

Pouring,
Spilling, Storing
and
Dripping

BY ROBERT A. SHULTS AND MICHAEL SEAN QUINN

*Environmental insurance coverage hinges on what's considered
an occurrence, an accident or intentional conduct.*

Liability insurance is central to the economy. Manufacturing and selling products would be astronomically more expensive without it. Entrepreneurship, as we know it, including new business start-ups, virtually would be impossible. Yet not every activity can be insured.

Insurance focuses on chance events, the unexpected, the undesigned. In the lingo of the insurance business, it focuses on the "fortuitous." If you burn your own house down quite deliberately, and get caught, you will not recover on the insurance policy. If you pour some substance that you know to be nasty onto the ground or into the drinking water, your liability insurance contract will not cover you for the obvious consequences you knew to be likely.

Take Your Chances

Textbooks describe the "Principle of Fortuity" as the fundamental axiom of insurance law. Such remarks exaggerate, but they are right in spirit.

Liability insurance policies insist on fortuity in three ways. First, where bodily injury and property damage are concerned, the standard liability insurance contract insures only against "occurrences." Nowadays, many widely used policies define that term as "an accident." The word "accident," in turn, is not defined, so it is to be understood as it is used in ordinary language. At the same time, an "occurrence" is said to include continuous or continual exposure to harmful conditions. Obviously, any such exposure must be accidental. Hence, pourings are not covered; spills are; and drips may be covered, depending on how they arise.

Second, standard liability policies almost universally deny coverage for injuries or damage an insured has brought about intentionally. Intentional acts are excluded

from coverage — from the domain of an "occurrence" — because they are, by definition, not accidents. Where the act is intentional, all the consequences of it are excluded from coverage, too. Injuries are types of consequences. If you mean for something to occur, and it's an injury, there's no coverage. If I intend to hurt you, and I do so, then there is no insurance for what I have done because I intended it. This is true even if I hurt you in a way other than the way I intended.

Third, liability policies uniformly exclude coverage predicated on injury or damages the insured expected to result from his activities — whether the insured intended that result or not. Sometimes courts even equate the accidental with the unexpected or the unintended. This is a natural misunderstanding, and it often is harmless, but the accident insured against is that which *causes* the injury, not the injury itself, and it is the injury that must be unexpected and unintended.

Clearly, one could both intend and expect to injure someone and then do it by means other than the intended ones. Suppose Jacob means to punch Paul squarely in the nose, but hits Patton instead, who falls into Paul and breaks his nose. The cause of the injury was an accident, but the injury was both expected and intended. (Isn't insurance law fun?)

These three themes weave deeply into the language of the typical commercial general liability contract: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damages' to which this insurance applies. This insurance applies only if the 'bodily injury' or 'property damage' is caused by an 'occurrence.' . . . The word 'occurrence' means an accident, including continuous or repeated exposure to substantially the same gen-

eral harmful condition. This insurance does not apply to 'bodily injury' or 'property damage' expected or intended from the standpoint of the insured."

Objective/Subjective

Enormous amounts of litigation swirl around the three themes. Important questions recur. Are the unintended and unexpected consequences of intentional acts covered? Might they be accidents even when the acts producing them are not? What about bad results that were expected in a general way, but the specific results were not explicitly anticipated? How do we determine when a bodily injury or property damage was intended or anticipated?

The last question is of tremendous importance to environmental insurance disputes. There is no simple answer to it. Jurisdictions differ, and diverging doctrines jostle one another. The axis on which this controversy turns, however, is simple: It is the subjective vs. the objective. When determining whether an insured intended or expected an injurious state of affairs, should courts scrutinize the actual subjective mental state of the insured? Or should they look to what the proverbial reasonable person would intend or know was coming?

Environmental cases mostly develop over several decades. Probing the minds of employees for what they expected or intended many years ago is a difficult business. Memory fades, as we all know, and it tends also to follow self-interest. Subjective intent and subjective expectation are, therefore, almost impossible to prove directly.

Circumstantial evidence is relevant but unreliable. Suppose an insurer can prove that the poisonous essence of a pollutant always was known in the better circles, that the Mom & Pop Waste Pit always subscribed to PC trade journals and

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its chief engineer regularly went to prestigious trade shows. Suppose further that a retired dump foreman claims (1) that he was always up to speed, (2) that he never knew that the substance was harmful, but (3) that he cannot remember for sure what he knew or when he knew it. (This sort of inconsistency is not uncommon.) Suppose further that Mom just kept the books, that Pop is now so obsessed with golf that he cannot remember anything and that Big Foul Industries, which bought out Mom & Pop, disposed of its documents long ago. Does it really make sense to demand proof of subjective, actual intentions or expectations under these circumstances? It does not.

Outside criminal law, intent and knowledge usually are measured by objective considerations — i.e., by the reasonable person standard. But the insurance contract does not explicitly commit itself to such a standard, and a subjective standard is more favorable to insureds. Courts usually adopt reasonable constructions of insurance policies that favor coverage.

The 5th Court of Appeals in Dallas considered this problem in July 1997 and said that subjective intent is "irrelevant when determining whether [an insured's] conduct was accidental." The case, *Wessinger v. Fire Ins. Exchange*, asked whether voluntary intoxication could make a severe beating accidental. The court basically said, "No! No! No!"

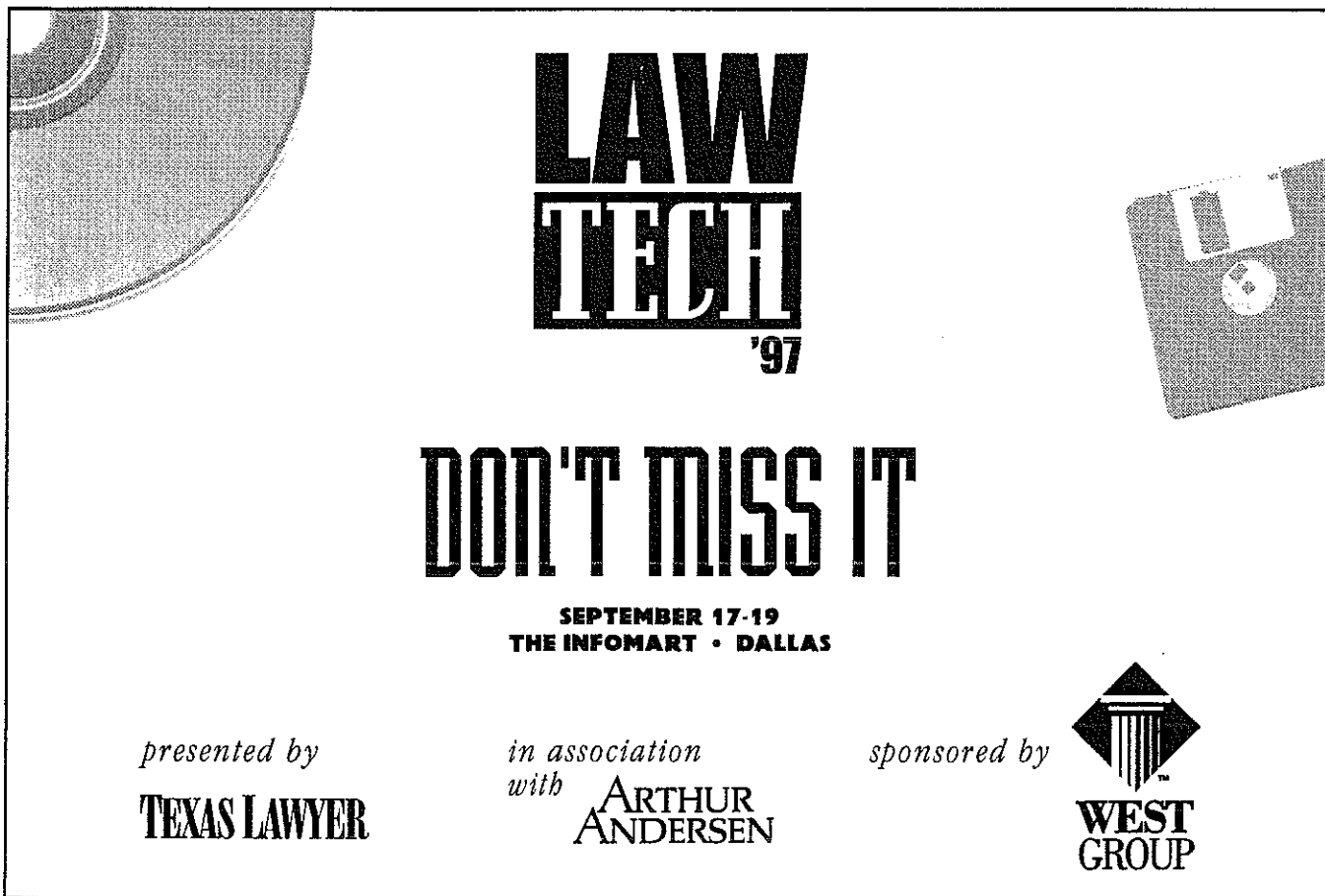
Moreover, an insurance contract usually says "intended or expected from the standpoint of the insured." It does not say that the insured actually must intend the injury or expect the damage. It focuses on someone positioned where the insured stood. That someone is none other than the reasonable person. Further, the intent of parties to a contract usually is measured by external, nonsubjective indicia, as are the meanings of words in a contract. Besides, insurance contracts are highly standardized — almost statute-like. Is it not, therefore, reasonable to use standardized, objective considerations when applying their terms?

Also, in environmental cases the

insured is usually a corporation. What sense does it make to speak of the subjective intent or the subjective expectations of a corporation? Isn't all such talk really fictional?

To be sure, the subjective intents of some corporate agents are attributed to the principal. But this transfer is itself constructive and driven by public policy. Why not just use objective criteria?

In some areas of insurance law, courts insist upon objective standards. They will not tolerate an insured's claim that he did not know that sexually molesting a small child would harm the child or that he intended no harm. Subjective mental states do not matter. Should there really be a special rule for sex-with-children cases, or should the same rule apply to all situations? Policyholders and victims sometimes ask, "Why should an innocent victim be deprived of insurance proceeds if her abuser did not realize the nature and character of his conduct, just because most people would realize that what they were doing was injurious?" The reason is




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that the law assumes that every adult realizes that it is injurious to have sex with a child. But what about an abuser who is insane or severely retarded: Is his conduct much more like an accident than an intentional act? Surely, so providing coverage for the injurious conduct of such a person is consistent with the Principle of Fortuity. Coverage for the acts of the retarded or the insane conceivably is permissible, but these are very special cases. They have no general application, and they do not apply to business activities that are supposed to be sane and rational.

Insurance should not pay if a person knows a substance is a poisonous pollutant and pours it — or knowingly lets it drip slowly — into a well. Spillages, of course, are different. If pretty much everybody in

tive criteria is a hallmark of civilized legal systems. Holmes' observation applies no less to insurance law than to any other law. To do otherwise would reward the "Know-Nothing Polluters."

The Lone Star Question

Objectivity vs. subjectivity is the battleground of much environmental litigation. The highest profile case to date, *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal.Rptr.2d 815 (1993), opted for a subjective test. Shell Oil manufactured chemicals and pesticides at the Rocky Mountain Arsenal near Boulder, Colo., for many years. It disposed of its waste there and contaminated both the soil and the groundwater. The remediation costs were estimated at \$1.8 billion.

Shell sent the cleanup bill to its

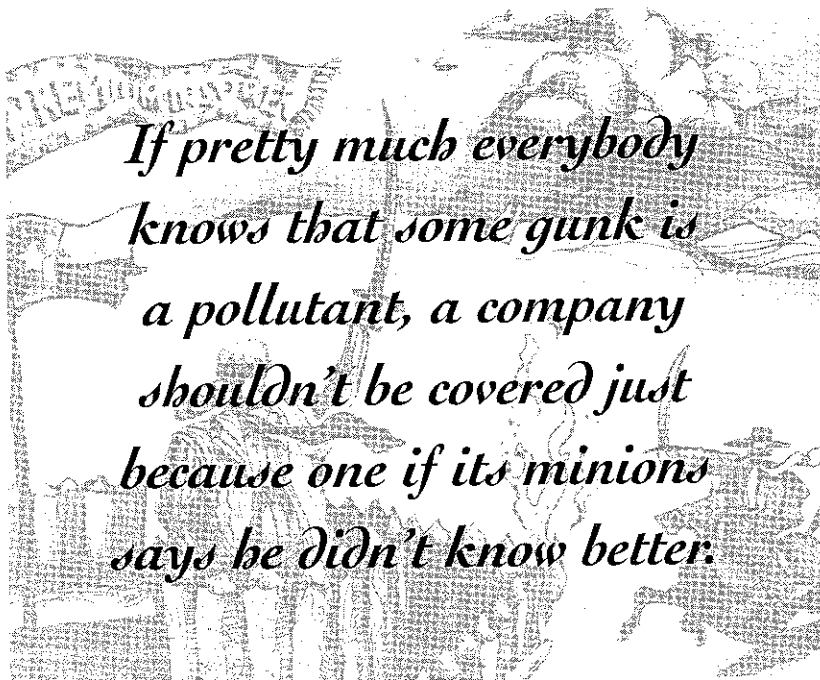
California Supreme Court declined to review.

Texas law stands silent, so far. A panel at the 2nd U.S. Circuit Court of Appeals, however, suggested that Texas would line up with New York and require subjective intent to harm or subjective expectations. The court didn't make much of the argument, however, and it cited no authority on point in *Stonewall Ins. Co. v. Asbestos Claim Management Corp.*, 73 F.2d 1178 (2d Cir. 1995). Furthermore, although the 2nd Circuit was discussing Texas law because it thought it might apply, it wasn't really sure, and its discussion was neither detailed nor deep.

The Texas Supreme Court obliquely wrote on the general issue not long ago in *Cowan v. Trinity Universal Ins. Co.*, 945 S.W.2d 819 (Tex. 1997). A young woman took provocative pictures of herself for her boyfriend. A kid at the supermarket photo-development counter made an extra set and passed them around. The Supreme Court held that there was no coverage because there was no "accident." There was something like an accident, since the photo-kid left the pictures with a friend, but with the instruction to destroy them after ogling them. That friend, of course, passed the pictures to yet another eager young buck, who told the young woman everything. The second passing of the pictures might well have been accidental from the kid's point of view. It certainly was paradigmatic negligence.

Nevertheless, the Supreme Court clearly was right. There should not be coverage for this kind of conduct. Perhaps the Supreme Court's decision really is about the expectations of the insured. Perhaps the court is saying, "Any reasonable person should expect that such pictures would not be destroyed and that appropriate information would get back to (and injure) the photographer-model." If this reconstruction is right, then Texas has by implication joined the ranks of those states utilizing an objective test.

And rightly so.



a given industry knows that some gunk really is a poisonous pollutant, a company should not get coverage just because one of its minions can say with a straight face that he did not realize what everybody else well knew. A public policy that focuses on the subjective will not encourage environmental responsibility in American industry. After all, it has been over a hundred years since the revered Justice Oliver Wendell Holmes posited that the use of nonsubjec-

insurers. They sent it back. A state court conducted a whopping-big trial in a San Francisco auditorium. It lasted for months and hundreds of lawyers were involved. The trial court asked the jury about Shell's intentions and expectations in objective terms, and the jury found that a reasonable person insured in Shell's position would have expected the kind of injuries and damages claimed. The court of appeals rejected the trial judge's approach and reversed for a new trial. The