with the same pollution exclusion issue. In *Hartford Accident & Indemnity Co. v. United States Fidelity and Guaranty Co.*,[126] the insured, El Paso, had "operated a gas transmission system" for fifteen years.[127] The operation of this system produced waste materials in the form of liquid wastes and lubricants.[128] For disposal of these materials, El Paso dumped the wastes onto the ground and into unlined pits dug in the ground.[129] Although at the time El Paso disposed of the waste materials it had no knowledge that the liquid wastes and lubricants contained polychlorinated biphenyls (PCBs), El Paso was later held liable for the $6.6 million dollar clean-up costs its successor incurred as a result of remedying the PCB contamination.[130] El Paso sought indemnification from its insurer Hartford, but Hartford refused coverage and claimed that El Paso was barred from coverage because El Paso did not fall within the sudden and accidental exception to the pollution exclusion clause.[131]

Judge Moore, writing for the Tenth Circuit, paralleled issues in *Hartford* to those in *Broderick* and concluded that the relevant discharge was the initial disposal of liquid waste into the unlined pits in the ground, not any later release or seepage into the environment; the disposal was a "continuous and routine . . . practice" that El Paso had been operating for years.[132] Thus, El Paso did not fall within the exception to the pollution exclusion clause since its discharge was neither sudden (abrupt) nor accidental (unexpected).[133] Also, by using the same parallelism, Judge Moore held that it was irrelevant whether or not El Paso intended to

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122. *Id.* (alteration in original) (quoting Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1088-89 n.7 (Colo. 1991)).

123. *See id.*

124. *Id.* at 608.

125. *Id.*

126. 962 F.2d 1484 (10th Cir.) (Hunter, District Judge, sitting by designation), *cert. denied*, 113 S. Ct. 411 (1992).

127. *Hartford*, 962 F.2d at 1486.

128. *Id.*

129. *Id.*

130. *Id.* at 1486-87.

131. *Id.* at 1487.

132. *Id.* at 1491-92.

133. *Id.*

cause the damage because the focal point of the sudden and accidental exception is the initial discharge.[134]

IV. The Instant Case

In *St. Paul Fire & Marine Insurance Co. v. Warwick Dyeing Corp.*,[135] the First Circuit Court of Appeals joined the considerable group of courts that had studied the "oft-litigated pollution exclusion clause commonly found in general liability insurance policies."[136] Although the First Circuit had the security of knowing that regardless of its holding it would have the support of a "sizeable number of . . . courts," the court joined the ranks of those courts which "narrowly constru[ed] the breadth of coverage" provided to the policyholder under the pollution exclusion clause and ruled in favor of the insurer.[137]

After interpreting the insurance contract between Warwick and St. Paul, the district court held that "Warwick's claims [were] excluded from coverage as a matter of law."[138] The First Circuit, in its review de novo of the district court's decision, was governed by Rhode Island law;[139] case law in Rhode Island established that judicial construction should be used in interpreting insurance policies only when the terms of the policy are found to be ambiguous.[140] Although courts should not "seek out ambiguity," "[l]anguage that is found to be ambiguous or capable of more than one reasonable interpretation will be construed liberally in favor of the insured and strictly against the insurer."[141]

Since the Rhode Island courts had not yet considered the pollution exclusion clause, the First Circuit relied on Rhode Island's standards for contract construction and decisions from other jurisdictions which used the same principles in interpreting insurance contracts.[142] In deciding one issue, however, the First Circuit relied on its holding in *A. Johnson & Co. v. Aetna Casualty & Surety Co.*[143] where it had applied Maine law.[144] The First Circuit in *A. Johnson* held that the insurer bears the burden of proving "that the pollution exclusion applies" and that the insured was responsible for proving that he fell within the exception to the pollution exclusion clause and was, therefore, entitled to coverage.[145] The insured bore this additional burden of proof since he also carried the burden of proving that he was covered under an insurance policy.[146] Thus, the First Circuit held that Warwick

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134. *See id.* at 1491.
135. 26 F.3d 1195 (1st Cir. 1994).
136. *Id.* at 1197.
137. *Id.*
138. *Id.* at 1199.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. 933 F.2d 66, 76 n.14 (1st Cir. 1991) (citing 19 George J. Couch, Couch on Insurance § 79:385 (2d ed. 1983)).
144. St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195, 1200 (1st Cir. 1994).
145. *Id.*
146. *Id.* (citations omitted).

was responsible for "establishing that the discharge of its waste was 'sudden and accidental' under the exception to the pollution exclusion."[147]

The insurance policies between St. Paul and Warwick contained a pollution exclusion clause which did not afford coverage for "property damage arising out of the discharge, dispersal, release or escape of pollutants of waste materials unless the discharge is 'sudden and accidental.' "[148] The important phrase of this clause is "sudden and accidental," for it is an exception to the exclusion which would have allowed Warwick to receive coverage for its claims.[149] However, the district court held that the "discharge of Warwick's wastes at the L & RR landfill was neither sudden nor accidental and thus not covered under the policies."[150]

The First Circuit agreed with the district court's holding on this issue.[151] Noting that courts are just about split down the middle as far as their interpretation of "sudden and accidental,"[152] the First Circuit decided to forego the debate on whether the term "sudden" is ambiguous.[153] The court of appeals adopted the position adopted by almost all courts that the term " 'sudden and accidental,' means, at the very least, 'unintended and unexpected.' "[154] Thus, the court did not find it necessary to determine whether or not "sudden" is an ambiguous term; it simply agreed with the district court on its interpretation and application of "sudden and accidental" and upheld the summary judgment granted to St. Paul.[155]

Warwick contended on appeal that the district court erred in finding that the disposal of wastes at the L & RR Site was expected and intended and that Warwick was, therefore, excluded from coverage.[156] Warwick's reasoning was that the relevant discharge – the "subsequent escape of pollutants from the landfill into the surrounding environment" – was unexpected and unintended and that St. Paul should afford Warwick coverage for its claims.[157]

To determine what was the relevant discharge, the First Circuit referred to the clear language of the pollution exclusion clause in the insurance policy and concluded that "the occurrence that must be sudden and accidental – or, for our purposes, unintentional and unexpected – is the discharge of pollutants 'into or upon

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147. *Id.*

148. *Id.*

149. *See id.*

150. *Id.*

151. *Id.* at 1201.

152. *Id.* at 1200. Some courts construe "sudden" to unambiguously mean " 'abrupt' or 'immediate.' " *Id.* This interpretation favors the insurer since in most cases the common form of pollution is a "gradual release of pollutants into the environment over an extended period of time" and, thus, coverage is barred. *Id.* An almost equal number of courts interpret the exception to the pollution exclusion as providing coverage for these gradual releases of pollutants. *Id.* The latter group of courts' interpretation of "sudden" is " 'unintended and unexpected.' " *Id.* (citations omitted).

153. *Id.* at 1201. The court implied that it wasn't necessary to determine if the term "sudden" was ambiguous since the interpretation the court did adopt offered the broadest possible coverage. *See id.* at 1201-02.

154. *Id.* at 1201.

155. *Id.*

156. *Id.*

157. *Id.*

land' from which the property damage arose."[158] After considering the facts, the court determined that the damage arose from the initial disposal of hazardous waste materials into the L & RR Site, and, thus, the relevant discharge was this disposal into the landfill.[159] The court disagreed with Warwick that there was an intermediate discharge that caused the harm to the environment.[160] Supporting this point, the court distinguished the disposal of Warwick's waste into the landfill from intermediate discharges, such as "ruptured or exploding tanks, leaking drums, or even some sort of improper dumping of waste after its arrival at the Site."[161]

Furthermore, the First Circuit rejected Warwick's argument that the term "discharge" in the pollution exclusion clause was ambiguous.[162] The court characterized Warwick's argument merely as "an attempt to recast the damages in this case as a separate discharge."[163] Noting once again that the "sudden and accidental" exception to the pollution exclusion focuses on the initial discharge and not the resulting damages, the First Circuit determined that there could be no separate discharge since the damage to the environment was "coterminous" with the subsequent release of pollutants from the L & RR Site to the environment.[164] Otherwise, the court stated, the "distinction established between intentional and expected damages and intentional and expected discharges" would be "eviscerated."[165]

The First Circuit rejected Warwick's argument that the "landfill [was] some type of container, like a storage tank, which did not discharge its contents into the environment until some unforeseen, unexpected releasing event occurred."[166] Supporting its position, the court related that the EPA was concerned with the wastes placed in the L & RR Site, not the landfill's failure to contain the hazardous substances.[167] Also, the First Circuit distinguished the facts of the instant case from those of the recent case in the Seventh Circuit[168]—*Patz v. St. Paul Fire & Marine Insurance Co.*[169] In *Patz*, the insured had dug a pit in the earth to serve as a "containment vessel" for its hazardous wastes.[170] Judge Posner, writing for the Seventh Circuit, held that it was possible that there was a "separate unexpected discharge of pollutants subsequent to the placement of waste into the pit."[171] In the instant case, ACME actually removed the waste from containers and subse-

158. *Id.* at 1203.
159. *Id.* at 1203-04.
160. *Id.* at 1204.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 1205.
167. *Id.*
168. *See id.*
169. 15 F.3d 699 (7th Cir. 1994).
170. St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195, 1205 (1st Cir. 1994) (citing *Patz*, 15 F.3d at 703-05).
171. *Id.*

quently dumped it "literally onto the land" at the L & RR Site; this was the discharge that resulted in contamination.[172]

Warwick also contended on appeal that even if the disposal of wastes at the L & RR site was the relevant discharge, the pollution exclusion was not triggered since ACME, a third party waste hauler, actually made the discharge.[173] The First Circuit quickly noted that many courts reject the argument that the pollution exclusion clause only applies to active polluters:[174] "[T]here is no meaningful distinction between arranging for waste to be hauled off for disposal and actually disposing of the waste in a landfill."[175] The First Circuit stated that the pollution exclusion clause bars coverage for damage that occurs from *the* discharge.[176] Determining who made the actual discharge was not a relevant factor since the clause did not specify that only discharges made by the insured were excluded.[177]

As to Warwick's intentions and expectations, the record showed that Warwick was unaware of the disposal details—how and where the wastes were being discharged—but it was clear that Warwick expected and intended that its wastes would be " 'taken care of' " by ACME.[178] After collecting the wastes from Warwick's west plant, ACME chose the landfill, a "sufficiently common . . . destination for the disposal of waste," and disposed of the waste by pouring it directly onto the ground, which was not found to be an improper method of disposal.[179] ACME did not do anything surprising or unusual in disposing of the waste; thus, the disposal was consistent with Warwick's intentions and expectations.[180]

In conclusion of its debate on the various issues that arise under the pollution exclusion clause, the First Circuit adopted the district court's determination that Warwick was barred from coverage by the pollution exclusion clause: Warwick's discharge of waste at the L & RR Site, the relevant discharge, was not unexpected and unintended, and, thus, Warwick did not fall within the "sudden and accidental" exception to the clause.[181]

V. ANALYSIS

"The fierce struggle between insurers and insureds has caused practically every word of the insurance policy to receive careful scrutiny . . . ."[182] Traditionally, the sudden and accidental exception to the pollution exclusion clause has been the

172. *Id.* at 1203, 1205.
173. *Id.* at 1205.
174. *Id.* at 1201-02.
175. *Id.* at 1202.
176. *Id.* (emphasis added).
177. *Id.*
178. *Id.*
179. *Id.* at 1202-03.
180. *Id.* at 1203.
181. *Id.*
182. ENVIRONMENTAL LAW, *supra* note 7, § 8.01, at 8-3.

"key battleground" in insurance claims involving hazardous waste liability.[183] Now it seems that even the word "discharge" in the pollution exclusion clause has joined the ranks of ambiguous terms.

"Discharge" is defined in one dictionary as "to pour forth; emit;" to illustrate the meaning of "discharge," that dictionary also uses the word discharge in an example phrase, the example being "to discharge oil."[184] This interpretation is one most likely favored by the insurer since it more distinctly describes the act of insureds discharging wastes into pits dug into the earth. Insureds, however, also use dictionary definitions and rely on a "semantic analysis" to contend that the terms discharge, dispersal, release and escape "impl[y] the act of being freed from containment."[185] For instance, another dictionary's definition of discharge is "to release from confinement."[186] Insureds favor this particular definition which more likely lends support to insureds' contentions that they responsibly placed wastes into containers, such as evaporation pits, but that the wastes suddenly and accidentally were released from the containers at some later time.[187] Urging that the courts adopt this interpretation of discharge, policyholders have argued that discharge is an ambiguous term that should be construed against the insurer who drafted the policy's language.[188]

Is discharge an ambiguous term? In *Hartford*, the Tenth Circuit noted the Third Circuit's warning that "the existence of numerous dictionary definitions [did not] require[ ] a finding of ambiguity."[189] As the First Circuit advised in the instant case, courts should not "seek out ambiguity" but should rather give the "plain everyday meaning" to words used in an insurance policy.[190] Also, the Tenth Circuit in *Broderick* opined on the method of constructing an interpretation of discharge and stated that the term "must be read in the context of the remainder of the language of the clause."[191]

The original intent of the pollution exclusion clause "was to exclude the day-to-day type pollution activities and not true accidents."[192] On a daily basis, manufac-

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183. *Id.* § 8.04[7], at 8-23. *See also* New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1195 & nn.60-61 (3d Cir. 1991) which is the authority most courts cite when noting that there is almost an even split among the courts in their interpretation of the terms "sudden" and "accidental." *See, e.g.*, Hartford Accident & Indem. Co. v. United States Fidelity & Guar. Co., 962 F.2d 1484, 1488 (10th Cir.) (Hunter, District Judge, sitting by designation), *cert. denied*, 113 S. Ct. 411 (1992).

184. RANDOM HOUSE COLLEGE DICTIONARY 377 (rev. ed. 1988).

185. Defense Practice Seminar, *supra* note 68, at A-42.

186. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 360 (1987).

187. *See supra* note 112 and accompanying text.

188. *See generally* Gregory Reynolds, *Comprehensive General Liability Policy Coverage of CERCLA Cleanup Costs: A Proposed Guide to Interpretation*, 2 MD. J. CONTEMP. LEGAL ISSUES 33, (1991). *See also* St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195, 1204 (1st Cir. 1994).

189. Hartford Accident & Indem. Co. v. United States Fidelity & Guar. Co., 962 F.2d 1484, 1489 (10th Cir.) (Hunter, District Judge, sitting by designation) (citing New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1193 (3d Cir. 1991)), *cert. denied*, 113 S. Ct. 411 (1992).

190. St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195, 1199 (1st Cir. 1994).

191. Broderick Investment Co. v. Hartford Accident & Indem. Co., 954 F.2d 601, 607 (10th Cir.) (Bratton, District Judge, sitting by designation), *cert. denied*, 113 S. Ct. 189 (1992).

192. Interview with Lydia C. Warren, CPCU, Senior Insurance Counsel for Southern Farm Bureau Casualty Insurance Company, in Jackson, Miss. (Jan. 10, 1995).

turing and other types of industries which create hazardous wastes as a by-product use various disposal methods to get rid of their waste materials. Thus, by employing the advice from the circuit courts mentioned above, we may determine that the unambiguous term "discharge," when read in context with the other three terms "dispersal, release or escape" and the most significant phrase "into or upon the land," has the everyday meaning "to get rid of; to dispose of."

Prior to the instant case, two Tenth Circuit opinions had consistently interpreted "discharge" to have a meaning similar to the everyday meaning discussed above. First, in *Broderick*, Judge Tacha held that the "common sense, plain meaning" of discharge unequivocally describes insured's initial act of disposing waste materials into a pit dug into the earth.[193] Approximately four months after *Broderick*, Judge Moore reasserted in *Hartford* the Tenth Circuit's position that disposing of wastes into an unlined earthen pit is discharging wastes into the land.[194] Concurring with this precedent set by the Tenth Circuit, the First Circuit in the present case also interpreted discharge to mean the act of dumping wastes into the land at the L & RR Site.[195] The *Warwick* Court even stated that the term discharge is unambiguous.[196] From the courts' interpretations set out above, we can conclude (1) discharge is indeed unambiguous; and (2) the Tenth and First Circuits agree on the plain, everyday meaning of this term. Chief Judge Posner's opinion in *Patz*, however, disrupts the consistency which lends itself to the unambiguous analysis and interpretation of discharge.

In *Patz*, Posner did not define discharge as the initial act of placing waste materials into an unlined earthen pit; on the contrary, Posner viewed the initial placement of wastes into a pit as merely filling a *container* with waste materials.[197] Posner characterized the evaporation pit as a container since clay soil, which is a "building material," formed the pit's floor.[198] Therefore, pollutants did not discharge into the land until the defective container, the pit, leaked its contents into the surrounding environment.[199] Prior to *Patz*, Judge Tacha in *Broderick* expressly rejected the insured's contentions that unlined pits in the ground were better characterized as containers and, hence, placing waste materials into the pits was not a discharge into the land.[200] Judge Tacha held that discharging wastes into the unlined pits is still a discharge into the land even if the insured was correct in his description of the pits as containers.[201] Similarly, in the instant case the First Circuit

193. *See supra* notes 109-117 and accompanying text.

194. *See supra* note 134 and accompanying text.

195. St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195, 1204 (1st Cir. 1994).

196. *See supra* note 161 and accompanying text.

197. *See supra* note 92 and accompanying text.

198. Patz v. St. Paul Fire & Marine Ins. Co., 15 F.3d 699, 704 (7th Cir. 1994).

199. *Id.* at 703-04.

200. Broderick Investment Co. v. Hartford Accident & Indem. Co., 954 F.2d 601, 607-08 (10th Cir.) (Bratton, District Judge, sitting by designation), *cert. denied*, 113 S. Ct. 189 (1992).

201. *Id.* at 607 & n.5.

did not find support for Warwick's argument that "the landfill [was] some type of container."[202]

The First Circuit distinguished the situation in the instant case from the one in *Patz* on the basis that Warwick had removed the waste material from containers before it disposed of it at the landfill.[203] This reasoning implies that the Patzes' waste water flowed directly into the pit and was not first placed into a container and then carried to the pit. The facts of the *Patz* case do not clearly support this implication;[204] thus, the distinction stated by the First Circuit is not one that can be relied upon to explain Posner's divergence from what otherwise seems like a consistent interpretation of the term discharge.

In the instant case, the First Circuit described Warwick's argument that the meaning of discharge was ambiguous as "merely an attempt to recast the damages in this case as a separate discharge."[205] Although Posner did not explicitly announce discharge as ambiguous, the First Circuit's characterization of Warwick's argument also suits Posner's interpretation of discharge.

In *Patz*, Posner shifted his focus and the focus of the sudden and accidental exception to the secondary discharge – the subsequent leakage of contaminants from the evaporation pit.[206] Interestingly, the secondary discharge was coterminous with the damage – the groundwater contamination;[207] there was no "separate . . . discharge of pollutants subsequent" to the leakage from the pit.[208] By focusing his attention on the result instead of the act, Posner, therefore, eviscerated the necessary distinction between the discharge and the resulting damage.

The purpose of the pollution exclusion clause's exception was to provide coverage for acts (discharges) which were unintentional; whether or not insured intended and expected to damage the surrounding environment is irrelevant.[209] "The focus of the pollution exclusion is on the point in time when contaminants are released or discharged into the environment[;] . . . [t]heir behavior after that time is irrelevant to a determination of 'sudden and accidental.' "[210] The First Circuit in the instant case asserted this same position in its opinion: "[W]hat must be sudden and accidental is the discharge and not the resulting damages."[211] The three recent judicial opinions – *Broderick*, *Hartford*, and *Warwick* – have all addressed this is-

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202. St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195, 1203, 1205 (1st Cir. 1994).
203. *Warwick*, 26 F.3d at 1205.
204. *See* St. Paul Fire & Marine Ins. Co. v. Patz, 15 F.3d 699, 701-02 (7th Cir. 1994).
205. *Warwick*, 26 F.3d at 1204.
206. *See Patz*, 15 F.3d at 703-05.
207. *Id.*
208. *Warwick*, 26 F.3d at 1205.
209. Interview with Lydia C. Warren, *supra* note 192.
210. Defense Practice Seminar, *supra* note 69, at A-44.
211. *Warwick*, 26 F.3d at 1204.

sue and agree that whether or not the insured intended for its discharge to cause damage is irrelevant.[212]

As stated above, Posner shifted the focus from the initial act to the resulting damage—the secondary discharge; with this shift, Posner avoided the work of detailing an analysis of the interpretation of sudden and accidental and found coverage for the insured under the sudden and accidental exception. Posner commented that enterprises, such as the Patz family business, do not intentionally pollute their own land and cause damage.[213] Unlike Posner, the First Circuit in the instant case focused on the insured's actions and held that the initial discharge of wastes into the landfill was the relevant discharge for purposes of the sudden and accidental exception. In *Warwick*, the circuit court held that unless there is a separate discharge between the initial discharge and the resulting damage,[214] " 'only the initial release is relevant to the sudden and accidental inquiry.' "[215] The First Circuit relied also on Judge Tacha's opinion in *Broderick* to support its holding that Warwick's initial discharge of pollutants into the landfill was the relevant discharge under the pollution exclusion clause.[216] Posner's opinion, therefore, is remarkable because it rejects the basic premise established by the Tenth Circuit in *Broderick* and later followed by the *Warwick* Court—the premise that the initial act of placing waste materials into an earthen pit is the relevant discharge under the pollution exclusion.

The explicit language of the pollution exclusion clause lends little support to the " 'secondary discharge' " argument; for the clause says it will bar coverage for damage " 'arising out of' " the discharge of contaminants into the surrounding environment.[217] After the initial discharge of pollutants into the environment, any subsequent release would certainly "arise out of" the initial introduction of wastes and "would not trigger coverage if the initial release was not both 'sudden and accidental.' "[218]

The three cases discussed above and other sources agree that the placement of wastes into an unlined earthen pit is a "discharge into or upon the land." It seems that Posner's opinion in *Patz* is the rebel which creates ambiguity for the term "discharge." Posner's analysis is certainly very creative, but it is not cogent. In agreeing with the Tenth Circuit's interpretation of discharge in *Broderick* and *Hartford*, the First Circuit correctly decided the instant case and held for the insurer.

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212. Broderick Investment Co. v. Hartford Accident & Indem. Co., 954 F.2d 601, 607 (10th Cir.) (Bratton, District Judge, sitting by designation), *cert. denied*, 113 S. Ct. 189 (1992); Hartford Accident & Indem. Co. v. United States Fidelity & Guar. Co., 962 F.2d 1484, 1491 (10th Cir. 1992) (Hunter, District Judge, sitting by designation); *Warwick*, 26 F.3d at 1205.

213. Patz v. St. Paul Fire & Marine Ins. Co., 15 F.3d 699, 703 (7th Cir. 1994).

214. *Warwick*, 26 F.3d at 1204 (internal quotations omitted).

215. *Id.* at 1205 (quoting A. Johnson & Co., Inc. v. Aetna Casualty & Surety Co., 933 F.2d 66, 72 & n.9 (1st Cir. 1991)).

216. *See id.* at 1204-05.

217. Defense Practice Seminar, *supra* note 69, at A-45.

218. *Id.*

It appears that Judge Posner's reasoning in *Patz* was driven by a particular motive – perhaps to find coverage for the insured under the exception to the pollution exclusion. The insureds, however, are not affected by the court's decision to choose one interpretation over the other.[219] For example, a court's interpretation of discharge which favors the insured will not give manufacturing and other types of industries a disincentive to handle wastes properly. Since already "coverage is expensive and difficult to acquire" in this area, insureds cannot rely on predictions that the court will rule in their favor.[220]

If all courts, including the First Circuit in *Warwick*, adopted Judge Posner's interpretation of the term "discharge," then the insurance industry would become liable to reimburse various parties millions, and possibly even billions, of dollars for the costs the parties incurred as a result of cleaning up hazardous waste contaminants caused by the insureds' actions. The other effects of this interpretation on the insurance industry, surprisingly, do not compare to the industry's enormous monetary liability. For example, an interpretation of the term "discharge" which favors the insured will not lead to the eventual demise of insurance for bodily injury and property damage; however, such an interpretation will foster a need for the industry to revise the pollution exclusion with even "tighter" language.[221] Therefore, there will still be coverage for incidents occurring outside polluting events, "but then it becomes necessary to define what is a polluting event"[222] – and, yet, even another battleground for ambiguity is created.[223]

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219. Interview with Lydia C. Warren, *supra* note 192.

220. *Id.*

221. *Id.* To avoid future losses, the insurance industry could tighten the language of the pollution exclusion by including the terms "initial" and "placement" in the clause. Thus, the re-drafted clause would read:

> [I]t is agreed that the insurance does not apply to bodily injury or property damage arising out of the [*initial placement*,] discharge, dispersal, release, or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere, or any watercourse or body of water; but this exclusion does not apply if [the *initial placement*,] discharge, dispersal, release or escape is sudden and accidental.

ENVIRONMENTAL LAW, *supra* note 7, § 8.02[1], at 8-6 to 8-7.

222. Interview with Lydia C. Warren, *supra* note 192.

223. Halfway through the 1980s, insurance companies revised the pollution exclusion clause. ENVIRONMENTAL LAW, *supra* note 7, § 8.04[7], at 8-26. The new version was referred to as the "absolute" pollution exclusion: it excluded specific types of pollution from coverage and qualified the exclusion with the language "whether or not such discharge, dispersal, release or escape is sudden or accidental." *Id.* § 8.04[7] & n. 90, at 8-26 to 8-27. The more restrictive absolute pollution exclusion limited the insurance industry's liability to afford coverage for its policyholders' pollution incidents and eliminated the need for debate over the interpretation of sudden and accidental. *See id.* § 8.04[7], at 8-26.

Although in the mid-1980s the insurance industry revised the pollution exclusion clause to be absolute – without any exceptions such as sudden and accidental exception, "policyholders (and courts) have become more creative" in arguing that this exclusion is not absolute, but that its application has limitations. Defense Practice Seminar, *supra* note 69, at A-53.

It is rumored that certain groups in the insurance industry are looking at the "possibility of drafting a new pollution exclusion clause that will provide coverage for at least a limited range of pollution incidents." ENVIRONMENTAL LAW, *supra* note 7, § 8.04[7], at 8-26 to 8-27. Whether or not the groups will succeed in creating another new version of the pollution exclusion clause remains to be seen. *Id.*

VI. CONCLUSION

The pollution exclusion clause from the 1970s is only a partial exclusion which has caused a great deal of confusion.[224] Cases which require courts to interpret the 1970s version of the pollution exclusion clause continue to occupy the courts.[225] Although courts generally agree that the focus of the pollution exclusion clause is on the insured's initial actions and not the resulting damage,[226] the split of authority among state courts which have interpreted the terms "sudden" and "accidental" indicates that the states' courts, and thus the federal courts, will never agree upon one accepted interpretation of the pollution exclusion clause.[227] From this it follows that judicial opinions on the interpretations of discharge also will continue to be inconsistent. In the federal courts of appeals, other factors besides precedent affect the courts' decisions whether or not to rule in favor of the insured—factors such as hidden motives or revealed biases and the imposition of state law. Since contract interpretation is a matter of state law, the United States Supreme Court will not be able to resolve this conflict.[228] Insurers and their policy holders can hope only for certainty in their respective states as state appellate courts give more rulings on this issue.[229]

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224. John S. Vishneski, III et al., *The Insurance Industry's 1970 Pollution Exclusion: An Exercise in Ambiguity*, 23 LOY. U. CHI. L.J. 67, 69 (1991).

225. *Id.*

226. *See supra* note 59 and accompanying text.

227. ENVIRONMENTAL LAW, *supra* note 7, § 8.04[7], at 8-26.

228. *Id.*

229. *Id.*