
Affording Coverage for 'Gradual' Property Damage Under Standard Liability Insurance Policies: A History

by Marc S. Mayerson

For what is approaching two decades, policyholders and insurers tenaciously have been litigating coverage for environmental liabilities, particularly those associated with environmental contamination taking place over time. The genesis of the present predicament of state-by-state disputes over whether liability coverage should apply to environmental liabilities lies in two aspects of the history of the insurance industry throughout this century: the objective of standardizing policy language for use nationwide and ambivalence about providing coverage for "gradual" property damage claims.

Although the adoption of standardized liability insurance policies manifests a consensus within the insurance industry as to wording, differences of opinion may persist about the meaning of the words chosen or the desirability of covering certain risks that may be encompassed by the standard terms. Throughout the 1940s and 1950s the industry was divided on whether the standard policy language provided coverage for gradual injury claims or whether it should do so. Consensus as to wording *and* intent was achieved with the introduction of the 1966 standard form comprehensive general liability (CGL) policy, and the American insurance industry unreservedly committed itself to providing express gradual property damage coverage under that form. Four years later, the industry introduced the "pollution exclusion," where once again agreement as to wording camouflaged divisions as to its meaning and as to the purpose of introducing the provision.

This article traces both the development of standardized insurance policies and the debate within the liability-insurance industry over gradual property damage coverage. I first review the efforts to coordinate the liability-insurance industry and to introduce standard-form liability-insurance policies earlier this century. Then I focus on the divisions in the 1940s and 1950s in particular about affording coverage for gradual property damage. After chronicling the development of the 1966 standard form CGL policy—whose express coverage for gradual property damage was trumpeted by the insurance industry as part of its marketing—I briefly reflect on the introduction in 1970 of the pollution exclusion in

the light of this history showing that the insurers were well aware of—and worried about—the pollution exposure but intended to "meet[] the legitimate needs of insureds for protection. . . ."¹

The Development of Standard Form Liability Policies

Since being introduced in 1886,² liability insurance has been available to cover liability to third parties injured or damaged as a result of the operation of commercial enterprises.³ Early this century, in response to the identification of specific hazards resulting in claims, individual insurers began offering—and manufacturers and commercial enterprises began purchasing—a variety of separate policies for each risk.⁴ As one of the inventors of the modern general liability policy later reflected: "Liability insurance was not planned. It grew."⁵ The proliferation of policies and coverages and the entry into the market of numerous insurers and mutual companies impeded the development of nationwide insurance protection in the developing nationwide economy. Many insurers began to recognize that coordination in their industry was necessary to complement the increasing concentration and interstate operations of their customers in commercial industry.



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Thus, around the turn of the century "it became apparent to insurers that mutual consultation with respect to phraseology would be of benefit to all."⁶ Turn-of-the-century insurance companies understood that determining rates adequate to cover losses and to yield a profit required the common collection of loss-experience data. Because such data were meaningful only where the policy language used by different insurers provided (more or less) congruent coverage, inter-insurer consultation over time became more formalized and began to focus on the development of standard insurance policies. The most important of these early insurer organizations was the National Bureau of Casualty Underwriters (NBCU) which dated its origins from 1896 and its modern existence from 1910, and which played a leading role until the early 1970s, when it was superseded ultimately by the Insurance Services Office (ISO).⁷

The 'objective of comprehensive liability insurance . . . is to afford, on as broad a basis as is feasible, protection against liability for any hazard not excluded.'

Consistent with the insurers' strategy of becoming essential financial adjuncts to businesses, the insurance industry sought to offer nationwide coverage to nationwide commercial enterprises (and later international coverage to enterprises competing worldwide) under a single comprehensive liability insurance policy. Liability insurance was to complement business by relieving companies of the risk of liability and the uncertainty of unpredictable liability costs.⁸ In addition to its stabilizing influence on economic development,⁹ liability insurance in the 1930s and 1940s began to fulfill the "public" function of ensuring that victims of industrialization were compensated.¹⁰

By the late 1930s, the American liability-insurance industry embraced complementary objectives. First, the insurers committed to jointly drafting standard-form policies that were to be used nationwide.¹¹ Second, in contrast to early forms of liability-insurance policies that covered only specified hazards, the scope of coverage was to be expanded considerably to offer businesses presumptive protection against legal liability, unless a specific exclusion applied.¹²

In 1939 the National Bureau of Casualty Underwriters, which operated nationwide, and the Mutual Casualty Insurance Rating Bureau, which operated in states that regulated rates (like New York), agreed to develop a single comprehensive liability policy that would comply with all state requirements.¹³ In most states, prior filing or approval, or both, was a precondition to the sale of liability insurance policies.¹⁴ A standard, state-approved policy was needed because the "nature of comprehensive liability insurance is such that it must be acceptable

in all States in order to be available for businesses which do or may operate in all States."¹⁵

In addition to agreeing to issue a standard, nationwide insurance policy,¹⁶ the insurers had agreed that the policy should provide "comprehensive" liability coverage. The "objective of comprehensive liability insurance . . . is to afford, on as broad a basis as is feasible, protection against liability for any hazard not excluded."¹⁷ Comprehensive coverage would insure *both* risks of liability of which the insured and the insurers were aware (risks that formerly had been covered by "scheduled" policies) *and* unknown, unanticipated risks of legal liability. As Elmer Warren Sawyer, a staff attorney with the NBCU who spearheaded the development of the standardized policy,¹⁸ explained in 1943:

Whereas, in the past we have offered multiple separate liability covers, each excluding hazards within other covers and each being optional with the insured, and have insured only against hazards with the covers chosen by the insured, we now insure against all of the hazards within the scope of the insuring clause which are not specifically mentioned as excluded. Stated differently, instead of insuring against only enumerated hazards we now insure against all hazards not excluded.¹⁹

The new "comprehensive" policy afforded "blanket" coverage, relieving a business of losses it would have failed to anticipate and separately insure.²⁰ As Sawyer announced at a meeting of the Insurance Institute of America in 1941: "Coverage of the unknown or unanticipated hazard, which was the difficult step, has been accepted. The dangers inherent in the change have already been assumed."²¹

The new CGL policy was initially marketed to larger insureds that operated nationwide and could benefit from national, comprehensive coverage. Conveniently, these businesses could also more readily afford the higher overall premiums charged for the new comprehensive general liability policy—a premium that included a flat one per cent surcharge for comprehensive cover. This surcharge was popularly called the "unknown hazard" premium. Because the policy covered all risk of liability unless excluded, an additional premium was needed to convince some insurers to go forward jointly with comprehensive policies in 1940, when the first standard-form comprehensive general liability (CGL) policy was promulgated.²²

The 1940 standardized comprehensive general liability policy was soon followed by formal policy revisions in 1943 and 1955.²³ Although the policies were intended to cover all risks of harm (the "breadth" of the coverage), the standard policies nevertheless contained exclusions and limitations that were designed to limit the obligation of the policy to respond. For example, in the early policies, property damage liability, products liability and contractual liability were made optional covers available for additional premium.²⁴ These coverages later were included presumptively as part of "package" CGL policies.

The Concern over Gradual Property Damage Coverage

In the 1940s and 1950s, some segments of the insurance industry believed that injury and damage that were caused gradually from continuous exposure resulting in accumulating injury should not be covered, and they anticipated that such coverage would not be found under the form CGL policy because the form policy applied to injury and damage "caused by accident."²⁵

Other segments of the industry affirmatively sought to cover so-called gradual injuries.²⁶ Soon after the 1940 policy was introduced, for example, several insurers began to provide coverage expressly for gradual bodily injury caused by an insured's product when separate products-liability coverage was purchased.²⁷ By 1943, a variety of separate endorsements designed to provide express coverage for gradual injury began to be widely used; this was usually accomplished simply by changing the basis of the policy from "caused by accident" to "occurrence."²⁸ Partly in response to the proliferation of these express gradual-injury coverage forms, the policy-drafting committees recommended in late 1943 that gradual bodily injury and property damage coverage be provided expressly in the standard CGL policy.²⁹ But it was not until 1950 that the NBCU issued a standard "occurrence" endorsement, and this endorsement applied only to bodily injury coverage.³⁰ Even as late as 1955 when the CGL was revised once again, there was insufficient support within the insurance industry to afford express coverage for gradual injuries in the form policy. Consequently, the 1955 revision of the standard CGL policy continued to provide coverage for bodily injury and property damage on a "caused by accident" basis.

Gilbert Bean, then Assistant Secretary of Liberty Mutual Insurance Company and who later played an important role in the adoption of the 1966 standard CGL policy,³¹ explained in a 1959 speech the reason for some insurers' reservations about providing gradual property damage coverage to business and industry. In his speech, Bean acknowledged that "the policyholder needs and should be able to expect protection from many types of gradual injuries as well as for many types of sudden injuries."³² Nevertheless, Bean expressed concern that covering gradual property damage could result in "moral hazard": "[B]ecause the world at large takes less precautions for property damage, . . . [t]here is greater moral hazard here than in the case of bodily injury."³³

Bean furthermore argued that public censure for property damage is less than it is for bodily injury. As a result, a commercial enterprise would more likely take greater risks where the only result would be property damage. The insurers, according to Bean, were reluctant to provide coverage in the event such claims came to fruition, particularly because gradual property damage claims were often of substantial proportion. "Bear in mind," Bean said, "that damage from waste disposal, smoke, fumes, dust, vibration, radiation and settling due to excavation falls in the category of gradual damage. . . . It can some-

times accumulate to severe proportions before it is detected."³⁴

Bean also maintained that under "caused by accident" policies insurers could deny coverage on "fault"-like grounds by arguing that damage occurring over time resulting from the insured's business operations should be presumed in effect not to have been an "accident." As he explained:

By limiting coverage to that injury or damage which is 'caused by accident,' insurers expected that they were eliminating coverage not only for conduct deliberately intended to injure or damage someone, but for irresponsible and willful conduct, borne of gross indifference to the public safety which results in foreseeable injury or damage. This willful disregard of probable injury is negligence which exceeds accidental, but falls short of intentional. . . . 'Occurrence' coverage could be depended upon to exclude no more than strictly intentional injury or damage."³⁵

Precluding such gradual property damage coverage hinged on one word in the policy—"accident"—and many insurers did not believe that coverage would be, or even should be, precluded in long-term damage situations. Courts all over the country consistently had rejected a temporally restricted reading of the term "accident" in insurance policies.³⁶ Indeed, one legal commentator contemporaneously noted that "*accident* remains a blob of jelly."³⁷ As a result, Bean explained in his 1959 speech the insurance industry was rethinking the provision of gradual property damage coverage. The question was no longer whether the insurance industry could or should provide coverage for gradual property damage, but on what terms gradual property damage coverage would be provided.³⁸ This was one of the central points of debate leading to the promulgation of the new CGL policy form in October 1966.

The Express Acceptance of Gradual Property Damage Coverage

The introduction of the 1966 CGL form was a seminal event in the development of insurance coverages in this country. With a slight revision in 1973, the 1966 form established standard coverage for two decades.

The 1966 policy was developed after intensive work by the insurance industry and the principal associations, the NBCU and the Mutual Insurance Rating Bureau (MIRB). In 1960, a Joint Drafting Committee, comprised of a representative of the NBCU, George Katz, and a representative of the MIRB, Richard Schmalz, was instructed to draft a new CGL policy.³⁹ Katz and Schmalz together with Herbert Schoen were the principal drafters of the 1966 CGL policy adopted by both the NBCU and the MIRB. By early 1964, a near final version was prepared, and the insurers commenced a two-year process of obtaining state approval for use of the policy form and

of educating the insurance industry, brokers, insureds, and the public about the new policy.

The insurers vigorously promoted the 1966 policy. Speeches and articles directed to risk managers, brokers, and the insurance industry about the new policy were prepared by the two drafters (Katz and Schmalz),⁴⁰ officials with the NBCU and MIRB (Norman Nachman, Richard Elliot),⁴¹ representatives from the Rating Committees (Henry Mildrum, Gilbert Bean),⁴² and the Secretary of Underwriting of the Insurance Company of North America (Lyman Baldwin) who gave a speech promoting the new policy even though his company at the time was not affiliated with either Bureau.⁴³

Consensus as to the wording of the pollution exclusion and consensus as to the desirability of its introduction masked underlying divisions within the insurance industry.

One important change was the unreserved grant of coverage for gradual bodily injury and gradual property damage. The basis of the policy was changed from "accident" to "occurrence," and no distinction was made either between bodily injury or property damage or between sudden or gradual events and injuries. In September 1966, a major insurance brokerage firm, Johnson & Higgins, announced the introduction of the new CGL policy to its clients and commented:

Perhaps the most significant change is that all policies now cover injury or damage . . . from gradual happenings such as pollution of streams, emanations of effluent from stacks, disposal of waste products and so forth. The great majority of our clients have enjoyed this type of coverage (by extension of coverage endorsement) as to bodily injury liability, but in the area of damage to the property of others, there has been the greatest resistance to such an extension either by certain underwriters or with respect to individual accounts. Now the broadened cover is available quite generally.⁴⁴

Other insurance brokers similarly sent letters to their clients or made speeches explaining the new express acceptance of coverage for gradual property damage. In a 1965 speech to the American Management Association, a vice president of Alexander & Alexander explained: "Examples of events covered on an 'occurrence' basis . . . are found in the gradual or continual (a) pollution or contamination of air, vegetation, or water, and (b) vibration of land."⁴⁵

In view of the concerns about covering gradual property damage expressed by Gilbert Bean in 1959, Bean's remarks promoting the 1966 policy show the depth of the commitment of the insurers to provide coverage for gradual property damage, including for pollution claims.

In November 1965, Bean addressed the Mutual Insurance Technical Conference. Bean started his address by noting that "[t]he scope of coverage, as you well know by now, is considerably broader than previously, meeting legitimate needs of insureds for protection against gradual as well as sudden injury or damage which, after all, can be equally costly and equally unpredictable."⁴⁶ And Bean specifically illustrated the types of claims that would now be covered expressly:

The operations of some risks may create a substantial gradual injury or gradual property damage exposure . . . Examples are industries whose operations produce a serious noise, odor, vibration or dust. There are also risks which use poisons, or toxic or radioactive substances, whose operations might create severe hazards to others than employees. . . . Perhaps it is in the *waste disposal* area that a manufacturer's basic premises-operations coverage is liberalized most substantially.⁴⁷

The Introduction of the Pollution Exclusion Endorsement

Four years after the introduction of the 1966 CGL form, the Mutual Insurance Rating Bureau and the Insurance Rating Board (the successor to the NBCU) introduced a standard endorsement governing pollution that was to be used for CGL policies.⁴⁸

Some in the industry believed the pollution exclusion was not intended to restrict coverage for gradual property damage claims but rather was intended to underscore that "expected or intended" pollution would not be covered. The MIRB's submission for approval to insurance commissioners of the exclusion reflects this viewpoint:

This endorsement is actually a clarification of the original intent, in that the definition of occurrence excludes damages that can be said to be expected or intended. However, coverage would be afforded, as heretofore, where the damage was the result of a discharge, dispersal, release or escape that was sudden and accidental.⁴⁹

Moreover, the words chosen, "sudden and accidental," reasonably were understood to mean "unexpected and unintended" and thus only reinforced the "occurrence" requirement.⁵⁰

To others in the industry, the pollution exclusion may have genuinely represented retreat from covering gradual property damage claims. Accepting this view, however, leads to the conclusion that the explanatory statements and formal filings with Insurance Commissioners were less than candid about the impact of the exclusion or misrepresented its import, which is the premise of some courts refusing to enforce a restrictive construction of the pollution exclusion.⁵¹

Consensus as to the wording of the pollution exclusion and consensus as to the desirability of its introduction masked underlying divisions within the insurance

industry. Some in the insurance industry appear to have favored introducing the exclusion to make clear—to the emerging environmental movement, government regulators and the business community—that, notwithstanding the marketing of the 1966 CGL policy and the commitment to cover pollution liabilities, intentional pollution damage was never intended to be, and would not be, indemnified. The state filings and contemporary public pronouncements concerning the exclusion's introduction—including the lack of any reduction in the standard premium rates on policies carrying the exclusion—are most consistent with this point of view. Others in the industry appear to have flinched at the express grant of gradual property damage coverage in the 1966 form, and they may have sought to cut back on the commitment to gradual property damage coverage in the 1966 form made only four years before. For those sectors of the industry or according to this view of the story, the state filings are highly problematic, and only a tortured and ahistorical reading of them can avoid the charge of intentional (or at least negligent) misrepresentation of the exclusion's import when it was filed for approval.

Cast against the history of the insurance industry since the 1940s, these divisions in the industry hardly should come as a surprise: agreement to adopt standard wording does not necessarily indicate agreed-upon understandings or uniform objectives among members of the insurance industry. At times it does, as with the commitment to provide coverage for gradual property damage in the 1966 CGL form; at other times it doesn't, as the pollution exclusion story reveals.

Conclusion

While insurers and policyholders over the past two decades have been litigating environmental coverage under CGL policies issued from the 1940s to the early 1980s, the insurance industry has continued to be divided and to oscillate between granting and limiting coverage for gradual property damage. In the early 1980s some insurers including ISO embraced specialized pollution policies, but in the mid 1980s reinsurers withdrew their support for underwriting this gradual property damage exposure either separately through pollution policies or at all in CGL policies, which led to the introduction in standard-form CGL policies of the so-called "absolute" pollution exclusion. The early 1990s saw smaller insurers begin to cover pollution-only exposures, and as the decade comes to its close the major players in the industry now offer a variety of instruments (cleanup-cost-over-run insurance, finite-risk instruments, integrated-risk policies, and the like) to cover pollution liabilities.

Gradual property damage exposures, including pollution exposures, are "insurable." They have been insured in the past; they are being insured in the present. For the more than half century since the introduction of the standard form CGL policy, the same questions recur: on what terms is such coverage to be provided and should it be done under standard-form policies?

Notes

1. G.L. Bean, *New Comprehensive General and Automobile Program—The Effect on Manufacturing Risks*, *Mutual Insurance Technical Conference* (Nov. 15-18, 1965), at 2.

2. See C.A. Williams, Jr., *Insurance Arrangements Under Workmen's Compensation* 3-4 (1969); C.A. Kulp & J.W. Hall, *Casualty Insurance* 20-22 (4th ed. 1968); Raymond N. Caverly, *The Background of the Casualty and Bonding Business in the U.S.*, 6 *Ins. Counsel J.* (Oct. 1939) at 62.

3. When introduced, liability insurance was challenged as being illegal or against public policy on the ground that the availability of insurance indemnification would undermine the deterrent rationale of the liability system. This argument ultimately was rejected by the courts. See Mary Coate McNeely, *Illegality as a Factor in Liability Insurance*, 41 *Colum. L. Rev.* 26 (1941); Gary T. Schwartz, *The Ethics and The Economics of Tort Liability Insurance*, 75 *Cornell L. Rev.* 313 (1990).

4. As one commentator summarized:

[After the first] employer's liability endorsement to an accident policy . . . came insurance for liability arising out of business operations at fixed locations (the precursor of OL&T and M&C insurance forms). There followed in the course of time liability policies for elevators, products, teams, automobiles, contracts, owners protective, etc. As a hazard of loss became sufficiently great to provide a demand and a market, insurers developed a separate policy for it. Each was designed to cover only specified hazards to the exclusion of all others, and each was rated by a method which seemed the most practical measure of the exposure (e.g., OL&T ordinarily by area or frontage of the premises, M&C by payroll, OCP by cost of work sublet, and Products by sales).

George H. Tinker, *Comprehensive General Liability Insurance—Perspective and Overview*, 25 *Fed. Ins. Counsel Q.* 217, 220 (1975).

5. Elmer Sawyer, *Comprehensive Liability Insurance* 11 (1943). Sawyer's book, which is quoted extensively here, has been described as the "authoritative history of the development of the standard provisions CGL policy." Tinker, *supra* note 4, at 220 n.4.

6. James B. Donovan, *National Standard Provisions for Casualty Policies*, Address before the American Bar Association (Sept. 6, 1949), at 1. Informal consultations among carriers began first among employers liability insurers. *Id.* Mr. Donovan was General Counsel of the National Bureau of Casualty and Surety Underwriters, an insurance industry trade association which, among other things, drafted policies for the American insurance industry.

7. *Id.* at 2. The NBCU was one of two organizations that participated in the development of the 1966 comprehensive general liability policy form. See *infra* text accompanying notes 39-43.

8. As Elmer Warren Sawyer, one of the moving forces behind the development of standard form comprehensive general liability insurance policies, explained in 1943:

With the increased use of credit came a greater reliance upon liability insurance as a stabilizing factor, and uninsured liability exposure was inconsistent with credit stabilization. . . . [L]iability insurance as it had been written must be modified to keep pace with changes in business economy. . . . [A]n insurance plan, flexible enough to follow changing and expanding hazards of business and to pick up automatically liability hazards whether or not known to exist in the insured's business,

was badly needed if liability insurance was to do its part in the expanding business economy.

Sawyer, *supra* note 5 at 19, 114.

9. Sawyer argued in 1943 that liability insurance was a fundamental source of stability in the American economic infrastructure:

Through the elimination of the impact of severe losses upon the financial structure of businesses, liability insurance has been a tremendous stabilizing factor in the economic and business development of our country. Because business can protect itself by insurance against liability losses which it cannot anticipate it is free to put into active use funds which it would otherwise be required to hold in reserve for such emergencies. The use of credit in business to the extent of its present expansion would have been virtually impossible but for the stabilizing effect of liability insurance. Uninsured liability exposure is inconsistent with credit stabilization. Liability insurance today is so much a part of the economic and business structure of our country that it is difficult to appraise the true value of it as a stabilizing factor.

Sawyer, *supra* note 5 at 83.

10. As one of the architects of the comprehensive liability insurance policy explained in 1941:

Liability insurance is no longer a contract solely for the protection of the assets of the insured. It is rapidly becoming a contract for the benefit of persons so unfortunate as to be injured. It is inevitable that in the next few years the ever-broadening views of social responsibility will expand the use of liability insurance for the protection of injured persons.

Elmer Sawyer, Address before the Insurance Institute of America (March 11, 1941), excerpted in Randolph M. Fields, Digging for Insights into the CGL, *Best's Review* Nov. 1990, at 52, 54.

11. It is important to note that state officials in the 1930s began to press for the adoption of uniform insurance policies. See James B. Donovan, Hardy Perennials of Insurance Contract Litigation, 1954 *Ins. L. J.* 163, 168. Indeed, New York State has regulated the insurers' rating bureaus (like the NBCU) since 1911. *Id.* at 167 n.19.

12. See Fields, *supra* note 10 at 54.

13. The precursor to the insurance industry's promulgation of standard general liability policies was the 1935 basic automobile liability policy and a garage liability form. Commencing in 1933, the policy was drafted jointly by the two principal rating bureaus: the NBCU (representing stock insurance companies) and the American Mutual Alliance (representing mutual insurance companies). Donovan, *supra* note 6 at 3-4.

14. See generally Edwin W. Patterson, *The Insurance Commissioner in the United States* (1927). As the General Counsel of the NBCU explained in 1949:

[F]or compliance with State laws requiring the filing and approval of policy forms, the standard provisions program aids governmental administration and the insurers concerned. For companies affiliated with a rating organization it eliminates individual filings and for unaffiliated companies it simplifies a filing by enabling a reference to be made as to whether the proposed form follows or differs from the model. So-called 'master filings' of standard provisions by rating organizations have been accepted as full compliance with form-filing statutes in all but the rare instance.

Donovan, *supra* note 6 at 11 (footnotes omitted); see also generally James B. Donovan, *The Standard Policy Program*, *Cas. & Sur. J.* Nov. 1948. This practice is followed today. E.g., *Gerrish Corp. v. Universal Ins. Co.*, 947 F.2d 1023 (2d Cir. 1991); Insurance Services Office, Insurance Services Office in a Competitive Marketplace: ISO's Role Within the Property/Casualty Insurance Industry 6 (1987).

15. Sawyer, *supra* note 5, at 21.

16. Standardization of insurance policies has been an essential objective of the insurance business in this country for most of this century. See Donovan, *supra* note 6, at 1. Use of standardized terms facilitates (i) price competition among carriers offering (more or less) the same insurance products, (ii) continuity of coverage through time even where an insured changes carriers, (iii) obtaining excess and umbrella coverage over primary-layer policies, (iv) pooling of loss data among carriers, (v) the carrier's own ability to obtain reinsurance of the risks undertaken under the policies it issued, and (vi) state approval of policy forms where required. See *id.* at 11; Insurance Services Office in a Competitive Marketplace, *supra* note 14.

17. Sawyer, *supra* note 5 at 26. Similarly the Eastern Underwriter in 1941 reported: "The essential difference(s) between these new comprehensive liability policies and the regular form policies . . . are that they insure against liability for all hazards not specifically excluded." And as an official at New Amsterdam Casualty Company explained in 1944: "All hazards of liability loss (other than automobile) are covered, whether such hazards are shown to exist or not." See Fields, *supra* note 10 at 54 (citations omitted).

A representative of The Travelers explained the appropriate sales pitch for comprehensive general liability policies in 1941:

Mr. Prospect, you and I don't know all the liability hazards you may have in your business. No one knows until someone's hurt and then it's too late. We might measure them today and tomorrow find that we had selected wrongly. You want complete liability protection no 'ifs,' 'ands,' or 'buts' and are willing to pay a fair price for that peace of mind. We'll protect you against all claims under a blanket automatic comprehensive policy that covers today's hazards and tomorrow's too. It does not cover this and this and this but with these understandable exceptions everything else is covered.

Egloff, *Comprehensive Liability Insurance: The Outside*, *Best's Review* 19, 57 (May 1941).

18. Fields, *supra* note 10 at 54.

19. Sawyer, *supra* note 5 at 11. Sawyer was opposed to the separate-cover approach in part because it tended to skew insurance costs as a result of "adverse selection." Adverse selection is said to result where risk-based premiums are not sufficiently refined to gauge the actual amount of risk created by a particular insured; where this insured is in fact aware of the higher degree of risks it faces, the policy premium may be underpriced and the insured may be willing to spend more dollars on insurance and thus obtain higher amounts of protection than if the rate reflected the higher risk. Where separate hazards are insured, adverse selection occurs both in the decision to purchase any insurance and in the decision to purchase additional levels of insurance. See also K. Abraham, *Distributing Risk* 15 (1986) (adverse selection is "the process by which low-risk insureds tend to purchase less coverage, and high risk insureds tend to purchase more coverage than they would if prices were accurate.").

Sawyer believed that adverse selection was not in the interest of either insurers or their insureds:

[Under a separate hazard policy, b]ecause each cover is selected only when the insured has a reasonable expectation of loss, the losses which have developed and which have been used for rate making purposes have been losses from insured hazards rather than from all hazards. On the surface, at least, it would appear that, since only those hazards which are expected to produce accidents have as a rule been insured, the premiums would be lower if such hazards of all insureds had been included and averaged in the premium costs. Adverse selection tends to increase insurance cost.

Sawyer, supra note 5 at 14.

20. *Id.*

21. Fields, supra note 10 at 54. One danger that Sawyer had in mind was the greater responsibility placed on the insurance industry to identify and manage risk. Whereas the hazard-based liability insurance policies had been developed in response to consumer demand resulting from a new liability exposure, under the CGL policy the carriers were on the hook for a new sources and forms of legal liability, including those that neither the insured nor the insurers anticipate. See, e.g., *Travelers Insurance Co. v. Industrial Indemnity Co.*, 18 Cal App. 3d 628 (1971) (requiring performance of a CGL insurer where liability had been imposed on the insured retroactively 26 years after the policy period.)

Accordingly, to ensure their own profits, it was incumbent on the insurers actively to identify and manage all risks of liability for which the CGL policy would provide coverage. Sawyer recognized that the insurers' providing comprehensive liability coverage was tantamount to the "voluntary assumption by the [insurance] business of substantially greater responsibilities . . . [in] discovering hazards of liability loss . . ." Sawyer, supra note 5 at 129.

Some carriers took this responsibility quite seriously. The Insurance Company of North America, for example, established its own laboratory in the early 1950s:

Using an impressive array of instruments, chemicals and devices, the lab technicians subjected all manner of products to tests to determine whether they could be used safely. . . . Often the technicians went out to the site of possible hazards. . . . Sewers and sump wells were checked for possible concentrations of deadly gases. The air in cement factories was examined as a possible cause of silicosis.

W.H.A. Carr, *Perils: Named and Unnamed—The Story of the Insurance Company of North America* 328 (1967). As an official of General Accident explained in 1955, to ensure their profitability after agreeing to cover legal liability comprehensively:

[CGL insurers] must have powers of sight beyond immediate horizons and, in fact, it might help if they had powers of prophecy to foresee the future development of our social and economic views which eventually shape our doctrines of legal liability.

Harold Scott Baile, *Insurance Buyer* Feb. 26, 1955, quoted in Fields, supra note 10 at 126.

22. As Sawyer explained:

[C]ertain exposures will not become known and rated unless accidents occur, even though no one is dishonest or neglectful. Some exposures will be overlooked. The additional premium of one per cent was regarded by some companies as necessary to meet this type of loss.

Sawyer, supra note 5 at 23-24. Sawyer went on to say that it was not certain that the one percent surcharge would be a permanent feature. *Id.*

23. The 1943 policy was approved for use in all but three states (Virginia, West Virginia, and Texas), and Sawyer proclaimed

that "we have a policy satisfactory for use in all States in which the comprehensive coverage may be afforded." Sawyer, supra note 5 at 157.

24. Providing these coverages on an optional basis reproduced the coverage approach of the old separate-hazard coverage that the CGL policy was designed to replace. The reluctance to afford truly "comprehensive" coverage eroded over the years and was ultimately put to rest when the 1966 CGL form policy was introduced. See *infra* text accompanying notes 39-47. Though clearly not agreeing with the approach, Sawyer explained the rationale for separating property-damage, products-liability and contractual-liability coverage:

The optional treatment of these three covers in comprehensive general liability insurance was regarded as imperative until more rating data can be accumulated and improved rating plans adopted which will show the leveling effect of broader distribution and embody refinements necessary for certain types of risk which have rarely bought these covers because of very limited exposure.

Sawyer, supra note 5 at 23.

25. As noted *infra* n. 29, 36, 37, the courts did not agree with the insurers that their "caused by accident" coverage did not embrace gradual injury.

26. Starting in the mid-1940s, insurers regularly provided "gradual" coverage in personal liability policies. These policies were not written on a "caused by accident" basis; instead, coverage was only limited by an intentional-acts exclusion. See Gilbert L. Bean, *The Accident Versus the Occurrence Concept*, 1959 *Ins. L. J.* 550, 552.

27. *Id.*

28. *Id.*

29. Memorandum from the Joint Drafting Committee to the Joint Forms Committee (Dec. 27, 1943). The Joint Drafting Committee suggested that such coverage be provided by using the following wording:

"The word 'accident' shall be deemed to include continuous or repeated exposure to conditions which result in injury during the policy period, provided such injury is accidentally caused."

Id. This definition was consistent with the interpretation being given in many states to the undefined term "accident." See, e.g., *American Mut. Liab. Ins. Co. v. Agricola Furnace Co.*, 183 So. 677 (Ala. 1938); *King v. Travelers Ins. Co.*, 192 A.311 (Conn. 1937); *Canadium Radium & Uranium Corp. v. Indemnity Ins. Co.*, 104 N.E. 2d 250 (Ill. 1952); *Webb v. New Mexico Pub. Co.*, 141 P.2d 333 (N.M. 1943); see also *infra* n.36.

30. See Circular from James B. Donovan, general counsel for the National Bureau of Casualty Underwriters, *Occurrence Basis - Endorsement to "All Companies"* (April 17, 1950). This endorsement was intended to change "the bodily injury coverage of these policy forms from 'accident' to an 'occurrence' basis and read in pertinent part: "'Occurrence' means an event, or continuous or repeated exposure to conditions, which unexpectedly causes injury during the policy period. All such exposure to substantially the same general conditions existing at or emanating from each premises location shall be deemed one occurrence." *Id.* The Executive Committee of the NBCU reached the decision to prepare a standard bodily injury "occurrence" endorsement in late September 1948. Memorandum to Executive Committee from James B. Donovan, General Counsel for the National Bureau of Casualty Underwriters, "Occurrence" Basis (Nov. 16, 1948).

31. In the period the 1966 CGL policy was being drafted, Gilbert Bean was on the Joint Rating Committee and the Joint

Scope of Coverage Subcommittee, which were intimately involved in the development and approval of the 1966 policy language. See *infra* n.39.

32. Bean, *supra* note 26 at 552.

33. *Id.* at 553. "Moral hazard" is said to result where the availability of insurance coverage reduces the insured's incentive to prevent damage from happening. Moral hazard was defined by Professors Ehrlich and Becker in their classic paper as the "alleged deterrent effect of market insurance on self protection that increases the actual probabilities of hazardous events." Ehrlich & Becker, *Market Insurance, Self-Insurance, and Self-Protection*, J. of Pol. Econ. 623, 641 (1972) (footnote and citations omitted). Sawyer did not believe that providing liability insurance protection had a moral-hazard effect: "An accident from products or one causing property damage is no less likely to occur if there is insurance against it, and is no more likely to occur if insurance against it is excluded." Sawyer, *supra* note 5 at 138. Sawyer's view has subsequently been universally validated by the academic literature. See Ehrlich & Becker, *supra*, J. of Pol. Econ. at 641 ("no one has shown rigorously why, or under what conditions, market insurance reduces self-protection"); Baruch Berliner, *Limits of Insurability of Risks* 72-74 (1982) (in liability policies, there is little, if any, moral hazard created); Moorehouse, *Pricing Insurance with Costly Information*, 19 *Atlantic Econ. J.* 41, 41 (1991) ("It is well known that a risk averse individual, who purchases actuarially fair [liability] insurance, will choose full coverage and exercise optimal care.") (fn. omitted). Accord *Edward Stern & Co. v. Liberty Mut. Ins. Co.*, 112 A. 865, 867 (Pa. Sup. 1921) ("Nor did the existence of the policy lead to, aid or encourage an infringement of the law."). The lack of moral hazard resulting from the purchase of liability insurance has been shown to be particularly inapplicable in the corporate context, because there is a dispersion between those actors purchasing coverage and those engaging in damage-causing acts or omissions. See Carol A. Heimer, *Reactive Risk and Rational Action: Managing Moral Hazard in Insurance Contracts* (1985).

34. Bean, *supra* note 26 at 553.

35. *Id.* at 555. Affording such broad coverage for property damage liability was not limited to "occurrence" policies; the courts similarly had refused to deny coverage under accident policies for injuries ordinarily generated by the insured's operations. Bean noted, for example, the case *Cross v. Zurich General Accident & Liability Ins. Co. Ltd.*, 184 F.2d 609 (7th Cir. 1950), where "a 'caused by accident' provision has been held to apply where an insured deliberately undertook an operation which he knows, or an average man in his business should have known, would cause injury or damage of the type which resulted." *Id.* at 555.

36. See, e.g., *Berger Bros. Elec. Motors, Inc. v. New Amsterdam Cas. Co.*, 46 N.Y.S.2d 64 (App. Div. 1943); *Moffat v. Metropolitan Cas. Ins. Co.*, 238 F. Supp. 165 (M.D. Pa. 1964) (damage caused by gas releases from policyholder's coal-burning banks); *Employers Ins. Co. v. Rives*, 87 So.2d 653 (Ala. 1955) (gasoline leak over several months); *White v. Smith*, 440 S.W.2d 497 (Mo. Ct. App. 1969) (well contamination caused by seepage over an indeterminate period); *Taylor v. Imperial Cas. & Indem. Co.*, 144 N.W.2d 856 (S.D. 1966) (gasoline leak); see also *supra* n.29.

37. David Mellinkoff, *The Language of Law* 377 (1963). As Mellinkoff recounts:

If someone acts intentionally, is there an accident? 'Yes' and 'No.' If there is negligence, is it an accident? 'Yes' and 'No.' . . . If you reach forward to stop a heavy crate

from falling, and get a heart attack, that's an accident. But if you reach upward to stop heavy planks from falling, and get a heart attack, that's no accident. A sunstroke is usually an accident, but it is anyone's guess whether sunstroke is an injury by accidental means. If there is any doubt in your mind about what an accident is, just remember that if Mr. Schwartz picks his nose and it bleeds, that's an accident.

Id. at 377-78 (numerous footnotes citing cases omitted; the Schwartz case referred to is *Schwartz v. Commercial Travelers' Mutual Ass'n of Am.*, 132 Misc. 200 (N.Y. 1928)).

38. Bean explained one approach to providing gradual injury coverage:

Are insurers justified in excluding injury or damage due to waste disposal, dust, vibration, fumes and radiation on the theory that the management of a business producing such a hazard must anticipate the resulting damage? . . . Perhaps we should assume that management has responsible intent in all cases until proven otherwise. Perhaps coverage for these losses should be given until injury or damage occurs to bring to the policyholder's attention the fact that his operation is injurious. After that, continuing to cause such damage could not be considered accidental and future claims, if the operation is continued, are probably improper to cover. Advocates of this approach call it the 'first bite' theory. The desirable cut-off point is not too clear, however, as knowledge may come not with the first case but the first wave of cases, and a lag in stopping an injurious cause may be encountered despite the most diligent corrective action.

Bean, *supra* note 26 at 556-57.

39. The NBCU and MIRB established several joint committees to supervise development of the new policy. The Joint Forms Committee was comprised of twelve insurer representatives: six stock insurance companies for the NBCU and six mutual insurance companies for the MIRB. The members were generally lawyers or underwriters with major carriers affiliated with the Bureaus. The Joint Drafting Committee, comprised of Messrs. Katz and Schmalz, was a subcommittee of the Joint Forms Committee; Herbert Schoen, who was a representative of the Hartford on the Joint Forms Committee, advised throughout the drafting process and was particularly involved in drafting the occurrence definition and the trigger of coverage. Schmalz represented Liberty Mutual and Katz represented Aetna on the Joint Forms Committee.

The Joint Forms Committee had another subcommittee called the Joint Scope of Coverage Subcommittee. Both the NBCU and MIRB simultaneously maintained separate Scope of Coverage Committees. The Joint Rating Committee expressed the underwriting guidelines for the new policy. Both bureaus also maintained General Liability Rating Committees which bore ultimate responsibility for the decision to adopt the standard form policy language.

In the light of this formal organizational structure, it is not surprising that there is a well-developed written record memorializing the drafting history of the 1966 policy. Detailed minutes of meetings were prepared, reviewed, and circulated throughout the Joint Committees and the bureaus, and throughout the insurance industry more broadly.

40. George Katz, *The New Liability Policy*, Address to Agents (1966), reprinted by Aetna Life & Casualty (1966); George Katz, *Why the New Liability Policy?*, *Insurance Advocate*, Oct. 6, 1966, at 14; R.A. Schmalz, *New Comprehensive General Liability and Automobile Program*, Address before the Mutual Insurance Technical Conference (Nov. 15-18, 1965).

41. Norman Nachman, *The New Policy Provisions for General Liability Insurance* 18 *The Annals* 197 (1965); Richard Elliott, *The New Comprehensive General Liability Policy*, reprinted by *Best's Insurance News* (n.d.).

42. Henry G. Mildrum, *Implications of Coverage for Gradual Injury or Damage, Address at the Sheraton Boston Hotel* (Nov. 11, 1965); Bean, *supra*, note 1.

43. Lyman J. Baldwin, *Address to the American Society for Insurance Management* (Oct. 20, 1965).

44. Memorandum from Johnson & Higgins to "Our Clients" (Sept. 1, 1966) at 1.

45. Robert W. Shipman, *What to Expect in the New Comprehensive General Liability Policy, Address before the American Management Association Spring Conference New York, N.Y.* (May 10, 1965), at 5. Mr. Shipman went on to explain:

Some illustrations are:

1. Potable water contaminated by discharge from an industrial plant.
2. Vegetation destroyed by effluent from stack of manufacturing plant.
3. Paint on buildings and automobiles damaged by effluent from stack of chemical plant.
4. Walls cracked by vibration from passing trucks or pounding of large gas compressors.

Id.

46. Bean, *supra*, note 1 at 2. Bean later underscored in connection with products-liability coverage that: "Manufacturing risks producing insecticides, plant foods, fertilizers, weed killers, paints, chemicals, thermostats or other regulating devices, to name a few, have several gradual PD [property damage] exposure. They need this protection and should legitimately expect to be able to buy it, so we have included it." Id. at 10.

47. Id. at 5-6 (emphasis in original).

48. The language of the endorsement reads:

This insurance does not apply to:

Bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapor, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste material or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

49. Letter from David E. Kuzienga, Secretary of the MIRB, to Samuel H. Weese, Insurance Commissioner of West Virginia (July 30, 1970). An IRB spokesman told *Business Insurance*, an independent trade publication, that the proposed language made clear that coverage would not be afforded for intentional pollution, and that such a clarification was necessary "to avoid any misunderstanding of the intention of the insurers." IRB Files Pollution Liability Exclusions, *Business Insurance*, June 8, 1970 at 46.

50. Contemporaneous commentary within the insurance industry by knowledgeable individuals comports with this view. For example, in the early 1970s, the Insurance Company of North America ("INA") had a designated "pollution specialist" in its home office, who prepared formal training materials concerning INA's version of the exclusion, which used the terms "sudden happening in the policy period, neither expected nor intended from the standpoint of the insured." The instruction material, which was approved by high-level managers within INA, stated:

[W]hat does sudden mean? It means "characterized by or manifesting haste." It also means, again by Merriam Webster, "unexpected, unforeseen, or unprepared for." Conclusion, a sudden happening is not limited to an accident, it is also an unexpected or unforeseen occurrence. . . . This is why I say that [our exclusion] . . . merely clarifies the underwriting intent to exclude damage arising out of pollution, unless it is non[sic]-fortuitous. Rephrased in reverse, [our exclusion] permits pollution coverage where the occurrence resulting in damage was unexpected and unintended from the standpoint of the insured.

M. Maliner, *Liability Seminar, Insurance Company of North America* (1971). See also *Anderson & Middleton Lumber Co. v. Lumbermen's Mut. Cas. Co.*, 333 P.2d 938, 940 (Wash. Sup. 1959) ("sudden and accidental" means "unforeseen and unexpected"); 10A G. Couch, *Couch on Insurance* 2d § 42:396 (1982) ("sudden" is not to be construed as synonymous with instantaneous"). The terms chosen also may be considered ambiguous, which triggers the usual insurance rule that uncertain terms should be construed in favor of coverage. E.g., *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493 (W. Va. 1992) (relying upon representations to the West Virginia Insurance Commission in barring restrictive application of the pollution exclusion).

51. E.g., *Morton Int'l, Inc. v. General Accident Ins. Co. of Am.*, 629 A.2d 831, 852 (N.J. 1993). The Morton court focused on the explanatory memorandum of the IRB, which stated in part:

Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries where the pollution or contamination results from an accident . . .

Id. at 851.

"[T]he first two sentences of the explanatory memorandum to state regulators are, to say the least, prodigious understatement." Morton, 629 A.2d at 852. "[T]o characterize so monumental a reduction in coverage as one that 'clarifies the situation' simply is indefensible." Id. at 852.

The Morton court found that the IRB's explanatory memorandum misstated the actual effect of the pollution exclusion clause. Id. at 852. The court explained that "the 1966 version of the CGL policy offered broad coverage; it covered property damage resulting from gradual pollution and imposed no restriction on the 'suddenness' of the pollutant discharge." Id. Therefore the first sentence of the explanatory memorandum which states, "[c]overage for pollution or contamination is not provided in most cases under present policies . . ." is not true. Id. (emphasis added).

Also, the second sentence of the memo which states that "[t]he above exclusion 'clarifies' this situation . . ." is false and misleading. Id. The insurance industry contended that the pollution exclusion clause denies coverage for all pollution damage, irrespective of the insured's intent, unless the discharge was "sudden" (defined as quick) and "accidental." Id. at 853. In contrast, CGL policies previously extended coverage to most pollution situations. Id. at 850. Therefore, rather than clarify the scope of coverage, the pollution exclusion clause severely restricts coverage provided by prior occurrence-based policies. Id. at 853.