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SULLINS v. ALLSTATE: LEAD PAINT AND THE GROWING AMBIGUITY OF THE POLLUTION EXCLUSION CLAUSE

I. INTRODUCTION

As many as three million children are at risk for lead paint poisoning.¹ Many older homes contain lead-based paints on interior surfaces.² Exposure to lead paint can cause children to develop learning disabilities and behavioral problems, as well as adversely affect the health of pregnant women.³ Damages arising from lead paint exposure can be substantial because of its severe negative health effects.⁴ Consequently, landlords often attempt to procure insurance policies that protect against lead paint liability.⁵

Generally, when an insurance policy covers a certain type of claim, the insurer has the duty to defend the insured against covered claims.⁶ The duty to defend ordinarily assures the insured of adequate resources to defend all claims brought against it that are within or *potentially* within the scope of the coverage provided by the policy.⁷

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1. See Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C.A. § 4851 (West 1995) (noting national lead paint statistics and Congressional findings); see also Jane Schukoske, *The Evolving Paradigm on Lead-Based Paint: From Code Violation to Environmental Hazard*, 45 S.C. L. REV. 511, 515-19 (1994).
 2. See Thomas J. Miceli, et al., *Protecting Children from Lead-Based Paint Poisoning: Should Landlords Bear the Burden?*, 23 B.C. ENVTL. AFF. L. REV. 1, 4 (1995); Karla L. Franken, Comment, *Lead-Based Paint Poisoning Liability: Wisconsin Realtors, Residential Property Sellers, and Landlords Beware*, 77 MARQ. L. REV. 550, 560 (1994).
 3. See 42 U.S.C.A. § 4851; see also MD. ANN. CODE art. 83B, § 2-301(7)(i) (1995) (discussing legislative findings regarding Maryland's Housing Rehabilitation Program).
 4. See, e.g., Clifford L. Rechtschaffen, *The Lead Poisoning Challenge: An Approach for California and Other States*, 21 HARV. ENVTL. L. REV. 387, 387 (1997); Schukoske, *supra* note 1, at 515-16.
 5. See *infra* notes 227-46, 254-74.
 6. See *infra* notes 41-48 and accompanying text (discussing the duty to defend and the duty to indemnify).
 7. See *Aetna Cas. & Sur. Co. v. Cochran*, 337 Md. 98, 104-05, 651 A.2d 859, 862 (1995) (holding that an insurer had a duty to defend an insured when the insured could have potentially been acting in self-defense, rather than committing an intentional tort); *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 408,

If an insurer does not want to pay to defend particular tortious acts by the insured, the insurance company can explicitly exclude coverage in its policy for those types of tort claims.⁸ The substantial exposure to liability for environmental pollution claims caused many insurers to include clauses in their insurance policies that limited coverage for damages caused by pollution—pollution exclusion clauses.⁹ Pollution exclusion clauses attempt to limit or eliminate the insurer's duty to defend and indemnify the insured against claims involving pollution.¹⁰ When the alleged damages are not caused by pollution, the pollution exclusion clause does not apply, and the insurer may have a duty to defend and indemnify the insured.¹¹

While causation is often an issue in pollution exclusion clause litigation,¹² a more fundamental issue that courts must resolve is whether the insured's conduct fell within the definition of pollution.¹³ When the insured's conduct is not pollution, the pollution exclusion clause does not apply to bar the insured from coverage or the insurer's duty to defend.¹⁴ In *Sullins v. Allstate Insurance Co.*,¹⁵ the Court of Appeals of Maryland considered whether lead paint was a pollutant within the meaning of an insurance policy's pollution exclusion clause.¹⁶ Maryland's highest court found that lead paint did not fit the definition of a pollutant and, therefore, was not precluded by the clause.¹⁷

347 A.2d 842, 850 (1975); see also 7C JOHN ALAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4683 (Walter F. Berdal ed., 1979); Andrew Janquitto, *Insurer's Duty to Defend in Maryland*, 18 U. Balt. L. Rev. 1, 2 (1988).

8. See, e.g., *Pepper Indus. v. Home Ins. Co.*, 134 Cal. Rptr. 904, 908 (Cal. Ct. App. 1977) (stating that if the insurance company intended to "exclude coverage for damage resulting from such incidents, it could have done so by the use of a few precise and specific words.").

9. See *infra* notes 104-41 and accompanying text.

10. See generally BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES, § 10.02, at 405 (8th ed. 1995) (discussing the development of the pollution exclusion and the ensuing litigation).

11. See E. Joshua Rosenkranz, Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237, 1293-94 (1986).

12. See 7A APPLEMAN, *supra* note 7, § 4525, at 225 (Lexis L. Pub. Supp. 1998).

13. See *id.* § 4524, at 211, 213-14 nn.3-4.

14. See *id.*

15. 340 Md. 503, 667 A.2d 617 (1995).

16. See *id.* at 504, 667 A.2d at 620. *Sullins* involved a certified question from the United States District Court for the District of Maryland. See *id.* at 506, 667 A.2d at 618.

17. See *id.* at 513, 518, 667 A.2d at 621-22, 624.

In the underlying case, a tenant brought suit against her landlord, the Sullinses, seeking damages for injuries that her infant suffered as a result of ingesting lead paint.¹⁸ Subsequently, the insurer, Allstate Insurance Company (Allstate) brought a declaratory judgment action in federal court, requesting the court to declare that it did not have the duty to defend the landlords in the lead paint suit.¹⁹ Allstate argued that it had no duty to defend because lead paint fell within the pollution exclusion clause.²⁰ In turn, the United States District Court for the District of Maryland certified the issue to the Court of Appeals of Maryland.²¹

The Court of Appeals of Maryland found Allstate's pollution exclusion clause ambiguous.²² The ambiguity could not be resolved by examining the extrinsic and parole evidence, therefore, the contract was " 'construed against the insurer as the drafter of the contract.' " ²³ Ultimately, the *Sullins* court held that the pollution exclusion clause was ineffective in the underlying lead paint suit.²⁴

The *Sullins* court's decision was in line with the majority of jurisdictions that have addressed substantively similar issues.²⁵ As the *Sullins* opinion demonstrates, pollution exclusion clauses are not the most effective means to exclude lead paint claims from insur-

18. *See id.* at 507, 667 A.2d at 618-19.

19. *See id.* at 508, 667 A.2d at 619.

20. *See id.* *See generally* Brohawn v. Transamerica Ins. Co., 276 Md. 396, 405, 347 A.2d 842, 848 (1975) ("A declaratory judgment action prior to the trial of a tort action against the insured may under some circumstances be a valuable means of resolving questions of policy coverage An early resolution could avoid unnecessary expense and delay to the parties."); Janquitto, *supra* note 7, at 53 (stating that the duty to defend places "the burden on the insurer to bring a declaratory judgment action to determine its obligation").

21. *See Sullins*, 340 Md. at 506, 667 A.2d at 618.

22. *See id.* at 508-10, 667 A.2d at 619-20.

23. *Id.* at 509, 667 A.2d at 619 (quoting *Cheney v. Bell Nat'l Life*, 315 Md. 761, 766-67, 556 A.2d 1135 (1989)); *see* *Mutual, Fire, Marine & Inland Ins. Co. v. Vollmer*, 306 Md. 243, 251, 508 A.2d 130, 134 (1986) (holding that if ambiguity exists after review of parole and extrinsic evidence, the ambiguity is to be construed against the insurer (citing *St. Paul Fire and Marine Ins. Co. v. Pryseski*, 292 Md. 187, 198-99, 438 A.2d 282, 288 (1981)); *C & H Plumbing & Heating, Inc. v. Employers Mut. Cas. Co.*, 264 Md. 510, 512, 287 A.2d 238, 239 (1972); *Government Employees Ins. Co. v. DeJames*, 256 Md. 717, 720, 261 A.2d 747, 749 (1970); *Josey v. Allstate Ins. Co.*, 252 Md. 274, 279, 250 A.2d 256, 259 (1969); *Mateer v. Reliance Ins. Co.*, 247 Md. 643, 648, 233 A.2d 797, 800 (1967).

24. *See Sullins*, 340 Md. at 518, 667 A.2d at 624.

25. *See infra* text accompanying notes 142-204.

ance coverage. Instead, insurers that do not want to provide coverage for lead paint injuries should include an explicit provision in their policies memorializing this intent.²⁶

This Note identifies and analyzes the key issues examined by the court of appeals in *Sullins*. The Background section provides a directory to some of the important issues for practitioners who litigate matters involving insurance coverage for pollution claims.²⁷ Part IV criticizes the *Sullins* court's willingness to side with an insured and explains how insurers can negate coverage for lead paint claims.²⁸

II. BACKGROUND

Insurance disputes are unique because they involve three parties—the insurer, the insured, and the person asserting a claim against the insured.²⁹ Underlying all insurance policies are ideas of risk management³⁰ and the transfer of risk.³¹ Insurance policies are commonly referred to as contracts of adhesion because they are usually standardized contracts drawn up by the insurer that leave the insured with little bargaining power.³²

26. See *infra* note 320 and accompanying text.

27. See *infra* notes 29-271 and accompanying text.

28. See *infra* notes 295-315 and accompanying text.

29. See Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 476-77 (1996) ("In no other area of the law are parties routinely represented by counsel selected and paid by a third party whose interests may differ from those of the individual or entity the attorney is defending."). This "tripartite relationship" and the insurance defense duties that flow from it have been referred to as " 'deeply and unavoidably vexing.' " *Id.* at 477 (quoting Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583, 1587 (1994)).

30. See ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW § 1.3, at 8 (1988).

31. See *id.* § 1.1(b), at 3 ("The articulation of a generally applicable definition of insurance has proven to be a very difficult task."). Although there is a problem in defining what exactly insurance is, it is basically understood to mean a contractual agreement whereby one party agrees to assume risk upon the occurrence of an event. See *id.*

32. An adhesion contract is usually a standard form submitted to one party who has a little or no bargaining power in the contract drafting. See *Standard Oil Co. of Cal. v. Perkins*, 347 F.2d 379, 383 n.5 (9th Cir. 1965). The contract is often offered on a "take it or leave it" basis. See *id.*; see also *Aetna Cas. & Sur. Co. v. Murphy*, 538 A.2d 219, 222 (Conn. 1988). "[I]nsurance contracts are contracts of adhesion because [t]he contract is drawn up by the insurer, and the insured, who merely 'adheres' to it, has little choice as to its terms." *Id.* (citing Edwin Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919)) (alteration in original); see KEETON & WIDISS, *supra* note 30,

As explained by the Court of Appeals of Maryland in *Cheney v. Bell National Life Insurance Co.*,³³ all contracts, including insurance policies, are interpreted according to the “four corners” rule.³⁴ In *Cheney*, the spouse of the insured sought payment under a life insurance policy.³⁵ The insured contracted Acquired Immunodeficiency Syndrome (AIDS) from a blood transfusion that was necessary for hemophilia treatment, and later died.³⁶ Under the terms of the policy, the insurer excluded coverage for any loss caused by “medical or surgical treatment” of a “sickness or disease.”³⁷ The court found that “hemophilia [was] a ‘disease’ within the commonly accepted meaning of that word, and therefore within the meaning of [the] insurance policy.”³⁸ Accordingly, the court of appeals ruled in favor of the insurer, emphasizing the rule that Maryland courts must examine the four corners of a contract to determine the parties’ intent.³⁹ The court noted that, unlike other jurisdictions, Maryland does not follow the rule that insurance policies are to be construed “most strongly against the insurer.”⁴⁰

A. *The Duty to Defend*

Insurers owe their insureds two contractual duties—the duty to

at 125-26 (“Insureds often learn, as a result of . . . an experience with an insurance coverage problem, that they had a deplorably inadequate understanding of the insurance product that was purchased.”).

33. 315 Md. 761, 556 A.2d 1135 (1989).

34. *See id.* at 767, 556 A.2d at 1138; *see also* *Kasten Constr. Co. v. Rod Enters.*, 268 Md. 318, 301 A.2d 12 (1971) (discussing ambiguous contracts). The *Kasten* court explained that the intent of the parties must be addressed when interpreting an ambiguous contract and viewed from the standpoint of the reasonable person—“[T]he true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.” *Id.* at 319, 301 A.2d at 18 (citing *U.S.I.F. Triangle v. Rockwood Dev. Co.*, 261 Md. 526, 270 A.2d 487 (1971), *Seldeen v. Canby*, 259 Md. 526, 270 A.2d 485 (1970), and *Katz v. Pratt St. Realty*, 257 Md. 103, 262 A.2d 540 (1970)).

35. *See Cheney*, 315 Md. at 763, 556 A.2d at 1137.

36. *See id.* at 763, 556 A.2d at 1136-37.

37. *Id.* at 763, 556 A.2d at 1136.

38. *Id.* at 770, 556 A.2d at 1140.

39. *See id.* at 766-67, 556 A.2d at 1138 (“Rather, following the rule applicable to the construction of contracts generally, we hold that the intention of the parties is to be ascertained if reasonably possible from the policy as a whole.”).

40. *Id.* at 766, 556 A.2d at 1138. In most jurisdictions, ambiguous insurance policies are to be resolved against the drafter of the policy. *See KEETON & WIDISS, supra* note 30, § 6.3(a)(2).

defend and the duty to indemnify.⁴¹ Initially, courts look to the four corners of the insurance policy at issue to determine the insurer's duty to defend.⁴² To trigger the duty to defend, the claim asserted against the insured must first fall within the insurance policy's coverage.⁴³ Generally, the insurer's duty to defend is "triggered" when an injury occurs during the coverage period.⁴⁴

It is well established in Maryland, and other jurisdictions, that an insurer's duty to defend is broader than and separate from its duty to pay or indemnify.⁴⁵ The duty to defend arises when there is a *potentiality* of coverage—a mere potentiality of the duty to indemnify.⁴⁶ An insurer has a duty to defend even if the suit against the insured would be unsuccessful or groundless.⁴⁷ Therefore, the mere fact that damages proven at trial might fall outside the policy will

41. See Richmond, *supra* note 29, at 477.

42. See OSTRAGER & NEWMAN, *supra* note 10, § 5.01, at 139 (citing *Western World Ins. Co. v. Hartford Mut. Ins. Co.*, 784 F.2d 558, 562 (4th Cir. 1986)). Some courts require the insured to demonstrate that the duty to defend was expressly provided for in the policy. See *id.* at 131 (citing *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 536 F.2d 730, 736 (7th Cir. 1976), *Mattocks v. Daylin, Inc.*, 452 F. Supp. 512, 514 (W.D. Pa. 1978), and *All-Star Ins. Corp. v. Steel Bar, Inc.*, 324 F. Supp. 160, 163 (N.D. Ind. 1971)).

43. See generally David S. Garbett, Comment, *The Duty to Defend Clause in a Liability Insurance Policy: Should the Exclusive Pleading Test Be Replaced?*, 36 U. MIAMI L. REV. 235, 237 (1982) (discussing the duty to defend under Florida law). "When the allegations of the complaint against the insured set forth facts outside the scope of . . . coverage, or facts that fall under an exclusionary provision which negates coverage, the insurer will generally have no duty to defend." *Id.*

44. See Lee H. Ogburn, *The Progression of Trigger Litigation in Maryland—Determining the Appropriate Trigger of Coverage, Its Limitations, and Ramifications*, 53 MD. L. REV. 220 (1994) (analyzing when the duty to defend is triggered, and addressing the "injury-in-fact" trigger theory adopted by the Court of Appeals of Maryland).

45. See *American States Ins. Co. v. Maryland Cas. Co.*, 587 F. Supp. 1549, 1551 (E.D. Mich. 1984) (discussing Michigan Law); *Aetna Ins. Co. v. Aaron*, 112 Md. App. 472, 685 A.2d 858 (1996); see also Susan Randall, *Redefining the Insurer's Duty to Defend*, 2 Conn. Ins. L.J. 221, 244 (1997) ("A typical analysis of the duty to defend consists of the court's recitation of the complaint rule, the statement that *the duty to defend is broader than, separate from, and independent of, the duty to indemnify*, and a description of the policy's coverage." (emphasis added)).

46. See *infra* notes 63-69 (discussing the potentiality of coverage issue discussed by the court of appeals); see also OSTRAGER & NEWMAN, *supra* note 10, § 5.02, at 133.

47. See 44 AM. JUR. 2D *Insurance* § 1539, at 420-21 (1969).

not excuse an insurance company from its duty to defend.⁴⁸

1. The Exclusive Pleading Rule

In *Lee v. Aetna Casualty & Surety Co.*,⁴⁹ the United States Court of Appeals for the Second Circuit established the rule for deciding what evidence courts may look to in determining whether an insurer has the duty to defend.⁵⁰ In Judge Learned Hand's majority opinion, he explained that an insurer has a duty to defend when a plaintiff files a claim against an insured that falls within the scope of coverage.⁵¹ Judge Learned Hand formulated what is commonly referred to as the exclusive pleading rule, which "holds that an insurer's defense obligation is determined solely by the allegations against the insured in the claimant's pleadings."⁵² The *Lee* court ruled that if one could comprehend that the complaint alleges an injury that could possibly be within the policy's coverage, the promise to defend must be construed to include this injury until it is clear that it does not.⁵³

48. See *infra* notes 63-68 and accompanying text (discussing the potentiality of coverage rule in Maryland); see also OSTRAGER & NEWMAN, *supra* note 10, § 5.02, at 133.

49. 178 F.2d 750 (2d Cir. 1949).

50. See *id.* at 750. Lee was a store patron who, at the invitation of the store owner, walked into an elevator and fell to the bottom of the shaft. See *id.* The store owner's insurance policy contained a provision stating that the insurer was not liable for incidents that occurred as a result of the store owner's "use" of any elevators. See *id.* A dispute arose between the insured and the insurer over whether the store owner used the elevator. See *id.* at 751. The store owner argued that it was not *using* the elevator when one of its patrons fell down the elevator shaft. See *id.* The insurer claimed that the store owner's act of inviting the patron into the elevator constituted *use* of the elevator, and was not covered by the insurance policy. See *id.*

51. See *id.* In *Lee*, the insurance policy included a provision requiring the insurer to "defend . . . any suit against the [i]nsured alleging injury, sickness, disease or destruction covered by [the] [p]olicy . . . even if such suit is groundless, false or fraudulent." *Id.* (alterations in original). Although the contract employed broad language in defining the insurer's duty to defend, the court imposed a threshold requirement that the injury must be of a type covered by the policy. See *id.* at 751-52.

52. Janquitto, *supra* note 7, at 7 ("Under this rule, information extrinsic to the pleadings is not relevant in determining the insurer's defense obligations."); see *Lee*, 178 F.2d at 751 ("[I]t is irrelevant that the insurer may get information from the insured, or from any one [sic] else, which indicates, or even demonstrates, that the injury is not in fact 'covered.'").

53. See *Lee*, 178 F.2d at 753.

2. The Exclusive Pleading Rule's Effect in Federal Court

The duty to defend, as determined under the exclusive pleading rule, places a greater burden on insurers litigating in federal court because of the notice pleading structure of the *Federal Rules of Civil Procedure*.⁵⁴ Notice pleading merely requires a party to allege facts sufficient to notify another party of a claim or defense.⁵⁵ Notice pleading does not require factually specific allegations in that the "pleader need not . . . worry about the particular form of the statement or that it fails to allege a specific fact to cover every element of the substantive law involved."⁵⁶ Therefore, an insurer is often unable to demonstrate that the underlying suit does not fall within the insured's policy through the pleadings alone.⁵⁷

The exclusive pleading rule prevents an insurer from using anything but the plaintiff's complaint to demonstrate that it has no duty to defend.⁵⁸ However, situations arise when the plaintiff's complaint does not clearly allege facts that bring the claim within the range of the insurance policy's coverage.⁵⁹ In these situations, the insurer's obligation to defend the insured becomes unclear.⁶⁰ Most federal courts follow the rule that when "a complaint, however ambiguous, may be read as premising liability on . . . grounds . . . *potentially or arguably* covered by the policy, the insured is entitled to a

54. See Janquitto, *supra* note 7, at 37-38 & n.215 ("The stricter pleading requirements of the past gave an insurer substantially more information on which to decide a duty-to-defend question. The continued viability of the exclusive pleading rule in light of the notice theory underlying current pleading systems has been questioned by both commentators and the courts.") (footnotes omitted); Randall, *supra* note 45, at 243-44 ("[S]ince the advent of notice pleading there will likely be broad ambiguous claims made against the insured making it more difficult for the insurer to determine whether the insurance policy covers the claims.") (quoting *Idaho v. Bunker Hill Co.*, 647 F. Supp. 1064, 1068 (D. Idaho 1986)).

55. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.7, at 253 (2d ed. 1993). See generally CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 68 (5th ed. 1994) (discussing the notice pleading requirement of the federal rules and the landmark decision in *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944)).

56. WRIGHT, *supra* note 55, at 254.

57. See Janquitto, *supra* note 7, at 37-38; cf. *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645, 649 (7th Cir. 1990) ("In a system of notice pleading, an insurer may be called on to defend without a complete articulation of the claim against its policyholders.").

58. See Janquitto, *supra* note 7, at 7.

59. See *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975); Randall, *supra* note 45, at 243-44.

60. See Randall, *supra* note 45, at 243-44.

defense.”⁶¹ As a result, a general, nondescript, or vague claim filed against an insured may trigger the insurer’s duty to defend whereas under more stringent pleading requirements, the absence of a duty to defend might be evident from the outset.⁶²

3. How to Determine the Duty to Defend in Maryland

The Court of Appeals of Maryland addressed what must exist to create a duty to defend in *Brohawn v. Transamerica Insurance Co.*⁶³ In *Brohawn*, the insured allegedly assaulted two nursing home employees while she attempted to remove her grandmother from the nursing home.⁶⁴ The nursing home employees sued Brohawn, alleging counts of negligence and intentional tort.⁶⁵ The insurance policy provided coverage for negligence, but not for intentional torts.⁶⁶ The court of appeals held that “[e]ven if a tort plaintiff does not allege facts which clearly bring the claim within or without the policy coverage, the insurer still must defend if there is a *potentiality* that the claim could be covered by the policy.”⁶⁷

Thus, under *Brohawn* the court of appeals extended the insurer’s duty to defend to all situations that create a *potentiality*, or as one commentator suggested, even the possibility of coverage.⁶⁸ However, the *Brohawn* court did not address how courts should determine whether a potentiality of coverage exists.⁶⁹

Subsequently, in *St. Paul Fire & Marine Insurance Co. v. Pryseski*,⁷⁰ the court of appeals developed a framework for determining whether the potentiality for coverage exists.⁷¹ *Pryseski* involved a sexual harassment suit brought against an employee of a life insurance

61. *Donnelly v. Transportation Ins. Co.*, 589 F.2d 761, 767 (4th Cir. 1978) (emphasis added); see also *Randall*, *supra* note 45, at 226-27.

62. See *Allison*, 907 F.2d at 649.

63. 276 Md. 396, 347 A.2d 842.

64. See *id.* at 398-99, 347 A.2d at 845.

65. See *id.* at 400, 347 A.2d at 846. Originally, the nursing home employees sued Brohawn alleging an intentional tort. See *id.* at 399-400, 347 A.2d at 846. The complaint was later amended to include a count for negligence. See *id.*

66. See *id.*

67. *Id.* at 408, 347 A.2d at 850 (citing *USF&G v. National Paving and Contracting Co.*, 228 Md. 40, 54, 178 A.2d 872, 879 (1962)) (emphasis added).

68. See Janquitto, *supra* note 7, at 13-14 (stating that perhaps the better term for the potentiality rule established by the *Brohawn* court would be the “possibility” rule).

69. See *id.* at 17.

70. 292 Md. 187, 438 A.2d 282 (1981).

71. See *id.* at 193, 438 A.2d at 285.

company.⁷² The insurer contended that the employee's tortious acts were not within the scope of his employment and that the policy did not cover "willful acts in violation of the penal statute or ordinance."⁷³ For these two reasons, the insurer argued that it owed Prysieski no duty to defend.⁷⁴

The *Prysieski* court announced that in order to determine whether an insurer has a duty to defend the insured, two questions must be answered.⁷⁵ First, the court must determine what acts are covered under the policy.⁷⁶ Second, the court must decide whether the facts alleged in the complaint potentially bring the claim within the policy's coverage.⁷⁷

Under the first prong of the *Prysieski* test, courts are to focus on the language contained in the policy; the second prong focuses on the allegations in the complaint against the insured.⁷⁸ Thus, *Prysieski* created a comparison test by which a deciding court normally must first determine the scope and limits of an insurance policy before addressing the potentiality of coverage.⁷⁹ Once a court determines

72. See *id.* at 190-91, 438 A.2d at 284.

73. *Id.* at 191, 438 A.2d at 284.

74. See *id.* at 191-93, 438 A.2d at 283-85.

75. See *id.* at 193, 438 A.2d at 285.

76. See *id.* The *Prysieski* court remanded the case to determine, through extrinsic evidence, the meaning of "occurrence" under the policy. See *id.* at 200, 438 A.2d at 289.

77. See *id.* at 193, 438 A.2d at 285; see also *Home Exterminating Co. v. Zurich-American Ins. Group*, 921 F. Supp. 318, 321 (D. Md. 1996) (applying the test provided by the *Prysieski* court as well as following the rationale provided by the *Sullins* court); *Truck Ins. Exch. v. Marks Rentals, Inc.*, 288 Md. 428, 435-36, 418 A.2d 1187, 1191 (1987) (applying a similar test to that relied on by the *Prysieski* court in determining whether an insurer owed the duty to defend in a tort suit arising out of an automobile accident involving the insured).

78. See *Prysieski*, 292 Md. at 193, 438 A.2d at 285.

79. See *id.*; see also *Janquitto*, *supra* note 7, at 18-20 (characterizing the standard announced by the *Prysieski* court as a "comparison test"). The *Prysieski* court set forth the following line of reasoning:

The first question focuses upon the language and requirements of the policy, and the second question focuses upon the allegations of the tort suit. At times these two questions involve *separate and distinct matters*, and at other times they are *intertwined*, perhaps involving an identical issue.

The "rule" applied by the Court of Special Appeals in this case, namely that the insurer has a duty to defend if the allegations of the tort suit raise a "potentiality" that coverage exists, is generally applicable only to the second question set forth above. It *may, however, be applicable* to an issue raised under the first question set forth above if

the scope of the policy's coverage, it will compare that with the allegations in the underlying tort claim and determine if there is the

that issue must also be resolved in the underlying tort suit.

Normally, however, when the question of coverage or defenses under the language or requirements of the insurance policy is *separate and distinct* from the issues involved in the tort suit, the "potentiality rule" relied on by the court below has no application.

Pryseski, 292 Md. at 193-94, 438 A.2d at 285-86 (emphasis added).

Subsequently, in *Northern Assurance Co. of America v. EDP Floors, Inc.*, 311 Md. 217, 533 A.2d 682 (1987), the court of appeals explained this passage in *Pryseski*:

As we stated in *Pryseski*, however, when, *as here*, the question of coverage or exclusion under the language of the insurance policy is *separate and distinct* from the issues involved in the tort suit, the "potentiality rule" normally has no application. To apply the "potentiality rule" in this case as [the insured] seeks would in effect create a canon of insurance contract interpretation that gives every benefit of the doubt to the insured, in contravention of our many holdings that the unambiguous language in an insurance contract is to be afforded its ordinary and accepted meaning.

Id. at 226, 533 A.2d at 686 (emphasis added).

As one commentator aptly recognized, the two lines of inquiries in the comparison test should remain mutually exclusive elements of a court's analysis. See Janquitto, *supra* note 7, at 21. However, cases arise when facts disputed in the pleadings must be resolved before the court can determine whether the insurer has a duty to defend. See *id.* Even in these *intertwined* cases, there is no need for the court to apply the potentiality test to the initial inquiry to determine the policy's coverage. See *id.* at 21-22 (explaining that dicta in *Pryseski* confused a test of insurance coverage with a test of contract construction). When the issues are intertwined, a court should apply the potentiality test *only* to the second inquiry—do the facts alleged in the complaint potentially bring the claim within the policy's coverage? See *id.* The net effect, however, is that the potentiality test controls the entire framework because the second inquiry ultimately controls the final outcome.

Despite the sound logic noted above, the same commentator suggested that the *Northern Assurance* court "specifically rejected the application of the potentiality rule to the first prong of the comparison test." *Id.* at 22. The commentator made this implication by quoting an expurgated portion of the passage in *Northern Assurance* that is reprinted above. See *id.* This misconstrues the court's holding.

The *Northern Assurance* court simply reiterated that the potentiality rule should never be applied to the first inquiry of the *Pryseski* framework when that inquiry is *separate and distinct* from the second inquiry. See *Northern Assurance*, 311 Md. at 226, 533 A.2d at 686. When cases involve intertwined inquiries, the dicta of *Pryseski* quoted above could still operate. See *id.* Thus, despite the arguably illogical nature of applying the potentiality rule to the first prong of *Pryseski*, the *Northern Assurance* court did not foreclose this possibility.

potentiality for coverage.⁸⁰

However, assessing the potentiality of coverage is often complicated because of the ambiguity in the insurance policy at issue.⁸¹ As a result, situations arise when the potentiality of coverage is unclear.⁸² In these situations, extrinsic evidence may be consulted, however, any doubt that remains as to the potentiality of coverage is interpreted in favor of the insured.⁸³ Thus, in Maryland, if ambiguity remains after examining extrinsic evidence, the policy will be interpreted against the insurer as the policy's drafter.⁸⁴

4. Using Extrinsic Evidence

Pryseski bifurcates the duty to defend analysis.⁸⁵ The first line of inquiry directs the court to look solely to the terms, conditions, and defenses set forth in the insurance policy.⁸⁶ From the policy alone, the court must determine what acts by the insured entitle the insured to the duty to defend.⁸⁷ If the policy's terms are unambigu-

80. See *Janquitto*, *supra* note 7, at 21.

81. See *Truck Ins. Exch. v. Marks Rentals Inc.*, 288 Md. 428, 433, 418 A.2d 1187, 1189 (1980) (explaining that ambiguity exists in an insurance policy if the policy's language is susceptible to more than one meaning).

82. See, e.g., *supra* notes 65-67 and accompanying text.

83. See *Aetna Cas. & Sur. Co. v. Cochran*, 337 Md. 98, 651 A.2d 859 (1995); see also JOHN D. CALAMARI AND JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 3-9, at 166 (3d ed. 1987) (defining extrinsic evidence as a very broad term including "not only prior and contemporaneous agreements but also surrounding circumstances (e.g., market conditions), evidence of subjective intention, what the parties said to each other with respect to meaning and customs, course of dealing and course of performance."). *Cochran* involved a policy clause that did not provide for a defense for certain intentional torts committed by the insured. See *Cochran*, 337 Md. at 101, 651 A.2d at 861. The insured contended his conduct was an act of self-defense, which was an act covered under his liability policy. See *id.* The *Cochran* court held that the extrinsic evidence—the assertions of self-defense that the insured made to the lower court—were admissible to establish a potentiality of coverage. See *id.* at 112, 651 A.2d at 866. Although it was not clear from the court's opinion, the *Cochran* court intimated that these assertions were made in the insured's Answer to the underlying suit. See *id.* at 101 n.2, 651 A.2d at 861 n.2.

84. See *Collier v. MD-Individual Practice Ass'n*, 327 Md. 1, 607 A.2d 537 (1992) (citing *Mutual Fire, Marine & Inland Ins. Co. v. Vollmer*, 306 Md. 243, 251, 508 A.2d 130, 134 (1986)).

85. See *St. Paul Fire & Marine Ins. Co. v. Pryseski*, 292 Md. 187, 193, 438 A.2d 282, 285 (1981).

86. See *id.*

87. See *id.* at 194, 438 A.2d at 286.

ous, the inquiry ends.⁸⁸

Only when the relevant portion of the insurance policy is ambiguous, must the court attempt to construe the meaning of the policy.⁸⁹ In doing so, the court may look to extrinsic evidence proffered by the insurer or the insured.⁹⁰ If the ambiguity cannot be resolved by extrinsic evidence, the policy must be construed against the drafter, which is generally the insurer.⁹¹

The second line of inquiry under *Pryseski* directs the court to view the plaintiff's complaint in the underlying suit.⁹² The court must compare the facts alleged in the complaint with the acts covered under the policy.⁹³ If the facts alleged in the complaint demonstrate that the insured's acts are potentially covered by the policy, the inquiry ends and the court must instruct the insurer of its duty to defend.⁹⁴ The insurer is not permitted to "use extrinsic evidence to contest coverage under an insurance policy if the . . . complaint establishes a potentiality of coverage."⁹⁵ When the facts alleged in the complaint do not clearly demonstrate that the insured's acts are potentially covered under the policy, the inquiry becomes more complex.

Maryland courts have slightly modified the exclusive pleading rule in this area.⁹⁶ In doing so, Maryland courts developed a double standard. Under Maryland precedent, if a complaint demonstrates that there is a potentiality of coverage, an insurer cannot use extrinsic evidence to defeat this showing.⁹⁷ This comports with the exclu-

88. See *Northern Assurance Co. of Am. v. EDP Floors, Inc.*, 311 Md. 217, 226, 533 A.2d 682, 687 (1987) ("[T]he unambiguous language in an insurance contract is to be afforded its ordinary and accepted meaning."); see also *Cheney v. Bell Nat'l Life Ins. Co.*, 315 Md. 761, 767, 556 A.2d 1135, 1138 (1989) (discussing the four corners rule).

89. See *Pryseski*, 292 Md. at 194, 438 A.2d at 286.

90. See *id.* at 198, 438 A.2d at 288 ("[I]n such a situation, extrinsic evidence is admissible at trial to show the parties' intent and to show whether the term does or does not have a particular trade usage.").

91. See *id.* at 194, 198, 200, 438 A.2d at 286, 288, 289.

92. See *id.* at 193, 438 A.2d at 285.

93. See *Janquitto*, *supra* note 7, at 21.

94. See *id.*

95. *Aetna Cas. & Sur. Co. v. Cochran*, 337 Md. 98, 107, 651 A.2d 859, 863-64 (1995).

96. See *id.* at 107, 651 A.2d at 863-64. *But see* *Janquitto*, *supra* note 7, at 8 ("Maryland has recognized the exclusive pleading rule. One court has even called it a black letter rule of Maryland insurance law, and exceptions to or deviations from the rule have been rejected repeatedly.").

97. See *Cochran*, 337 Md. at 107, 651 A.2d at 863-64.

sive pleading rule.⁹⁸ However, if a complaint does not demonstrate that there is a potentiality of coverage, the insured is permitted to use extrinsic evidence to demonstrate that there is a potentiality of coverage.⁹⁹ This violates the exclusive pleading rule.¹⁰⁰

Naturally, this breakdown begs the following question: If the complaint fails to demonstrate a potentiality of coverage, may the insurer use extrinsic evidence to demonstrate a lack of potentiality? *Pryseski* and its progeny do not address this specific inquiry.¹⁰¹ The insured is definitely permitted to resort to extrinsic evidence to demonstrate a potentiality of coverage.¹⁰² Thus, if courts prevent the insurer from resorting to extrinsic evidence, the double standard continues.

If the insurer can use extrinsic evidence to demonstrate a lack of potentiality of coverage, but the extrinsic evidence is unconvincing, the duty to defend will likely exist. The duty to defend is likely to exist because Maryland courts hold that "where a potentiality of coverage is uncertain from the allegations of a complaint, any doubt must be resolved in favor of the insured."¹⁰³

Outside of the controversies surrounding the duty to defend, coverage controversies generally focus on the meaning of the terms of the contract. In particular, many insurance policies explicitly preclude coverage for certain acts by the insured. The next section of this Note examines one exclusion in particular—the pollution exclusion.

98. See *supra* note 52 and accompanying text.

99. See *Cochran*, 337 Md. at 110, 651 A.2d at 865 (explaining that allowing an insured to use extrinsic evidence to demonstrate potentiality of coverage is consistent with the public policy concern that the insured pays premiums specifically for the promise to be defended). The burden is on the insured to demonstrate a "reasonable potential that the issue triggering coverage will be generated at trial." *Id.* at 112, 651 A.2d at 866.

100. See *supra* notes 52 and accompanying text.

101. The *Cochran* court noted: "*Brohawn* in no way intimates that reference to outside sources is prohibited if that reference is necessary to determine whether there is a potentiality of coverage under an insurance policy where the tort plaintiff's complaint neither conclusively establishes nor negates a potentiality of coverage." *Cochran*, 337 Md. at 108, 651 A.2d at 864. However, *Cochran* makes no mention of what evidence the insurer may introduce. Instead, the *Cochran* court cited precedent from other jurisdictions that impose an affirmative duty on the insurer to seek extrinsic evidence demonstrating that it has the duty to defend. See *id.* at 109, 651 A.2d at 865 (citing *Spruill Motors Inc. v. Universal Underwriters Ins. Co.*, 512 P.2d 403, 407 (Kan. 1973)).

102. See *id.* at 110, 651 A.2d at 865.

103. *Id.* at 107, 651 A.2d at 863-64.

B. *The Evolution of the Pollution Exclusion Clause*

Historically, the insurance industry attempted to limit its exposure to the heavy financial burden associated with pollution claims.¹⁰⁴ The industry memorialized its efforts in Comprehensive General Liability (CGL) policies—standardized insurance policies adopted industry-wide.¹⁰⁵ Often courts interpreted CGLs in a manner inconsistent with the insurance industry's efforts.¹⁰⁶ In part, this has resulted in the industry's current effort to exclude pollution coverage entirely through the "absolute" pollution exclusion clause.¹⁰⁷ Before the advent of the absolute pollution exclusion clause, however, pollution-related insurance policies evolved through four stages.¹⁰⁸

Initially, insurance policies did not contain pollution exclusion clauses.¹⁰⁹ The first type of coverage was "accident-based."¹¹⁰ To insurers, only sudden discharges that occurred at a fixed moment in time were considered "accidents" covered by accident-based policies.¹¹¹ Thus, the policies covered certain accidental pollution, but insurers did not consider gradual pollution to be an accident.¹¹² However, the courts formulated a variety of definitions for the word "accident."¹¹³ This led to unpredictable, fragmented precedents,

104. See *Bernhardt v. Hartford Fire Ins. Co.*, 102 Md. App. 45, 50, 648 A.2d 1047, 1049 (1994) (discussing the history of the pollution exclusion clause).

105. See, e.g., Thomas E. Mulvihill, *Insurance Coverage for Copyright Violations under a Comprehensive General Liability Policy*, 529 PRACTISING L. INST. PAT. 143, 145 (1998); cf. Melody A. Hamel, Comment, *The 1970 Pollution Exclusion in Comprehensive General Liability Policies: Reasons for Interpretations in Favor of Coverage in 1996 and Beyond*, 34 DUQ. L. REV. 1083, 1101-02 (1996) ("[C]ooperation among insurers for standard policy language is possible because the insurance industry, since 1948, has enjoyed a congressional exemption from most federal anti-trust prohibitions.").

106. See Rosenkranz, *supra* note 11, at 1240.

107. See 7A APPLEMAN, *supra* note 7, § 4525 (Lexis L. Pub. Supp. 1998).

108. See *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 513-15, 667 A.2d 617, 622 (1995); see also Rosenkranz, *supra* note 11, at 1241 (detailing the first three stages).

109. See Rosenkranz, *supra* note 11, at 1241.

110. See *id.*; see also Hamel, *supra* note 105, at 1102.

111. See Rosenkranz, *supra* note 11, at 1241-42; cf. Hamel, *supra* note 105, at 1102 ("Although undefined in the policy, 'accident' . . . was generally thought of as a 'boom' event where the cause and effect (damages) happened simultaneously.").

112. See Rosenkranz, *supra* note 11, at 1241-42.

113. See *id.* at 1243-44. Typically, courts interpreted "accident" to include continuous or repeated exposure which increased insurers' liability. See Hamel, *supra* note 105, at 1102.

leaving insurers without a reliable means of calculating their exposure to liability.¹¹⁴

Faced with this uncertainty and insureds' demands for broader coverage,¹¹⁵ the insurance industry abandoned accident-based policies and adopted "occurrence-based" policies in 1966.¹¹⁶ The standard occurrence-based policy defined occurrence to mean "an accident, including continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."¹¹⁷ Significantly, this definition was not intended to cover pollution that was either expected or intentional.¹¹⁸ Therefore, although occurrence-based coverage included gradual pollution, it did not cover gradual pollution that was caused by "natural and obvious consequence[s] [of] the [insured's] regular operation of a business."¹¹⁹

Again, the courts formulated their own interpretations of the scope of occurrence-based policies.¹²⁰ This resulted in unpredictable judicial determinations and an increase in liability exposure to insurers.¹²¹ In response to the increase in litigation and liability expo-

114. See Rosenkranz, *supra* note 11, at 1246.

115. See Hamel, *supra* note 105, at 1102. During the 1960s, courts began to embrace expansive tort theories encompassing claims arising from injuries that involved long latency periods. See *id.* Insureds began to demand coverage for these claims, and foreign insurers such as Lloyd's of London responded. See *id.* Thus, foreign competition was a major impetus for the occurrence-based CGL policy. See *id.*

116. See Rosenkranz, *supra* note 11, at 1246; Hamel, *supra* note 105, at 1102.

117. Rosenkranz, *supra* note 11, at 1246-47 (quoting Rynearson, *Exclusion of Expected or Intended Personal Injury Property Damage Under the Occurrence Definition of the Standard Comprehensive General Liability Policy*, 19 FORUM 513, 513 (1984)).

118. See *id.* at 1247; cf. 7A APPLEMAN, *supra* note 7, § 4523, at 207 ("If damages were expected or intended, then an occurrence takes place and no coverage exists.").

119. Rosenkranz, *supra* note 11, at 1248 (quoting Jerry E. Cardwell, Note, *Insurance and Its Role in the Struggle Between Protecting Pollution Victims and the Producers of Pollution*, 31 DRAKE L. REV. 913, 922 (1982)) (alterations in original); see also Hamel, *supra* note 105, at 1103 (detailing an insurance industry memorandum that indicated the occurrence-based CGL policy was intended to cover gradual damages).

120. See Rosenkranz, *supra* note 11, at 1248-50 (discussing the courts' approaches to construing the word "accident" in occurrence-based policies; indicating that many courts based their interpretations on the foreseeability of the damage).

121. See *id.* at 1251. See generally Hamel, *supra* note 105, at 1103 (explaining that in most states, insurers were required to submit policy changes, such as the newly adopted pollution exclusion clause, to the state's insurance commis-

sure regarding environmental coverage, insurers changed their policies a third time, opting for a pollution exclusion clause.¹²²

The original pollution exclusion clause, the standard pollution exclusion clause, incorporated in the 1973 CGL policy provided:

This [p]olicy [s]hall [n]ot [a]pply: [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. . . .¹²³

The standard pollution exclusion clause contained one major exception—the clause did not apply to “sudden and accidental” pollution.¹²⁴

Since the creation of the standard pollution exclusion clause, there has been considerable litigation over its scope.¹²⁵ Courts broadly construed the sudden and accidental exception to encompass losses caused by “intentional, ongoing business operations,” which enhanced insurers exposure for losses associated with environmental pollution.¹²⁶ This led one commentator to characterize

sioner for approval).

122. See *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 513-15, 667 A.2d 617, 622 (1995) (citing *Bernhardt v. Hartford Fire Ins. Co.*, 102 Md. App. 45, 51, 648 A.2d 1047 (1994)); TOD I. ZUCKERMAN & MARK C. RASKOFF, ENVIRONMENTAL INSURANCE LITIGATION § 5.02 (1998).

123. ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 10A.04[2] (1997) (discussing the pollution exclusion clause's development and evolution from the late 1960s until its present form, the “absolute pollution exclusion.”); see also *Bernhardt v. Hartford Fire Ins. Co.*, 102 Md. App. 45, 52, 648 A.2d 1047, 1050 (1994); 1973 Comprehensive General Liability Insurance Policy, reprinted in TOD I. ZUCKERMAN & MARK C. RASKOFF, ENVIRONMENTAL INSURANCE LITIGATION PRACTICE FORMS FORM VI-2, at VI-23 (1998).

124. See 7A APPLEMAN, *supra* note 7, § 4524.10 (Lexis L. Pub. Supp. 1998); LONG, *supra* note 123, 10A.04[2]. See generally ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES §§ 11.11-12 (1995) (discussing the limitations and evolution of the pollution exclusion clause to its current language).

125. One federal judge has stated that “[t]he cases swim the reporters like fish in a lake.” *Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co.*, 668 F. Supp. 1541, 1549 (S.D. Fla. 1987). The judge continued to state that the defendant, an insurer, “would have this Court pull up its line with a trout on the hook, and argue that the lake is full of trout only, when in fact the water is full of bass, salmon and sunfish too.” *Id.* at 1549-50 (explaining that the application of pollution exclusion clauses depend on the facts of each case).

126. Hamel, *supra* note 105, at 1253-56 (discussing interpretational problems associated with the terms “sudden” and “accidental” in the 1973 Comprehensive

the standard pollution exclusion clause as "ill-fated" because courts often sided with the insureds in actions seeking to negate it.¹²⁷ The rationale for these decisions focuses on the ambiguous nature of the pollution clause, coupled with the principle that ambiguous contracts are to be construed against the drafter of the contract.¹²⁸

In 1986, the insurance industry responded by amending the standard insurance policy to include a broader pollution exclusion clause.¹²⁹ This "absolute" pollution exclusion clause excluded coverage for: "'bodily injury' or 'property damage' arising out of the actual, alleged or threatened discharge . . . or escape of pollutants."¹³⁰ The absolute pollution exclusion clause defined the term pollution as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."¹³¹

The major change from the standard pollution exclusion clause to the absolute was that the absolute pollution exclusion clause dropped the sudden and accidental exception.¹³² Thus, the latest version of the pollution exclusion clause is broader than any of the preceding clauses and serves as an absolute bar against coverage.¹³³

The judicial uncertainty and disregard of the insurers intent that plagued the standard pollution exclusion clause forced many insurers to abandon the business of covering pollution related losses, opting for absolute exclusion.¹³⁴ One commentator has gone so far as to suggest that the courts unfaithful application of the pol-

General Liability policy).

127. See Garrett L. Joest, III, *Will Insurance Companies Clean the Augean Stables? - Insurance Coverage for the Landfill Operator*, 50 *Ins. Couns. J.* 258, 260 (1983) ("Where there is a possibility that another circumstance other than pollution may have caused the harm, the exclusion will not apply.").

128. See *supra* notes 23, 34, 40, 81, 84, *infra* notes 145-54, 157, 192, 237 and accompanying text. Other courts base their decision to negate the pollution exclusion clause on tort principles. See generally W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 4, 20 (5th ed. 1984) ("A recognized need for compensation is . . . a powerful factor influencing tort law. Even though, like other factors, it is not alone decisive, it nevertheless lends weight . . . to an argument for liability that is supported also by an array of other factors.").

129. See 7A APPLEMAN, *supra* note 7, § 4525 (Lexis L. Pub. Supp. 1998).

130. 1986 Comprehensive General Liability Insurance Policy, *reprinted in* ZUCKERMAN & RASKOFF, *supra* note 123, Form VI-1, at VI-9 (1998).

131. *Id.* In addition, the clause defines the term waste to include "materials to be recycled, reconditioned or reclaimed." *Id.*

132. See *id.* Form VI-1, at VI-9 & Form VI-2, at VI-23.

133. See 7A APPLEMAN, *supra* note 7, § 4525 (Lexis L. Pub. Supp. 1998).

134. See Rosenkranz, *supra* note 11, at 1278.

lution exclusion clause has directly caused a slow down in the already sluggish environmental cleanup effort.¹³⁵ Insurers are simply unable to bear the costs of cleaning up the environment.¹³⁶ As a result, insurers have refused to provide any coverage and in turn, the environmental cleanup effort has slowed even further.¹³⁷

Courts tend to uphold and enforce pollution exclusion clauses based on two public policy rationales. First, these clauses allow for limitations on coverage and ensure that insurance companies "can continue to serve their function of providing economic stability to their insureds."¹³⁸ Second, the clauses are needed to guard against the intentional pollution that may occur if insureds know that the insurer will defend them in any action stemming from pollution.¹³⁹ Litigation concerning the current pollution exclusion clause focuses less on the clause's general validity or whether the facts supporting the underlying claim meet the definition of an occurrence.¹⁴⁰ In-

135. *See id.*

136. *See id.*

137. *See id.*

138. Nancer Ballard & Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610, 628 (1990) (discussing CGLs in the wake of increasingly stringent environmental laws, such as the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA)). "The public and regulatory objective of general liability insurance is to transfer the risk of certain types of business-related losses that could threaten an insureds' viability. . . . [P]ublic policy [should forbid] the transfer of liability for . . . intentional losses." *Id.*

139. *See Morton Int'l, Inc. v. General Accident Ins. Co. of Am.*, 629 A.2d 831, 875 (N.J. 1993). "[I]f an insured knows that liability incurred by all manner of negligent or careless spills and releases is covered by his liability policy, he is tempted to diminish his precautions and relax his vigilance." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374, 381 (N.C. 1986).

140. *Cf. Alcolac Inc. v. California Union Ins. Co.*, 716 F. Supp. 1546, 1549 (D. Md. 1989) ("This pollution exclusion is just what it purports to be—absolute—and the Court perceives no reason why [the insurer] should be denied the benefit of its bargain with [the insured], as reflected in the insurance contract."); *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 509-11, 667 A.2d 617, 620-21 (1995) (focusing on whether lead paint was a pollutant under the absolute pollution exclusion clause); *Bernhardt v. Hartford Fire Ins. Co.*, 102 Md. App. 45, 50-55, 648 A.2d 1047, 1050-51 (1995) (focusing on whether carbon monoxide gas was a pollutant under the policy exclusion clause). The absolute pollution exclusion clause is a bar against coverage. Thus, in order to obtain coverage an insured must prove that the claim does not involve pollution, and therefore falls outside of the exclusion. *See generally* 7A APPLEMAN, *supra* note 7, § 4525, at 225-28 (Lexis L. Pub. Supp. 1998).

stead, the pivotal issue current courts often face revolves around defining pollutants because once something is deemed a pollutant, coverage is barred by the absolute pollution exclusion clause.¹⁴¹

C. *The Pollution Exclusion Outside of Maryland*

1. Federal Courts

Considerable debate surrounds the legally operative meaning of the word "pollutant."¹⁴² For instance, in *Regent Insurance Co. v. Holmes*,¹⁴³ the United States District Court for the District of Kansas held that carpet dye, used by a commercial carpet dyeing company that burned a child, was not a pollutant.¹⁴⁴ The court concluded that the insurance contract was ambiguous because of its definition of pollutant.¹⁴⁵ The court looked to the policy which defined pollutants to be " 'solid, liquid, gaseous, or thermal irritants or contaminants.' "¹⁴⁶ However, the policy did not further define irritants or contaminants. Therefore, the definition of pollutants was ambiguous and the court resorted to extrinsic evidence to resolve the ambiguity.¹⁴⁷

The court relied on standard dictionary definitions of the words contaminant and irritant.¹⁴⁸ According to the dictionary, an irritant was "something that irritates or excites;" a contaminant was

141. It appears as though the main problem with which many courts have grappled stems from the difficulty of defining exactly what is a "pollutant." See generally *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265 (1st Cir. 1990) (applying New Hampshire law and holding that extreme amounts of light and noise were not considered to be pollutants); *New Castle County v. Hartford Accident & Indem. Co.*, 778 F. Supp. 812 (D. Del. 1991), *rev'd*, 970 F.2d 1267 (1992) (holding that a substance is not a pollutant unless it is toxic in nature and recognized as toxic by statute); *Action Auto Stores, Inc. v. United Capitol Ins. Co.*, 845 F. Supp. 428 (W.D. Mich. 1983) (holding that gasoline in a storage tank was not a pollutant); *West Bend Ins. Co. v. Iowa Iron Works, Inc.*, 503 N.W.2d 596 (Iowa 1993) (holding that a pollution exclusion clause that excluded waste did not apply to garbage).

142. See *Regent Ins. Co. v. Holmes*, 835 F. Supp. 579, 581-82 (D. Kan. 1993).

143. *Id.* at 579.

144. See *id.* at 582.

145. See *id.* at 581. The court held that because of the ambiguity, the policy must be interpreted in the light most favorable to the insured. See *id.*

146. *Id.*

147. See *id.* at 581-82.

148. See *id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 491, 1197 (1986)).

“something that contaminates.”¹⁴⁹ The *Regent* court held that the policy’s definition of pollutant was too broad because many substances could irritate or contaminate; thus, it would be inconceivable to consider, and exclude, all such substances as pollutants.¹⁵⁰

Moreover, the extrinsic evidence was insufficient to resolve the ambiguity of the term pollutant.¹⁵¹ Consequently, the court construed the term pollutant in a light most favorable to the insured.¹⁵² In so doing, the court refused to classify the dye as a pollutant because it was not “harmful or toxic to persons or the environment” generally.¹⁵³ The court concluded that the carpet dye was not a pollutant that the insurance policy excluded from coverage.¹⁵⁴

Once a court finds that the pollution exclusion clause is ambiguous, many jurisdictions hold that such ambiguity should be interpreted in favor of the insured.¹⁵⁵ The United States Court of Appeals for the Ninth Circuit followed this principle in *Hydro Systems, Inc. v. Continental Insurance Co.*¹⁵⁶ In *Hydro Systems*, the court reasoned that standard insurance contracts are contracts of adhesion.¹⁵⁷

149. *Id.*

150. *See id.* at 582; *see also* Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1043 (7th Cir. 1992).

151. *See Regent*, 835 F. Supp. at 582.

152. *See id.* at 581-82.

153. *Id.* at 582 & n.5. The court stated that, under these facts, because this was a release that caused injury to a person, rather than to the environment, the carpet dye could not be considered a pollutant. The court also made a distinction between substances that are harmful or toxic to persons and the environment in general from substances that are harmful or toxic if not used correctly. *See id.*

154. *See id.*

155. *See, e.g.,* Commercial Union Ins. Co. v. Sponholz, 866 F.2d 1162, 1163 (9th Cir. 1989) (citing Reserve Ins. Co. v. Pisciotto, 640 P.2d 764 (Cal. 1982)).

156. 929 F.2d 472, 474 (9th Cir. 1991). *Hydro Systems* involved a manufacturer of fiberglass bathtubs being sued by nearby residents who sought injunctive relief, alleging that the manufacturer’s emissions were causing them bodily injury. *See id.* at 473. The manufacturer sought coverage for costs associated with complying with a city order that required it to install an air pollution control system to neutralize odors emanating from its plant. *See id.*

157. *See id.* at 474 (citing Globe Indem. Co. v. State, 118 Cal. Rptr. 75, 78 (1974)); *see also* W. David Slawson, *Standard Form Contracts and Democratic Control of Law Making Power*, 84 HARV. L. REV. 529, 540 (1971) (explaining that insurance contracts are different from most other contracts because the purchaser of the policy often does not view the policy until he pays for it). *See generally supra* notes 22, 24 (discussing contracts of adhesion and the doctrine of *contra proferentem*). *Contra proferentem* is a canon of contract construction that requires a court to construe ambiguous contract provisions “most strongly against the

The court also held that contracts of adhesion, when ambiguous, should be construed against the drafter.¹⁵⁸ Thus, it logically followed that the ambiguous standard insurance contract at issue should be construed against the insurer because the insurer drafted the contract.¹⁵⁹

2. State Holdings from Other Jurisdictions

In *West American Insurance Co. v. Tufco Flooring East, Inc.*,¹⁶⁰ a flooring installer resurfaced the floor of a chicken plant with an alleged pollutant.¹⁶¹ Shortly thereafter, the chickens held in a storage unit close to the newly resurfaced area tested positive for styrene, and were unfit for human consumption.¹⁶² Ruling that the flooring material, styrene monomer resin, was not a pollutant such as would fall under the relevant pollution exclusion clause, the North Carolina Court of Appeals relied on the principle that when a "reasonable person in the position of the insured" expects coverage, the policy should be interpreted to provide for coverage.¹⁶³ The court found that the flooring installer could have reasonably expected coverage for such an incident, and therefore held that the insurer was obligated to defend.¹⁶⁴

In *A-1 Sandblasting & Steamcleaning Co. v. Baiden*,¹⁶⁵ an action was brought against an insurance company by a bridge painter who caused damage to vehicles by negligently spray painting a bridge.¹⁶⁶ The Court of Appeals of Oregon held that there was a material issue of fact as to whether paint fell under the provisions of the pol-

person who selected the language." BLACK'S LAW DICTIONARY 327 (6th ed. 1990) (citing *United States v. Seckinger*, 397 U.S. 203, 216 (1970)).

158. See *Hydro Systems*, 929 F.2d at 474 (citing *Sponholz*, 866 F.2d at 1163); see also *Pisciotta*, 640 P.2d at 768.

159. See *Hydro Systems*, 929 F.2d at 474 (citing *Sponholz*, 866 F.2d at 1163); see also *Pisciotta*, 640 P.2d at 768.

160. 409 S.E.2d 692 (N.C. Ct. App. 1991).

161. See *id.* at 693.

162. See *id.*

163. *Id.* at 697 (citing *Grant v. Emmco Ins. Co.*, 243 S.E.2d 894, 897 (N.C. 1978) ("If this Court accepted West American's interpretation of the CGL policy, we would be allowing an insurance policy to accept premiums . . . and then to hide behind ambiguities in the policy")).

164. See *id.* (emphasizing that Tufco purchased the policy in order to cover itself in the event of just these types of liabilities).

165. 632 P.2d 1377 (Or. Ct. App. 1981).

166. See *id.*

icy's pollution exclusion clause.¹⁶⁷ The policy specifically excluded, among other things, smoke, soot, toxic chemicals, waste materials, "or other irritants, contaminants, or pollutants."¹⁶⁸ The court applied the doctrine of *ejusdem generis*,¹⁶⁹ and found that paint could be generally thought of as neither an irritant nor a contaminant, as it does not fairly fall into the category of specifically excluded substances enumerated before the "or other irritants, contaminants or pollutants" language.¹⁷⁰ The court also rejected the insurer's argument that paint was a "liquid irritant," reasoning that this proposed interpretation would be too broad.¹⁷¹ Similarly, while the paint may have fallen within the policy's definition of a pollutant, due to its chemical composition, a reasonable person in the position of the insured would not believe that paint was a substance referred to or covered by the pollution exclusion clause; thus, a reasonable person could expect to be insured under those circumstances.¹⁷²

In *Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Insurance Co.*,¹⁷³ a real estate developer allegedly caused property damage to the plaintiffs by negligently allowing dirt and sand to wash over their land.¹⁷⁴ Alabama's highest court addressed whether the sand that washed from the developer's construction site was an "intentional, expected and nonaccidental discharge of pollutants," and thereby exempted from coverage by the pollution exclusion clause.¹⁷⁵ The insured argued that the doctrine of *ejusdem generis* should be applied—even if the terms "contaminants" and "irritants" were given their broadest meaning, reasonable people could

167. *See id.* at 1378.

168. *Id.*

169. "[T]he '*ejusdem generis* rule' is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are . . . to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." BLACK'S LAW DICTIONARY 517 (6th ed. 1990).

170. *A-1 Sandblasting & Steamcleaning Co.*, 632 P.2d at 1379 (citing *McGrath v. Electrical Constr. Co.*, 370 P.2d 231 (Or. 1961); *Rayburn v. Crawford*, 211 P.2d 483 (Or. 1949)).

171. *See id.* The court stated that over-emphasis of the "liquid" element of the clause could lead to an argument that even pure water could be excluded from the policy. *See id.*

172. *See id.*

173. 347 So. 2d 95 (Ala. 1977).

174. *See id.* at 96-97.

175. *Id.* at 97. The court was also faced with the issue of whether the developer's actions were done with the specific intent to cause harm to the plaintiffs. *See id.*

not be expected to conclude that sand and dirt fell within the category of "smoke, vapors, soot, fumes, acids" or other toxic substances.¹⁷⁶

Ruling in favor of the insured, the court held that the pollution exclusion clause did not apply to the developer's activities.¹⁷⁷ The court noted that the clause applied only in instances involving "industrial pollution and contamination."¹⁷⁸ Therefore, the insurer had a duty to indemnify the real estate developer in the underlying suit.¹⁷⁹

Other courts have similarly adopted this interpretation.¹⁸⁰ In *Thompson v. Temple*,¹⁸¹ a Louisiana appellate court held that a landlord's insurer could be liable for a tenant's injuries resulting from carbon monoxide poisoning.¹⁸² The court reasoned that "[p]ollution exclusion clauses are intended to exclude coverage for active *industrial polluters*, when businesses knowingly emitted pollutants over extended periods of time."¹⁸³ These cases and others indicate a movement by courts to limit the circumstances when they will enforce pollution exclusion clauses.¹⁸⁴

176. *Id.* at 98. The insured countered that it could not be expected to list every substance in the clause. *See id.*

177. *See id.* at 100.

178. *Id.* at 99.

179. *See id.* at 96, 100.

180. *See American States Ins. Co. v. Maryland Cas. Co.*, 587 F. Supp. 1549, 1553 (E.D. Mich. 1984); *Autotronic Sys., Inc. v. Aetna Life & Cas.*, 456 N.Y.S.2d 504, 505-06 (N.Y. App. Div. 1982); *United Pac. Ins. Co. v. Van's Westlake Union, Inc.*, 664 P.2d 1262, 1266 (Wash. App. 1983).

181. 580 So. 2d 1133 (La. Ct. App. 1991).

182. *See id.* at 1135. *But see Bernhardt v. Hartford Fire Ins. Co.*, 102 Md. App. 45, 50, 648 A.2d 1047, 1049 (1994) (holding that an exception to the pollution exclusion clause that provided the insured landlord with coverage for damage resulting from fumes from a hostile fire did not apply to a release of carbon monoxide or fire resulting from such a release).

183. *Thompson*, 580 So. 2d at 1134 (emphasis added).

184. *See Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992).

To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants and contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.

Id.

3. The Sudden and Accidental Exception to the Standard Pollution Exclusion Clause

Even though many modern insurance policies use the absolute pollution exclusion clause, litigation involving the standard pollution exclusion clause is still prevalent. The principle distinction between the absolute pollution exclusion clause and the standard pollution exclusion clause is that the standard pollution exclusion clause contains one explicit exception.¹⁸⁵ The exception provides that the pollution exclusion clause will not apply if a "discharge, dispersal, release or escape is sudden and accidental."¹⁸⁶ While an insured may generally expect to be covered for sudden and accidental pollution incidents, an insurer's obligation to defend arises only if the pollution is unforeseeable and unintended.¹⁸⁷

Still, courts have held that long-term pollution, even if accidental, is within the language of the pollution exclusion clause.¹⁸⁸ Courts are divided on whether an intentional discharge could be sudden and accidental.¹⁸⁹ In some cases, courts have found that intentional discharge falls within the scope of the pollution exclusion clause, thereby relieving the insurer of any obligation to defend the insured.¹⁹⁰ For example, in *Transamerica Insurance Co. v. Sunnes*,¹⁹¹ the Oregon Court of Appeals found that the insured's intentional

185. See 7A APPLEMAN, *supra* note 7, §§ 4524-4524.10, at 210-24 (Lexis L. Pub. Supp. 1998).

186. LONG, *supra* note 123, § 10A.04[2]; see Rosenkranz, *supra* note 11, at 1241-46.

187. See Rosenkranz, *supra* note 11, at 1243-44. See generally LONG, *supra* note 123, § 10A.04[2].

188. See generally *Ray Indus. v. Liberty Mut. Ins. Co.*, 974 F.2d 754, 768-69 (6th Cir. 1992) (holding that gradual pollution resulting from regularly crushing barrels that contained contaminants was not sudden); *United States Fidelity & Guar. Co. v. Murray Ohio Mfg.*, 693 F. Supp. 617, 622 (M.D. Tenn. 1988) (holding that an "event" that occurs over a period of six years is not sudden); *Barment of Ind., Inc. v. Security Ins. Group*, 425 N.E.2d 201, 202-03 (Ind. Ct. App. 1981) (holding that gas emissions were not sudden and accidental because they were predictable and foreseeable); *City of Milwaukee v. Allied Smelting Corp.*, 344 N.W.2d 523, 527 (Wis. 1983) (holding that an insurer could not be held liable for damage to a city sewer system caused by the discharge of acid).

189. See Hamel, *supra* note 105, at 1099.

190. See *Transamerica Ins. Co. v. Sunnes*, 711 P.2d 212, 214 (Or. Ct. App. 1985) (holding that the insurer had no duty to defend the insured because the insured's release of pollutants over a long period of time was not sudden and accidental).

191. *Id.* at 212.

discharge over many years precluded coverage by the insurer.¹⁹² The court held that the exclusion clause in question clearly negated the insurer's duty to defend because the insured was an "active polluter."¹⁹³

Notably, the sudden and accidental exception has been construed by courts to include a temporal element—the word "sudden" means that the pollution cannot occur over a long period of time.¹⁹⁴ In *Anaconda Minerals Co. v. Stoller Chemical Co.*,¹⁹⁵ the United States District Court for the District of Utah held that routine discharges which occurred over a long period of time were not sudden and accidental.¹⁹⁶ The issue in *Anaconda* was whether an insurer had a duty to defend and indemnify an insured party who consented to environmental clean-up.¹⁹⁷ In discussing whether the insured party's insurer must pay for damages assessed against the insured, the court, emphasizing the accidental element of the exception, ruled that the sudden and accidental exception did not apply to intended pollution discharges.¹⁹⁸

When construing insurance contracts, Utah courts follow the general rule that drafters intend all of the language used in a contract to have a purpose.¹⁹⁹ Under this rule, courts will not interpret words in such a way as to render other language superfluous.²⁰⁰ The court reasoned that the word "sudden" "has an ordinary meaning with a temporal element that makes it synonymous with 'abruptly' or 'quickly.'"²⁰¹ Furthermore, "accidental" was defined as meaning "not expected or intended by the insured."²⁰² Therefore, construing "sudden" to have a temporal element was necessary in order to

192. *See id.* at 214. For a case involving an egregious polluter's attempts to establish ambiguity in a pollution exclusion clause, see *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 702 F. Supp. 1317, 1321 (E.D. Mich. 1988).

193. *Transamerica Ins. Co.*, 711 P.2d at 214.

194. *See Ex-Cell-O Corp.*, 702 F. Supp. at 1317 (discussing the fact that an event that is "sudden," by its customary definition, cannot occur over a period of years).

195. 773 F. Supp. 1498 (D. Utah 1991).

196. *See id.* at 1508.

197. *See id.* at 1500.

198. *See id.* at 1505-06. For an in-depth analysis of the sudden and accidental exception and long-term pollution, see *Morton Int'l, Inc. v. General Accident Ins. Co. of Am.*, 629 A.2d 831 (N.J. 1993).

199. *See Anaconda*, 773 F. Supp. at 1504.

200. *See id.* at 1504.

201. *Id.*

202. *Id.* at 1505.

avoid defining it as meaning "unexpected."²⁰³ Without a temporal element, the term "sudden" would be construed as synonymous with "accident," therefore violating Utah contract law by effectively rendering "accidental" meaningless as surplusage.²⁰⁴

D. The Pollution Exclusion Clause in Maryland

Recently, the Court of Special Appeals of Maryland addressed the effect of the pollution exclusion clause in *Bentz v. Mutual Fire, Marine & Inland Insurance Co.*²⁰⁵ In *Bentz*, the plaintiffs alleged that an exterminator negligently applied toxic pesticides to interior surfaces and exterior portions of the plaintiffs' home.²⁰⁶ The plaintiffs, homeowners in West Virginia, sued the exterminator's insurer seeking a declaratory judgment that the insurer had a duty to defend and indemnify the exterminator.²⁰⁷ The court, finding that the negligent acts of the exterminator were sudden and accidental,²⁰⁸ ruled that the defendant's acts fell within the sudden and accidental exception to the pollution exclusion clause.²⁰⁹ Therefore, the plaintiffs' claim against the exterminator was not excluded by the pollution exclusion clause, and thus, the insurer had a duty to defend and indemnify the exterminator.²¹⁰

A few years later, the Court of Special Appeals of Maryland analyzed another pollution exclusion clause in *Bernhardt v. Hartford Fire Insurance Co.*²¹¹ In *Bernhardt*, a landlord's heating system malfunctioned, causing tenants in his apartment building to suffer carbon monoxide poisoning.²¹² The insurance company denied the

203. *See id.* at 1506.

204. *See id.*

205. 83 Md. App. 524, 575 A.2d 795 (1990).

206. *See id.* at 527, 575 A.2d at 796. The plaintiffs also contended that the spraying violated federal law as well as West Virginia and Maryland law. *See id.*

207. *See id.* at 528, 575 A.2d at 797. The exterminator "assigned to Plaintiffs all of his rights, interests, and causes of action to proceed against [his insurer] to obtain a judicial Declaration of [its] duties and liabilities." *Id.* (alterations in original).

208. *See id.* at 538, 575 A.2d at 803 (explaining that the exterminator's negligence was "accidental in that it was unintended" and "sudden in that the inappropriate contact, from which the harm arose, was more or less instantaneous").

209. *See id.* The pollution exclusion clause did not apply if "'such discharge, dispersal, release or escape' [was] sudden and accidental." *Id.* at 530, 575 A.2d at 798.

210. *See id.* at 540, 575 A.2d at 803.

211. 102 Md. App. 45, 648 A.2d 1047 (1994).

212. *See id.* at 47, 648 A.2d at 1047-48. The heater malfunctioned because debris fell from an old chimney and blocked the boiler's air passageway. *See id.* at 47,

landlord coverage, relying on the policy's pollution exclusion clause.²¹³ The landlord argued that the pollution exclusion clause only pertained to industrial pollution.²¹⁴ The court rejected this argument because there was no language in the pollution exclusion clause that limited the exclusion to industrial pollution.²¹⁵ Additionally, the court opined that the landlord's argument would be difficult to apply because there is no exact definition of "industrial pollution."²¹⁶ Finally, the court explained that it would be difficult to understand why the insurance industry would include a limitation or coverage exclusion of this type in a homeowner's policy if the exclusion applied only to industrial pollution.²¹⁷ Thus, the court declined to limit the pollution exclusion clause in the homeowner's policy to industrial waste.²¹⁸

In *American Motorists Insurance Co. v. ARTRA Group, Inc.*,²¹⁹ the Court of Appeals of Maryland addressed the sudden and accidental exception to the pollution exclusion clause in the context of a long-term polluter.²²⁰ The pollution exclusion clause in question stated that the insurer would not provide coverage for bodily injury or property damage stemming from pollution unless the pollution was sudden and accidental.²²¹ The case involved the sale of a paint factory to Sherwin-Williams, and the subsequent discovery that the site had contaminated groundwater and soil.²²² The court held that Sherwin-Williams's complaint sufficiently alleged continuous pollut-

648 A.2d at 1048.

213. *See id.* at 48, 648 A.2d at 1048.

214. *See id.* at 50, 648 A.2d at 1049. The landlord also argued that the exception to the pollution exclusion clause provided coverage for damages resulting from a hostile fire and that this incident fell within the exception. *See id.*

215. *See id.* at 55, 648 A.2d at 1051.

216. *See id.*

217. *See id.*

218. *See id.* at 57, 648 A.2d at 1052.

219. 338 Md. 560, 659 A.2d 1295 (1995).

220. *See id.* at 586, 659 A.2d at 1308; *see also* Douglas I. Wood, Note, *Limited Renvoi Exception Will Be Utilized When Lex Loci Contractus Indicates That Foreign Jurisdictions Would Apply Maryland Law to Substantive Issue*, 26 U. BALT. L. REV. 247 (1996) (discussing the pollution exclusion issue as well as the doctrine of *lex loci contractus* in the context of the *American Motorists* court's decision).

221. *See American Motorists*, 338 Md. at 564-65, 659 A.2d at 1297.

222. *See id.* at 563-64, 659 A.2d at 1296-97. Sherwin-Williams Company purchased the site from ARTRA and brought suit against ARTRA and other past owners after the Maryland Department of the Environment ordered Sherwin-Williams to "investigate and remedy hazardous waste contamination in the soil and groundwater at the . . . [s]ite." *Id.* at 564, 659 A.2d at 1297.

ing activity by the insured, and therefore avoided potential coverage under the "sudden and accidental" language of the pollution exclusion clause.²²³ The allegations made by Sherwin-Williams concerning gradual pollution could not "be isolated to provide occurrences which are sudden."²²⁴ As a result, there was no basis for finding the insurer liable to indemnify or defend the insured.²²⁵

E. Lead Paint and the Pollution Exclusion Clause

When faced with a pollution exclusion clause in a lead paint case, most courts have held that lead paint falls outside of the exclusion; thus, the insurer must defend the insured.²²⁶ For example, in *Generali-U.S. Branch v. Caribe Realty Corp.*,²²⁷ a New York trial court held that the pollution exclusion clause did not apply in a case involving a child who ingested lead paint.²²⁸ The court reasoned that in order for an insurer to negate coverage for lead paint injuries, the insurer should include the term "lead, paint, or lead based paint" in the policy's definition of pollutant.²²⁹ The definition of pollutant in the policy at issue in *Generali* failed to include these specific terms, therefore the court held that the insurer failed to meet its burden of proving that the policy did not cover lead paint exposure.²³⁰

223. *See id.* at 593, 659 A.2d at 1311.

224. *Id.* at 589, 659 A.2d at 1309 (internal quotation marks omitted).

225. *See id.* at 594, 659 A.2d at 1311-12.

226. *See* Lefrak Org., Inc. v. Chubb Custom Ins. Co., 942 F. Supp. 949, 956 (S.D.N.Y. 1996); Weaver v. Royal Ins. Co. of Am., 674 A.2d 975, 978 (N.H. 1996) (holding that lead paint chips were not pollution where the chips had been transported by an industrial worker and ingested by a child, subsequently causing lead paint poisoning in the child). *But see* United States Liab. Ins. Co. v. Bourbeau, 49 F.3d 786, 789 (1st Cir. 1995) (holding that paint chips which had negligently fallen onto the soil were pollution); Shalmar Contractors, Inc. v. American States Ins. Co., 975 F. Supp. 1450, 1457 (M.D. Ala. 1997). For cases disallowing the application of the pollution exclusion clause in instances of lead paint poisoning, see NL Indus., Inc. v. Committee Union Ins. Co., 926 F. Supp. 446 (D.N.J. 1996), Atlantic Mut. Ins. Co. v. McFadden, 595 N.E.2d 762 (Mass. 1992), GA Ins. Co. v. Naimerg Realty Assoc., Inc., 650 N.Y.S.2d 246 (N.Y. Sup. Ct. 1996), General Accident Ins. Co. of Am. v. Idbar Realty Corp., 622 N.Y.S.2d 417 (N.Y. Sup. Ct. 1994), Generali-U.S. Branch v. Caribe Realty Corp., 612 N.Y.S.2d 296 (N.Y. Sup. Ct. 1994), and Vance v. Sukup, 558 N.W.2d 683 (Wis. Ct. App. 1996).

227. 612 N.Y.S.2d 296 (N.Y. Sup. Ct. 1994).

228. *See id.* at 299.

229. *Id.*

230. *See id.* at 298.

In *General Accident Insurance Co. of America v. Idbar Realty*,²³¹ a New York trial court followed a rationale similar to that employed by the *Generali* court.²³² The case involved a lead paint poisoning claim brought on behalf of a child who ingested lead paint chips which were peeling off the apartment's walls.²³³ The court held that an insurer "cannot negate coverage unless the exclusion is subject to no other reasonable interpretation."²³⁴ However, the pollution exclusion clause at issue was in fact subject to a different interpretation—the pollution exclusion clause only applied "to claims for injuries based upon industrial environmental pollution."²³⁵ In light of evidence that the plaintiff suffered injuries during the period of coverage,²³⁶ and the absence of an express unambiguous exclusion, the court concluded that the insurer had a duty to defend.²³⁷

However, in *Oates v. State*,²³⁸ another New York trial court reached the opposite result. The *Oates* court held that lead paint was a chemical that could irritate, and therefore fell "within the general tenor of the specifically listed pollutants."²³⁹ The court reasoned that it would be impossible for an insurer to list every substance that they intended to fall within the pollution exclusion clause.²⁴⁰

In *Atlantic Mutual Insurance Co. v. McFadden*,²⁴¹ Massachusetts's highest court ruled in favor of the insured, rejecting the argument that the pollution exclusion clause applied to lead paint poisoning.²⁴² The insurer sought a declaratory judgment relieving itself of the duty to defend a landlord in an action arising from lead paint

231. 622 N.Y.S.2d 417 (N.Y. Sup. Ct. 1994).

232. *See id.* at 418-20.

233. *See id.* at 418.

234. *Id.* at 419.

235. *Id.* "[T]he plaintiff cannot meet its burden as to the applicability of the exclusion and is obligated to indemnify its insureds upon the trial of the underlying action." *Id.* at 419-20.

236. *See id.* at 418.

237. *See id.* For an exclusion to be unambiguous, it must be "subject to no other reasonable interpretation." *Id.* at 419.

238. 597 N.Y.S.2d 550 (N.Y. Ct. Cl. 1993).

239. *Id.* at 554. The insurance policy defined pollutants as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." *Id.* at 551.

240. *See id.* at 554.

241. 595 N.E.2d 762 (Mass. 1992).

242. *See id.* at 764.

poisoning involving the tenant's two children.²⁴³ In ruling that the insurer had a duty to defend the landlord in an action brought by a tenant exposed to lead paint, the court stated that there was no language in the exclusion provision which indicated that the policy was drafted with the intent of limiting liability for lead paint poisoning.²⁴⁴ Indeed, the definition of "pollutant" in the policy did not indicate that leaded materials fell within its scope.²⁴⁵ The court reasoned that an insured might reasonably expect lead-related injuries to be covered, and therefore concluded that the exclusion clause applied only in situations arising from industrial pollution.²⁴⁶

In *United States Liability Insurance Co. v. Bourbeau*,²⁴⁷ the court distinguished the case before it from the *McFadden* case and ruled that discharged lead paint was a pollutant within the standard pollution exclusion clause.²⁴⁸ *Bourbeau*, a painting contractor, removed old paint from a building, and in the process contaminated the surrounding soil.²⁴⁹ The court distinguished the facts of this case from *McFadden* by noting that *McFadden* was a personal injury case involving the presence of lead paint inside a house, while *Bourbeau* was an environmental pollution case.²⁵⁰

Specifically, the *Bourbeau* case involved the discharge of lead paint chips onto land, while in *McFadden* the lead paint remained inside a house and was not discharged into the soil.²⁵¹ The *Bourbeau* court explained that the discharge of a harmful substance into the environment was a classic example of pollution whereas "[a]n objectively reasonable person simply would not ascribe the word 'pollution' to the presence of lead paint in[side] a house."²⁵² Therefore, the *Bourbeau* court concluded that the insured painting contractor could not have reasonably expected to be covered for an injury that arose from lead paint contamination of land surrounding the area he worked on.²⁵³

243. *See id.* at 763. The landlords in this case were Dime Real Estate Services-Massachusetts, Inc., and Dime Savings Bank of New York, FSB. *See id.*

244. *See id.* at 764.

245. *See id.*

246. *See id.*

247. 49 F.3d 786 (1st Cir. 1995).

248. *See id.*

249. *See id.*

250. *See id.*

251. *See id.*

252. *Id.* at 789.

253. *See id.* *But see* A-1 Sandblasting & Steamcleaning Co. v. Baiden Co., 632 P.2d 1377, 1379 (Or. Ct. App. 1981) (holding that when property damage resulted

The rationale of the *Oates* court was followed in *St. Leger v. American Fire & Casualty Insurance Co.*²⁵⁴ In *St. Leger*, the landlord's insurer denied the landlord a defense in a lead paint case brought by a tenant.²⁵⁵ In reaching its holding, the court first looked to the policy which defined pollutant as an irritant or contaminant.²⁵⁶ Relying on a previous case, the court concluded that the term "pollutant" unambiguously included lead paint within its definition.²⁵⁷

Despite determining that the term pollutant unambiguously included lead paint, the court looked to several federal statutes that dealt with lead paint and pollution.²⁵⁸ The federal statutes used language indicating that lead paint was commonly referred to as an irritant and a pollutant.²⁵⁹ Accordingly, the court found that lead paint was a pollutant within the meaning of the pollution exclusion clause.²⁶⁰ Therefore, the court held that the insurer did not have a duty to defend.²⁶¹

Until *Sullins*, Maryland's high court had never addressed whether injuries from lead paint exposure fall within the purview of an absolute pollution exclusion clause. In *Chantel Associates v. Mount Vernon Fire Insurance Co.*,²⁶² the court of appeals held that an insurer had a duty to defend a landlord in a lead paint case.²⁶³ The issue before the court in *Chantel*, however, was the effective date of coverage and when an insurer's duty to defend was triggered, rather than the applicability of the pollution exclusion clause.²⁶⁴ The *Chantel* court held that the insurer has a duty to defend when there are facts alleged in the complaint that allude to the potentiality for

from a painter's negligent painting, the paint was not considered a pollutant).
254. 870 F. Supp. 641 (E.D. Pa. 1994).

255. *See id.* at 642.

256. *See id.* at 643.

257. *See id.* The court explained that "[t]he meaning here is clear. '[L]ead is a chemical that irritates and contaminates.' This is widely understood." *Id.* (quoting *Kaytes v. Imperial Cas. & Indem. Co.*, No. 93-1573 (E.D. Pa. Jan. 6, 1994) (slip opinion)) (alteration in original).

258. *See id.* (citing 40 C.F.R. §§ 50.2, 50.12 (defining lead as a pollutant in the context of the ambient air quality standards provided by the Clean Air Act)).

259. *See id.* (citing Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851(b)(15) and Clean Air Act, 40 C.F.R. §§ 50.2, 50.12).

260. *See id.*

261. *See id.* at 644.

262. 338 Md. 131, 656 A.2d 779 (1995).

263. *See id.* at 146, 656 A.2d at 786.

264. *See id.*; *see also* Ogburn, *supra* note 44. (discussing how insurance coverage is triggered in Maryland and Maryland's adoption of the injury-in-fact trigger theory).

coverage.²⁶⁵

The *Chantel* case involved four insurers.²⁶⁶ Three of the four insurers issued general liability insurance policies to Chantel; the fourth insurer issued a renewable umbrella policy for the period covered by the general liability policies.²⁶⁷ The trial judge granted summary judgment in favor of one of the insurers, Scottsdale Insurance Company, because it had a clause in its policy specifically excluding claims for damages arising from lead paint injuries.²⁶⁸ Mount Vernon's policy provided for coverage for bodily injuries arising from an occurrence; however, the policy contained neither a lead paint exclusion clause nor a pollution exclusion clause.²⁶⁹ The court concluded that injuries resulting from lead paint poisoning were bodily injuries arising from an occurrence,²⁷⁰ and therefore Mount Vernon owed a duty to defend the landlord.²⁷¹ Thus, *Chantel* set the stage for the *Sullins* court's decision.

III. THE SULLINS CASE

In *Sullins v. Allstate Insurance Co.*,²⁷² a tenant living in rental property owned by the Sullinses sued them, alleging that her child suffered injuries as a result of ingesting lead paint.²⁷³ Allstate filed a complaint in the United States District Court for the District of Maryland arguing that the pollution exclusion clause excused Allstate's duty to provide a defense or to indemnify the Sullinses.²⁷⁴

265. See *Chantel*, 338 Md. at 142, 656 A.2d at 784.

266. See *id.* at 136, 656 A.2d at 781-82. Empire Indemnity Insurance Company provided Chantel with general liability coverage from April 1, 1984 through April 1, 1985. See *id.* Chantel's general liability insurance policy with Mount Vernon Fire Insurance Company ran from April 1, 1985 through March 12, 1986. See *id.* at 136, 656 A.2d at 781. Scottsdale Insurance Company provided general liability coverage from March 12, 1986 through March 12, 1988, in two consecutive policies. See *id.* Allstate Insurance Company provided umbrella coverage, on an annual basis, for the period from February 10, 1983 through February 10, 1993. See *id.*

267. See *id.* at 136, 656 A.2d at 781-82.

268. See *id.* at 139, 656 A.2d at 783. The court also found that Chantel was aware of the exclusion in the policy. See *id.*

269. See *id.* at 142-43, 656 A.2d at 785.

270. See *id.* at 138, 656 A.2d at 782-83. "[T]here was a potentiality that the lead-related injuries occurred during Mount Vernon's policy period." *Id.* at 146, 656 A.2d at 786.

271. See *id.*

272. 340 Md. 503, 667 A.2d 617 (1995).

273. See *id.* at 507, 667 A.2d at 618-19.

274. See *id.* at 508, 667 A.2d at 619.

The policy in question did not have the Insurance Services Office (ISO) of America's standard pollution exclusion clause.²⁷⁵ The pertinent part of Allstate's policy for the Sullinses was an absolute pollution exclusion clause that read as follows: "we do not cover bodily injury or property damage which results in any manner from the discharge, dispersal, release, or escape of: a) vapors, fumes, acids, toxic chemicals, toxic liquids or toxic gasses; b) waste materials or other irritants, contaminants or pollutants."²⁷⁶ The United States District Court for the District of Maryland certified to Maryland's high court the question whether Allstate had a duty to defend the Sullinses for the lead paint claim in light of the policy's absolute pollution exclusion clause.²⁷⁷

The court of appeals held that the exclusion clause used in the homeowners' policy was ambiguous because the terms "contaminants" and "pollutants" were "susceptible of two interpretations by a reasonable prudent layperson."²⁷⁸ In order to resolve the issue of ambiguity, the court relied on the principles it espoused in *Cheney v. Bell National Life Insurance Co.*²⁷⁹ In *Cheney*, the court of appeals explained that ambiguity should be dealt with in the following manner:

275. See *Bernhardt v. Hartford Fire Ins. Co.*, 102 Md. App. 45, 51-52, 648 A.2d 1047, 1049-50 (1994). The standard ISO pollution exclusion provides that the policy does not apply to:

bodily injury 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.

Id.

276. *Sullins*, 340 Md. at 506-07, 667 A.2d at 618.

277. See *id.* at 506, 667 A.2d at 618. The exact question certified to the court of appeals was:

Whether an insurance company has a duty to defend and/or indemnify its insured in an action alleging injury from exposure to lead paint where the insurance policy excludes coverage for:

bodily injury which results in any manner from the discharge, dispersal, release or escape of:

a) vapors, fumes, acids, toxic chemicals, toxic liquids or toxic gasses;

b) waste materials or other irritants, contaminants or pollutants.

Id.

278. *Id.* at 509, 617 A.2d at 620.

279. 315 Md. 761, 556 A.2d 1135 (1989).

In the event of an ambiguity . . . extrinsic and parol evidence may be considered. If no extrinsic or parol evidence is introduced, or if the ambiguity remains after consideration of extrinsic or parol evidence that is introduced, [the policy] will be construed against the insurer as the drafter of the instrument.²⁸⁰

The *Sullins* court construed the policy against the insurer because the record did not contain any extrinsic evidence to clarify the ambiguity.²⁸¹ The court ruled that the insurer had a duty to defend in accordance with the potentiality rule.²⁸²

The court relied primarily on dictionary definitions and extra-territorial judicial interpretations in reaching its conclusion that the terms "contaminant" and "pollutant" were ambiguous.²⁸³ The court viewed contaminant to mean "something that contaminates" . . . as 'to soil, stain, corrupt, or infect by contact or association' or 'make inferior or impure by mixture.'²⁸⁴ The court explained that "Webster's Dictionary defines pollutant as 'something that pollutes' and 'pollute' as to 'make physically impure or unclean.'²⁸⁵

The *Sullins* court relied primarily on the decision in *Atlantic Mutual Insurance Co. v. McFadden*²⁸⁶ to find that the exclusion clause provided no language that would lead a reasonable person to believe that the clause included lead paint.²⁸⁷ The *Sullins* court opined that a broad interpretation of the pollution exclusion clause would run contrary to the contracting parties' intentions.²⁸⁸ The court of appeals embraced the notion that pollution exclusion clauses were not intended for non-environmental pollution, but rather for instances of hazardous waste pollution.²⁸⁹

280. *Id.* at 767, 556 A.2d at 1138.

281. *See Sullins*, 340 Md. at 509, 667 A.2d at 620.

282. *See id.* at 508, 667 A.2d at 620; *see also* *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 407-08, 347 A.2d 842, 850 (1975) (discussing the potentiality rule); *supra* notes 50-56.

283. *See Sullins*, 340 Md. at 509-13, 556 A.2d at 620-22.

284. *Id.* at 510, 667 A.2d at 620 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 384 (1981)).

285. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1756 (1981)).

286. 595 N.E.2d 762, 764 (Mass. 1992).

287. *See Sullins*, 340 Md. at 511, 667 A.2d at 620.

288. *See id.* at 507, 667 A.2d at 619.

289. *See id.* at 515-16, 667 A.2d at 623. "[T]he [insurance] industry's intention was to exclude only environmental pollution damage from coverage" *Id.* at 515, 667 A.2d at 622.

The *Sullins* court could not distinguish its decision from *St. Leger v. American Fire & Casualty Insurance Co.*,²⁹⁰ which held that lead paint fell within the scope of the pollution exclusion clause.²⁹¹ Instead, the *Sullins* court rejected the *St. Leger* holding, but noted that the decision was important because it demonstrated that there were conflicting judicial opinions on the issue before it.²⁹² The court of appeals ruled that "conflicting interpretations of policy language in judicial opinions is not determinative of, but is a factor to be considered in determining the existence of ambiguity."²⁹³ Ultimately, the court bolstered its finding of ambiguity in the meaning of the pollution exclusion clause with the fact that courts of different jurisdictions have ruled differently when construing the pollution exclusion clause.²⁹⁴

IV. ANALYSIS OF THE *SULLINS* COURT'S RATIONALE

In *Sullins*, the court of appeals concluded that an absolute pollution exclusion clause only applies "to environmental pollution."²⁹⁵ This holding is in contrast to the Court of Special Appeals of Maryland's decision in *Bernhardt v. Hartford Fire Insurance Co.*²⁹⁶ In *Bernhardt*, the court concluded that a pollution exclusion clause expressed no limitation to industry-related or environmental incidents.²⁹⁷ This apparent inconsistency in Maryland law indicates that insurance counsel may have wiggle room in litigating claims for injuries that result from household pollution.²⁹⁸

In concluding that the terms "contaminants" and "pollutants" were ambiguous, the court of appeals engaged in an analysis using

290. 870 F. Supp. 641 (E.D. Pa. 1994). The *Sullins* court did note, however, that "[t]he court in *St. Leger* relied on an unpublished opinion and federal statutes, neither of which is persuasive under Maryland law." *Sullins*, 340 Md. at 516, 667 A.2d at 623.

291. *See id.* at 643-44 (holding that an insurer did not have a duty to defend a landlord in a lead paint poisoning case).

292. *See Sullins*, 340 Md. at 516, 667 A.2d at 623.

293. *Id.* at 518, 667 A.2d at 624.

294. *See id.*

295. *Id.* at 515-16, 667 A.2d at 623.

296. 102 Md. App. 45, 648 A.2d 1047 (1994).

297. *See id.* at 55-56, 648 A.2d at 1051-52.

298. *Compare id.* at 55, 648 A.2d at 1051 (holding that the release of carbon monoxide from a furnace in a home was a pollutant as defined by the absolute pollution exclusion clause), *with Sullins*, 340 Md. at 516, 667 A.2d at 621-22 (holding that lead paint in a home was not a pollutant within the meaning of the absolute pollution exclusion clause).

dictionary definitions.²⁹⁹ A judge has a duty to determine whether a more scientific or legal definition than those provided by a standard dictionary exist.³⁰⁰ The United States District Court for the Eastern District of Michigan, in discussing a pollution exclusion clause and the alleged ambiguity therein, aptly recognized that, "if merely applying a definition in the dictionary suffices to create ambiguity, no term would be unambiguous. The interpretation of contractual language is not mechanical."³⁰¹

The *Sullins* court's decision would have been more persuasive if the court had relied on statutory definitions of the terms involved instead of standard dictionary definitions. Relying on statutory definitions, however, might have led to a different outcome.

The Comprehensive Environmental Response Compensation and Liability Act defines a pollutant as "any . . . substance . . . which after release into the environment and upon exposure . . . will or may reasonably be anticipated to cause death, disease, [or] behavioral abnormalities."³⁰² Given this statute, the court could have concluded that lead paint is a pollutant because Congress recognized that "at low levels, lead poisoning in children causes intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems."³⁰³ Relying upon federal statutes as extrinsic evidence, Maryland's highest court could have concluded that the Sullinses' policy did not cover lead paint exposure, and hence, Allstate would

299. See *Sullins*, 340 Md. at 509-11, 667 A.2d at 620-21. "By one interpretation, these terms encompass lead paint; by another interpretation, they apply only to cases of environmental pollution or contamination, and not to products such as lead paint." *Id.* at 509, 667 A.2d at 620. At least two Supreme Court Justices have intimated that judges should not use dictionaries when writing their opinions and concluding a matter of law. See *NLRB v. Highland Park Mfg.*, 341 U.S. 322, 326 (1951) (Frankfurter, J., dissenting) ("The Taft-Hartley Act is not an abstract document to be construed with only the aid of a standard dictionary."); *Jordan v. De George*, 341 U.S. 223, 234 (1951) (Jackson, J., dissenting) (commenting that the dictionary has been termed the "last resort of the baffled judge").

300. See *Highland Park*, 341 U.S. at 326 (Frankfurter, J., dissenting).

301. *Fireman's Fund Ins. Cas. v. Ex-Cell-O Corp.*, 702 F. Supp. 1317, 1324 (E.D. Mich. 1988). Using a dictionary may even *help* create ambiguity rather than clarify it. For instance, the noun "ball" has 10 different dictionary definitions. See WEBSTER'S NEW WORLD DICTIONARY 105 (3d ed. 1988).

302. Asset Conservation, Lead Liability, and Deposit Insurance Protection Act of 1996, 42 U.S.C.A. § 9601 (West 1997).

303. Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C.A. § 4851 (West 1995) (Congressional findings).

have owed no duty to defend.³⁰⁴

The *Sullins* ruling is an apparently logical extension of Maryland insurance law and the potentiality rule established by the *Browhawn* court.³⁰⁵ The *Sullins* decision aligns Maryland with those jurisdictions that hold that lead paint in a household is not a pollutant governed by the pollution exclusion clause.³⁰⁶

However, the practitioner should note that the *Sullins* ruling is limited to lead paint.³⁰⁷ The Court of Appeals of Maryland ruled that lead paint is not within the absolute pollution exclusion clause.³⁰⁸ This may be a fair ruling based on the insured's expectations. The duty to defend provides the landlord with the financial resources of the insurer for lead paint litigation.³⁰⁹

Insurers can negate their coverage for lead paint injuries by simply including in their policies a clause that would exclude coverage for these types of injuries.³¹⁰ While insurance defense attorneys should be concerned that the *Sullins* holding may be applicable to other household incidents, the *Bernhardt* case, suggests otherwise.³¹¹ A window may still exist for an insurer to argue that other household incident are covered under a pollution exclusion clause. This argument would be reasonable because the *Bernhardt* court applied a pollution exclusion clause to a household incident involving carbon monoxide poisoning, yet the *Sullins* court did not overrule *Bernhardt*.³¹²

The *Sullins* holding is in accord with most jurisdictions and the trend concerning the pollution exclusion clause's applicability to

304. See *St. Leger v. American Fire and Cas. Ins. Co.*, 870 F. Supp. 641, 643 (E.D. Pa. 1994) (holding that lead is a pollutant under the Clean Air Act's national ambient air quality standards), *aff'd*, 61 F.3d 896 (3d Cir. 1995).

305. See *supra* text accompanying notes 63-69 (discussing the potentiality rule).

306. See *supra* text accompanying notes 226.

307. See *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 518, 667 A.2d 617, 624 (1995).

308. See *id.*

309. See *supra* text accompanying note 9.

310. See *Chantel v. Mount Vernon Fire Ins. Co.*, 338 Md. 131, 656 A.2d 79 (1995) (acknowledging the trial court's dismissal of one of the insurers involved in the underlying suit). The insurer's " 'policy clearly had an exclusion for both indemnification and . . . defense of any lead paint suit [a]nd that was clearly the understanding between the parties.'" *Id.* at 139, 656 A.2d at 783 (alteration in original) (quoting the circuit court's order).

311. See *Bernhardt v. Hartford Fire Ins. Co.*, 102 Md. App. 45, 648 A.2d 1047 (1994).

312. See *id.*

lead paint.³¹³ It also stands as a decision that was made in accordance with the tort theory of recovery for damages, as well as one that was made with the insured's best interest in mind.³¹⁴ In so holding, however, the *Sullins* court seemed more willing to protect the insured than to apply the law of insurance policy construction. The *Sullins* case indicates that the court of appeals may be moving away from the doctrine set forth in *Cheney*, toward deciding insurance policy disputes in accordance with the *contra proferentem* theory.³¹⁵

V. CONCLUSION

The *Sullins* decision represents a further expansion of both an insurer's duty to defend and the potentiality rule established in *Brohawn v. Transamerica Insurance Co.*³¹⁶ The potentiality of coverage will continue to arise in situations involving ambiguous or vague pleadings.³¹⁷ Moreover, the duty to defend is virtually unavoidable, even when an insurer could prove otherwise through extrinsic evidence.³¹⁸ The *Sullins* court extended an insurer's duty to defend by holding that lead paint in a home was not a pollutant within the meaning of the widely-adopted absolute pollution exclusion clause.³¹⁹ In sum, insurance companies that do not wish to defend for lead paint poisoning cases must do so through "the use of a few precise and specific words;" perhaps a specific lead paint exclusion.³²⁰

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313. *See supra* notes 226-61.

314. *See supra* note 77 (discussing the tort theory of recovery for damages).

315. *See supra* notes 33-40 and accompanying text. *But see* *Bailer v. Erie Exch. Co.*, 344 Md. 515, 522, 687 A.2d 1375, 1378 (1997) (stating that in Maryland "an insurance contract will be construed against the insurer only when ambiguity remains after considering" extrinsic and parole evidence).

316. 276 Md. 396, 347 A.2d 842 (1975).

317. *See id.*

318. *See supra* notes 272-94.

319. *See supra* notes 272-94.

320. *Pepper Indus. v. Home Ins. Co.*, 134 Cal. Rptr. 904, 908 (Cal. Ct. App. 1977); *see Sullins v. Allstate Ins. Co.*, 340 Md. 503, 518 n.3, 667 A.2d 617, 624 n.3 (1995) ("To be sure that lead paint poisoning claims were excluded from coverage, Allstate could have included a provision . . . explicitly excluding such claims.").

