

Sudden & Accidental vs. Non-Sudden & Gradual Coverage

Background on the distinction between Sudden & Accidental vs Non-Sudden & Gradual pollution releases:

The 1970's saw the advent of environmental regulations that attempted to hold entities responsible for pollution releases that they caused. Around this time, insurers and reinsurers started to see an increase in the number of environmental claims being submitted related to environmental liability. As a result of these developments, they started to include policy language within their forms that attempted to limit the types of environmental claims to which their policies would apply. An example of this limiting language was the Sudden & Accidental (S&A) trigger. The following is an example of the standard language that was added to Commercial General Liability (CGL) policies at that time:

(This policy does not apply)

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

Through the years, the term “Sudden & Accidental” pollution has been litigated vigorously and there has been much debate about the meaning of S&A versus a Non-Sudden and Gradual (gradual) pollution event. A classic example of the complexity of this issue involves the circumstance where an area of a site has staining and the cause of the staining has been determined to be a leak from a pipe. A question is posed as to whether the staining was caused by an S&A event or a gradual event. If one believes that it is a result of an S&A event – is it because the event was the first drop (and everything subsequent to that was the same occurrence)? Conversely, was the staining the result of a non-sudden & gradual, consistent stream of drops over time? Even if it was determined that the stain was a result of a gradual release, shouldn't the first drop be considered an S&A event and therefore, some amount of the staining would fall into the S&A category? There are many opinions that one might have with regard to this simple example and this is only a glimpse of how complicated this debate became.

This paper is an attempt to distinguish between S&A and gradual triggers and how they might impact coverage for an insured. To illustrate, we are providing examples of some of the court decisions that might have proven favorable to the insured if they had purchased gradual coverage rather than the more limiting S&A coverage.

What is the difference between Sudden & Accidental vs. Non-Sudden and Gradual Coverage?

The word “sudden” had been litigated extensively in many courts, and was initially interpreted to mean “unexpected”, rather than “quick”. The word “accidental” was often interpreted as “unintended”. This broad interpretation of S&A, i.e., “unexpected and unintended”, rather than “quick”, resulted in many court decisions that were advantageous to the insured because of the fact that the unclear interpretation of the words resulted in ambiguities. Over time, this broad, ambiguous interpretation of S&A became narrower. In recent years, S&A has been interpreted to mean that it takes place in its entirety at a specific time and place. Insureds may have difficulty demonstrating that a pollution condition or release of pollutants was sudden and took place at a specific time.

To clarify their position, some carriers have added back coverage on a “time element” basis. This means that a pollution condition must begin and end within a certain time frame, an insured has to know when a pollution release started within a certain time period, and they have to report the release to their insurer within another time frame. This is often the case with pollution coverage offered under general and trade contractor CGL policies. Typical time element conditions might be that a pollution release has to begin and end within 72 hours, be discovered by the insured within 7 days, and be reported to the insurance carrier within 30 days.

In the case of the previous leaky pipe example, there might be many ways in which to interpret when the release occurred (i.e. was it at the first drop or after the last drop caused the soil staining?), but insureds would often fail to meet the beginning and end time frame as well as the notice requirements. In the case of a large aboveground tank breach that occurs during working hours, the time element trigger might be sufficient. Clearly companies are trying to tie pollution coverage to events that can be immediately reported and dealt with. By giving this coverage, they are stating their intention to not provide coverage for more insidious, and expensive, gradual releases.

Many, but not all, environmental insurance policies provide coverage for both S&A and gradual pollution releases. There is no distinction between one or the other in most environmental insurance forms. With gradual coverage in place, the insured does not have to be concerned about meeting the reporting requirements outlined in the time element trigger, or the potential ambiguity of older S&A forms.

Non-sudden and gradual coverage in premises specific forms is not without its issues as well. It is important for insureds to understand the difference between “unknown” pre-existing conditions and “new” conditions. These are the subjects of another discussion, but play a meaningful role in the degree to which environmental coverage protects an insured.

Table 1 includes some of the court cases where S&A vs. gradual releases have been contemplated. It is generally believed that if the insured had a policy that offered gradual pollution coverage, such as a Pollution Legal Liability policy or a Contractor Pollution Liability policy, the insured would have had coverage for the pollution claims discussed.

**Table 1
Coverage Outcomes When Insured Had Only S&A Pollution Coverage**

Citation	Coverage under S & A Policy?	Coverage Sought	Sudden and Accidental Court Interpretation
Aydin Corp. v. First State Ins. Co., 959 P.2d 1213 (Cal 1998)	No	Insured sought coverage for contamination at one of its manufacturing facilities.	The court decided that the insured has the burden of proving the S&A exception to the pollution exclusion (since the insured is more likely to have the information available to satisfy this burden).
FMC Corp. v. Plaisted & Cos., 72 Cal.rptr.2d 467 (Cal.Ct.App.1998)	No	Insured sought coverage for pollution at various owned sites and third-party sites.	The insured argued that the word “sudden” means “unexpected” and not “abrupt”, however, the court did not agree and therefore decided that coverage did not apply to the gradual releases at the various owned and third party sites
Buell Indus., Inc. v. Greater N.Y. Mut. Ins. Co., 791 a.2d 489 (Conn. 2002)	No	Insured sought coverage for groundwater pollution resulting from TCE releases from a plant’s former wastewater lagoon.	The insured argued that the word “sudden” means “unexpected”, however, the court decided that the word “sudden” includes a temporal quality and required the onset of the release to happen quickly or abruptly.
Schilberg Integrated Metals Corp.v.Continental Cas.Co., 819 A.2d773 (Conn.2003)	No	Insured (scrap metal processor) sought coverage for pollution at a site at which it disposed of hazardous waste.	The court decided that the insurer had no duty to defend the insured and that the insured failed to meet its burden of proving the applicability of the sudden and accidental discharge exception to the pollution exclusion.

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Iowa Comprehensive Petroleum UST Fund Bd.v.Farmland Mut. Ins. Co., 568 N.W.2d815 (Iowa 1997)	No	Insured sought coverage for pollution arising out of soil and groundwater contamination stemming stemmed from releases of gasoline from underground storage tanks.	The term “sudden” is not ambiguous, and the exclusion applies to bar coverage for pollution that occurred over a period of many years.
Crabtree v. Hayes-Dockside, Inc., 612 So. 2d 249 (La.Ct.App.1992)	No	Insured sought coverage for discharge of PVC dust onto adjacent property.	The production and release of PVC was a known consequence of the insured’s on-going business operations making the insured an “active polluter.”
Western Nat’l Mut.Ins.Co.v.Westling Mfg. Inc., 2003 WL 23024479 (Minn. Ct.App.2003)	No	Insured sought coverage for property damage arising out of pollution.	Where the insured fails to produce any evidence that the pollution resulted from a sudden and accidental release of pollutants during the policy period, the exclusion applies to bar coverage.
Dutton-Lainson Co. v.Continental Ins. Co., 716 N.W.2d 87 (Neb.2006)	No	Insured sought coverage for pollution resulting from its lawful disposal of cleaning solvents in a landfill and contamination of groundwater beneath its manufacturing facility.	An event occurring over a period of time is not sudden; a reasonable person in the position of the insured would understand the term “sudden” to refer to the objectively temporally abrupt release of pollutants into the environment.
Morrow Corp.v.Harleysville Mut.Ins.Co., 101 F.Supp.2d 422 (E.D.Va.2000)	No	Insured sought coverage for PCE contamination resulting from its operation of a dry cleaning business.	The exception to the exclusion is triggered only if the alleged discharges are both (i) unexpected and (ii) quick or abrupt.
Sinclair Oil corp.v.Re-public Ins. Co., 929 P.2d 535 (Wyo.1996)	No	Insured sought coverage for pollution arising out of its operation of an oil refinery.	The words “sudden and accidental” encompass a temporal aspect that requires the occurrence of an event to happen abruptly, without any significant notice and unexpectedly.

Information for this document was obtained from the following sources:

www.epa.gov

www.cwilson.com

Commercial General Liability Coverage Guide, 10th Edition, Donald S. Malecki, CPCU, The National Underwriter Company

Environmental Coverage Case Law, 22nd Edition, 2011, Munich Reinsurance America, Inc.

The Environmental Law Reporter

While the coverages we offer are designed to address these general issues, we make no guarantee or warranty that any individual policy we offer will respond to all issues as described herein. Please refer to the actual policy wording in each offered form to determine coverage applicability and acceptability. In the event your client applies for coverage and we offer terms, please review those terms carefully to determine if all of your client's exposures are being addressed. In some instances, more than one policy or type of coverage may be necessary.