



# The “Metaphysical Moment” When a Pipe Begins to Leak Is Not a “Sudden” Discharge Where Damage Only Results From a Gradual or Continuous Process

*By Gary J. Wax and Robert A. Olson*

**W**hat is “sudden?” Relative to the history of the universe, human evolution is sudden. Occurring over millennia, it only registers as a mere blip on the universe’s overall time continuum. By contrast, the blink of an eye is anything but sudden compared to the lifespan of certain subatomic particles. When a small crack in a dam appears instantly, growing in size over a period of years until the entire dam slowly erodes away, does the presence of the initial small crack mean the dam failed “suddenly?” These philosophical musings have practical significance when it comes to interpreting insurance policies, which often cover “sudden and accidental” events. The meaning of “accidental” has been the subject of much judicial ink; the meaning of “sudden,” less so. Even then, the term has generally been interpreted in the context of a pollution exclusion exception. There, the typical construction of “sudden” has been an event that occurs immediately, quickly, or abruptly. But the meaning of “sudden” is equally important in the more mundane circumstance of leaking water pipes.

A newly reported decision by the California Court of Appeal, Second District in *Brown v. Mid-Century Ins. Co.*, 215 Cal. App. 4th 841 (2013), holds that a water leak from a home’s plumbing system is not “sudden” where it continues constantly and gradually over a period of time, even if the first drip began at a single moment in time. Accordingly, a slow leak – even if commencing in a microscopically-measurable instant – is not covered by a first-party homeowners’ insurance policy providing water-damage coverage only where a leak is caused by a “sudden and accidental discharge” from a plumbing system.

## **Condensation, mold and a pond of water under the house.**

In *Brown* the insured homeowners began noticing condensation throughout the interior walls and windows of their house, and, soon thereafter, mold. 215 Cal. App. 4th at 844, 847. Every day for a month they tried to wipe the moisture off, but it continuously reappeared. *Id.* at

844. Eventually, they hired a plumber to investigate. *Id.* at 845. He looked under the house and discovered a significant pond of water – 2 feet deep and about 4 to 5 feet wide and 10 to 15 feet long. *Id.* at 844-45. He also found the source of the leak – a hot, pressurized water pipe had corroded over decades due to being improperly encased in the house’s concrete-slab foundation and eventually formed one or two small holes (no larger than 1/8” x 1/32”). *Id.* at 845, 848-49. Through these tiny holes, water had leaked or sprayed over a period of time, eventually accumulating enough water to form the sub-foundation pond. *Id.* at 847-50.

## **The homeowner’s standard insurance policy covers “sudden and accidental” water discharges, but not slow, continuous water leaks.**

The standard homeowners’ policy at issue covered damage caused by a “sudden and accidental” discharge of water from a

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plumbing system, but expressly did not cover damage occurring “over a period of time from any constant or repeating gradual, intermittent or slow discharge, seepage, leakage, trickle, collecting infiltration, or overflow of water from any source.” *Id.* at 846.

The carrier denied coverage.

### The insureds claim that every pipe leak starts suddenly.

The homeowners sued for breach of contract and bad faith, alleging that the “home was damaged when a plumbing pipe *burst* causing Plaintiffs substantial loss.” *Id.* at 848 (emphasis added).

In opposing summary judgment, the homeowners did not dispute that corrosion slowly wore away at the pipe causing the leak or that the pipe continuously leaked over a period of months underneath their house (although they argued that the pipe leaked for 1 to 2 months versus the carrier’s 5-month estimate). *Id.* at 849. Instead, they relied on the investigating plumber’s colloquial use of the word “burst” and on their expert’s declaration opining that “the pipe burst *suddenly* – in a “nano-second,” spraying water in the crawlspace” and therefore the water-discharge event could be “best described as a *sudden* breach of the pipe.” *Id.* at 845 n.1, 849, 851 (emphasis added). In the expert’s view, “[i]t would have taken a mere fraction of [a] second” – i.e., a “nano-second” – “between the water tight and non[-]water tight condition of the pipe” and therefore, the leak *must* have occurred “suddenly.” *Id.* at 849-50.

The trial court rejected the expert’s theory, concluding that there was no coverage as a matter of law and entered summary judgment to that effect. *Id.* at 850.

### The California Court of Appeal, rejecting plaintiffs’ “metaphysical moment” argument, holds that a leak that only causes damage through a gradual or ongoing process is not “sudden.”

On appeal, the homeowners again relied on their expert’s conclusion that “the pipe

burst *suddenly* – in a “nano-second” when it changed from a water-tight to a leaking condition. *Id.* at 851 (emphasis added). The California Court of Appeal rejected that argument. *Id.* at 851-54.

Relying on three decisions from Texas, *Saint Paul Surplus Lines Ins. Co. v. Geo Pipe Co.*, 25 S.W.3d 900, 905 (Tex. Ct. App. 2000); *Snyder General Corp. v. Century Indem. Co.*, 907 F. Supp. 991, 1001 (N.D. Tex. 1995); *Mesa Operating Co. v. Cal. Union Ins. Co.*, 986 S.W.2d 749, 757 (Tex Ct. App. 1999), and one from New York, *Am. Ins. Co. v. Fairchild Indus., Inc.*, 852 F. Supp. 1173, 1182 n.18 (E.D.N.Y. 1994), the court rejected what it labeled the homeowners’ “metaphysical moment” theory, a term it borrowed from those cases. *Id.* at 853-54. It acknowledged that there may be some micro-analyzed instant in time when a pipe goes from a water-tight to non-water-tight condition: “A gradual process, viewed through an electron microscope that can show physical changes occurring in nanoseconds, can appear sudden at certain

points in time. Given a small enough time interval, even a slow gradual leak is sudden.” *Id.* at 854. But it rejected the use of such philosophical speculation in the context of insurance policy language interpretation. Under the logic of the insureds’ theory “every event or condition not existing from the dawn of time would be considered “sudden” because at one moment it did not exist and the next moment it did.” *Id.* at 853. Interpreting “sudden” in such a way would impermissibly read the temporal component of the term out of the policy. *Id.* at 853-54.

For the mathematically inclined, the court offered an equation to explain why the homeowners’ argument failed: “There is always a time,  $t^1$ , before the first water molecule breaches the surface of a corroding pipe, and a time,  $t^2$ , after the first water breaches the surface, such that the breach can appear sudden if  $t^2 - t^1$  is small enough. Such a calculus, however, does not make a gradual release of water sudden.” *Id.* at 854.

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*Brown*’s holding suggests that the initial “sudden” discharge must cause associated damage *by itself*, rather than gradually over time. If a small leak’s first drop or spray does not cause damage over a relatively short time (in the context of human experience) but only the build-up of discharged water over a period of time causes damage, that’s not a covered “sudden” discharge under the “sudden and accidental” provision. See *id.* at 852-54. By contrast, *Brown* noted, “[a] dishwasher hose breaking in mid-cycle, a water heater giving out and flooding a room, or an overflowing toilet” would be a “sudden” discharge. *Id.* at 853. In each of these examples, the initial water discharge causes a substantial amount of water to escape – enough water to cause *immediate* damage. On the other hand, a process that occurs “slowly and incrementally over a relatively long time” before causing damage, like the one described in *Brown*, cannot reasonably be called “sudden.” *Id.* at 852. It doesn’t matter if a plumber labels the pipe leak as a “burst” or an expert declares that

the leak began “suddenly” in a “nano-second.” What matters is whether, in the context of common human experience, the damaging quantum of water discharged gradually or continuously over an extended period of time causing damage.

### ***Brown* and the rest of the country.**

Many homeowners’ policies include language similar to that in *Brown*, either in a restricted coverage grant or by way of exclusion or an exception to an exclusion. Although it may surprise many homeowners and judges, most standard homeowners’ policies simply do not cover slow water leaks.

Surprisingly, there is a dearth of reported decisions addressing coverage for slow water pipe leaks, not just in California, but across the country. *Brown* appears to come up with the correct rule: If damage does not result unless water leaks over an extended period of time, there is no coverage, no matter how “sudden” the first drop might

be conceptualized. That, at least, is the answer in California for now. Any other rule, nonsensically, would suggest that *all* pipe leaks are covered, for there will always be a moment in time – if measured in small enough increments – when a pipe goes from a watertight to a non-watertight condition. ▼

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