IN THE SUPREME COURT
OF THE STATE OF FLORIDA

DIMMITT CHEVROLET, INC. and
DIMMITT CADILLAC, INC.,

Defendants/Appellants

v. CASE NO. 78-293

SOUTHEASTERN FIDELITY
INSURANCE CORPORATION,

Plaintiff, Appellee.
_____/

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF FLORIDA

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INTEREST OF AMICUS CURIAE

The State of Florida, pursuant to Rule 9.370 of the Florida rules of Appellate Procedure, respectfully files this amicus curiae brief in support of appellants, who are policyholders of comprehensive general liability ("CGL") insurance.

The Attorney General of the State of Florida has filed this amicus curiae brief because of the statewide significance of this case; the outcome of which will have a direct impact on thousands of Floridians and governmental entities. Should the insurance industry be permitted to rewrite history, Florida's efforts to protect and preserve its environment through aggressive enforcement and cleanup programs, will be significantly curtailed.

If a policyholder believes there will be no coverage for unintentional contamination at a particular site, it is less likely that an early, voluntary cleanup of a contaminated site will be initiated. There is a good likelihood that the contaminated site will remain as such until discovered, and may continue in its present state due to lack of funds to pursue a cleanup; all this despite legitimate insurance coverage that is supposed to protect policyholders for environmental damage that occurs over an extended period of time, so long as that damage is unexpected and unintended.

Important public policy arguments mandate a decision in favor of policyholders in the instant lawsuit. Environmental contamination is a major problem in Florida as it is for most states around the nation. The State of Florida has a substantial

interest in protecting all property from environmental damage, and as such, has an interest in ensuring the success of these efforts within the State.

More then anything else, this case is about a group of insurance corporations, who seek to escape their contractual obligations to assist in the cleanup of Florida's environment. The Insurance Environmental Litigation Association has sought leave to file an amicus curiae brief in this case just as it has done in numerous other cases across this land. They are the lead protagonists, who along with the insurance industry lawyers, would attempt to keep from the courts the prior representations by the industry itself, concerning the pollution exclusion clause.

The Attorney General firmly believes that as a matter of law and sound public policy, the insurers are wrong in their present assertions that insurance coverage only exists if the pollution damage happens abruptly, instantly, or within a short period of time.

The State of Florida serves in the unique role as trustee of the public's natural resources. The Governor and elected cabinet, along with the state legislature, have made the protection and preservation of public lands a priority. The citizens of Florida have continued to designate protection of the environment as one of the most important issues we face today.

The scope and size of the environmental contamination problem in Florida is enormous. It is without question that the only way to respond successfully to this problem is through a

partnership between the public and private sector. We are at a point in time in our history when public finances are severely limited. The funding for a great portion of this cleanup effort must come from the private sector. For those individuals and businesses who purchased Comprehensive General Liability insurance in return for substantial premiums, there should be no doubt that the insurance corporations should bear the cost of protecting our state's natural resources from environmental damage.

The success of Florida's environmental program depends upon the response of the private sector, and those that insure them. If Florida does not hold the insurance industry to their contractual obligations, the impact will be far greater then the failure to enforce an agreement; the fragile environment that we all hold close to our hearts, may cease to exist.

The insurance corporation in this case has refused to pay valid claims for environmental damage from its insured; payment for which it has a contractual obligation to remit. It is not just the policyholder who is injured by this arrogant position taken by the insurance corporation, but the public at large, who is being denied an important asset in remediating this site, and others like it. The integrity of Florida's regulatory system is at stake. The insurance corporations are attempting to refute their prior representations to the Department of Insurance. They should not be permitted to do so.

The State of Florida files this amicus curiae brief to assist the Court in addressing the public policy issues raised by this appeal.

STATEMENT OF THE CASE AND FACTS

For the purpose of the issue certified to the Florida Supreme Court, the State relies on District Judge Hodges' finding of facts in Industrial Idemnity Ins. Co. v. Crown Auto Dealership, Inc., 731 F.Supp. 1517 (M.D. Fla. 1990) ("Crown Auto").

This case is before the Florida Supreme Court on certification from the United States Court of Appeals for the Eleventh Circuit, pursuant to Article 5, Section 3 (b)(6) of the Florida Constitution. The Eleventh Circuit certified the following question to the Florida Supreme Court:

> WHETHER, AS A MATTER OF LAW, THE POLLUTION EXCLUSION CLAUSE CONTAINED IN THE COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICY PRECLUDES COVERAGE TO ITS INSURED FOR LIABILITY FOR THE ENVIRONMENTAL CONTAMINATION THAT OCCURRED IN THIS CASE.

In posing the question, the Court made note of the fact that the particular phrasing was not intended to limit the Florida Supreme Court in its review of overall issues presented by this case.

This case was before the Eleventh Circuit Court of Appeals on appeal from the judgment and order entered by the United States District Court for the Middle District of Florida, Tampa Division in Case No. 88-00745 CIV-T-10 (B). The District Court had jurisdiction in this case pursuant to 28 U.S.C. s. 1332. The District Court resolved substantive issues by applying Florida law. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The Court of Appeals had jurisdiction pursuant to 28 U.S.C. s. 1291.

The Appellants in this case are policyholders of comprehensive general liability ("CGL") insurance. The policyholders appealed a judgment and order of the United States District Court for the Middle District of Florida (Hodges, J.), which denied them liability coverage for environmental damage claims.

The policies in question define an occurrence as

> an accident, including injurious 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.

The policies at issue contain the disputed pollution exclusion clause which provides that

> the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, <u>but this exclusion does not apply if such dispersal, release or escape is sudden or accidental</u>
>
> (Emphasis added).

The District Court held that the standard form pollution exclusion in comprehensive general liability precludes coverage for environmental claims unless the pollution damage happens abruptly, instantly, or within a short period of time. This construction of the word "sudden" resulted in coverage being denied in this case; a decision that adversely effects all Florida policyholders, who reasonably expect coverage from policies for which premiums were paid.

The Attorney General filed an amicus curiae brief in the Eleventh Circuit Court of Appeals, and likewise files a brief before this honorable Court because this case presents issues that are of paramount importance to the people of the State of Florida.

SUMMARY OF ARGUMENT

The Florida Supreme Court has before it a case whose outcome will determine the fate of the State and Federal government's goals to protect and preserve the natural environment of Florida. Should the court adopt the District Court's construction of the word "sudden" in the "sudden and accidental" exception to the pollution exclusion clause, efforts to encourage prompt and efficient restoration of natural resources contaminated by pollution, will be severely hampered.

The District Court held that the standard form pollution exclusion precludes automatically liability coverage for pollution damage that happens over an extended period of time. The court reached this conclusion by its construction of the word "sudden" as having a temporal meaning. The court found that the term refers to "pollution which occurs abruptly, instantly, or within a very short period of time." Crown Auto, 731 F.Supp. at 1520.

As a result of this misinterpretation of Florida law by the District Court, the policyholders in this case were denied reimbursement and indemnification for the costs involved in decontaminating the Peak site. Likewise, thousands of

policyholders in Florida were potentially deprived of coverage as a direct result of this decision.

In order to protect the policyholders of Florida, safeguard the important policy goals inherent in prompt cleanup of environmental damage, and ensure the integrity of the insurance system in Florida, the District Court's judgment should be reversed.

ARGUMENT

THE DISTRICT COURT INCORRECTLY HELD UNDER FLORIDA LAW THAT THE STANDARD FORM POLLUTION EXCLUSION IN COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICIES PRECLUDES LIABILITY COVERAGE FOR ENVIRONMENTAL DAMAGE THAT HAPPENS OVER AN EXTENDED PERIOD OF TIME.

The policyholders in this lawsuit had insurance coverage that is similar to that of policyholders throughout Florida and the nation. These Comprehensive General Liability policies were designed to provide policyholders with broad coverage for occurrences that fall within the confines of the policy.

The policyholders in this lawsuit like those across the land, believed the pollution exclusion clause only excluded coverage for intentional polluters; that environmental damage that happens over an extended period of time is covered, so long as that damage is unexpected and unintended by the policyholder. The drafting history, statements by the insurance industry to state insurance commissioners and policyholders, legal decisions throughout the land, all point to this understanding of the pollution exclusion clause.

The decision rendered by the United States District Court for the Middle District of Florida, which denied the policyholders liability insurance coverage for environmental damage claims, if confirmed, will also deprive thousands of individuals, municipalities, cities and counties of insurance coverage for which millions of dollars in premiums have been paid.

There is no question but that without the coverage rightfully expected by policyholders, for unintentional environmental damage, privately financed cleanups of hazardous waste sites throughout Florida, will be significantly thwarted and/or delayed.

In an effort to assist the Court in the voluminous task of reviewing the lengthy record before it, the State of Florida has filed a motion reuesting leave to adopt the amicus curiae brief it filed in the Eleventh Circuit Court of Appeals. In this amicus curiae brief, the State will focus on the important public policy arguments that favor reversal of the District Court Order. In support of the public policy arguments raised in this amicus curiae brief and for purposes of review of the legal arguments, the State of Florida refers the Court to its brief submitted before the Eleventh Circuit Court of Appeals, and to that of the Appellant policyholders.

A. PUBLIC POLICY FAVORS INSURANCE COVERAGE

The State of Florida files this amicus brief in support of the policyholders' arguments to reverse the holding by the United States District Court. An affirmance of this holding would create significant delays in the prompt, privately financed clean up of hazardous waste sites in Florida. Likewise, the integrity of our state's insurance regulatory system would be severely impaired.

As the trustee of its natural resources, the Governor and cabinet are responsible to the citizens of Florida to preserve their precious natural resources and to revitalize whatever natural resources have been contaminated by pollution. A part of the State's natural resources include the contaminated soil and ground water at and around the Peak Oil Company's plant in Hillsborough County.

As noted in the State of Florida's amicus curiae brief filed with the Eleventh Circuit Court of Appeals, the Florida Legislature has declared "(t)hat the preservation of surface and ground water is a matter of the highest urgency and priority, as these waters provide the primary source of potable water in this state (.)" s. 376.30 (1)(b), Fla. Stat. (1989)(See State of Florida Amicus Curiae Brief p.4 for a more expansive discussion of important statutory provisions).

Not only is the State of Florida vitally concerned with protection of the environment, the United States government through the Environmental Protection Agency shares that concern. Of prime importance to the State of Florida, thousands of policyholders (including many municipalities, towns, and cities),

is the EPA's role in enforcing the provisions of the Comprehensive Environmental Response, Compensation and Liabilty Act ("CERCLA"), 42 U.S.C. 9601 et seq.

CERCLA was enacted in 1980 and was amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA") Pub. L. No. 99-499, 100 Stat. 1613 (Oct. 17, 1986). The main purpose of the act was to enhance the EPA's ability to deal effectively with the problem of the release of hazardous substances and contaminants into the environment. The EPA in cooperation with the Florida Department of Environmental Regulation, has joined other state agencies in the efforts to remediate and repair Florida's fragile environment.

The cost involved in many cleanup actions can be enormous. CERCLA applies strict, joint and several liability on owners, operators and generators of waste materials, along with other potentially responsible parties ("PRP's"), for costs incurred by federal and state governments or private parties in the cleanup of environmental contamination. CERCLA imposes retroactive liability without regard to fault. This is precisely the type of liabilty that is supposed to be covered by Comprehensive General Liability insurance.

Not only do innocent parties like the policyholders in the instant lawsuit find themselves in danger of financial ruin, but many cities, towns, and municipalities could find themselves in a similar position. Just as individual policyholders could face bankruptcy as a result of denial of insurance coverage for environmental contamination, so could many governmental entities.

The results in both cases could be devastating. There is a risk of financial ruin and a greater risk that funds will not be available to cleanup the contaminated site.

The record clearly reveals that the policyholders in this case did not intentionally cause any contamination of property. Public policy mandates that when contamination is not intentional, as in this case, and where insurance coverage is provided for, the cleanup should be privately financed. Public funds are simply insufficient to pursue cleanups at all sites posing a risk to public health and the environment.

Public policy dictates that the cleanup of waste sites be prompt, voluntary, and privately financed. In this case, this important public policy was achieved. The Appellants along with other responsible parties, voluntarily entered into two administrative orders with the EPA to undertake remedial measures at the Peak site. This short circuited the need for protracted litigation just to get the cleanup started. The cleanup is being supervised by the EPA, with the assistance of the Department of Environmental Regulation.

When, as in this case, a private party has or will expend its own money for a government mandated cleanup and then seeks to recover from its insurer, an incorrect interpretation of Florida insurance law, which denies coverage, will affect the willingness of other parties, in the future, to proceed promptly and voluntarily with their own cleanups.

In this case, the Middle District's incorrect interpretation of Florida law denied the policyholders insurance coverage for

their participation in the privately-funded cleanup of the Peak site. If the Court's judgment is not corrected by the Florida Supreme Court, other parties potentially responsible for pollution damage will be reluctant to participate in prompt and voluntary environmental cleanups. This will result in protracted litigation in an effort to enforce cleanup actions throughout the State. This would place an additional burden on a State with very limited finances.

The strained resources of the state and federal governments will be further reduced should protracted litigation have to proceed every time environmental contamination is found. Of even greater concern is the vast amount of environmental contamination that remains unknown and would stay in such condition were it not for the willingness of parties to come forward and assist in the cleanup efforts. If innocent parties are denied coverage for which they have paid premiums, they will not voluntarily come forward to cooperate with governmental agencies. The same holds true for some cities, towns, and municipalities, who find themselves financially imperiled as they face the prospects of the cost of a cleanup action.

The State of Florida maintains that the District Court incorrectly applied Florida law when it rendered its adverse, affecting thousands of policyholders in Florida. If Florida is to continue on its course of preservation and protection of our fragile environment, this decision cannot stand. The correct interpretation of the pollution exclusion clause is one that would insure the coverage expected by policyholders in the State of Florida.

B. THE INTEGRITY OF FLORIDA'S INSURANCE REGULATORY SYSTEM WILL BE DETERMINED BY THE OUTCOME OF THIS CASE

Florida law specifically provides that no new basic insurance policy, rider or endorsement form may be sold in the State unless it is filed with and not disapproved by the Insurance Department. S. 627.410, Fla. Stat. (1989). The Florida Department of Insurance can disapprove a filing if the form

> (b) (c)contains . . . any inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract; (or)
>
> (c) (h)as any title, heading or other indication of its provisions which is misleading(.) S. 627.411 (1)(b), Fla. Stat. (1989).

When insurance rating organizations, on behalf of their member subscribers, filed the pollution exclusion for approval by state insurance departments, they represented that the exclusion did not serve to cut back liability coverage because it was intended to be a "mere clarification" of the "occurrence" language, which already covered environmental damage that happened over time, as long as it was neither expected nor intended by the policyholder. See the June 10, 1970 letter from the Insurance Rating Board to the Georgia Department of Insurance, reproduced in Claussen v. Aetna Cas. & Sur. Co., 676 F.supp. 1571, 1583 (S.D. Ga. 1987)("The impact of the (pollution exclusion) on the vast majority of risks would be no changes. It is rather a situation of clarification which will make for a complete understanding of the intent of coverage").

In Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 575 (Wisc. 1990), the court quoted a memorandum accompanying the Insurance Rating Board's submission, which was found in an article by Price, Evidence Supporting Policyholders in Insurance Coverage Disputes, 3 Nat. Resources & Envir. 17, 48 (Spring 1988). These very same statements were made to the Florida Department of Insurance (See State of Florida's 11th Cir. Amicus Curiae Appendix, Exhibit K. May 28, 1970 letter of Kenneth G. Schivone of St. Paul Insurance Companies to the Honorable Broward Williams, Florida Insurance Commissioner). The Rating Board stated that:

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

These same statements were made nationwide. Today, the insurance companies seek to disavow their industry's 1970 representations to state insurance departments. What had been represented as a mere clarification of when an "occurrence" happens is now an automtic exclusion of liability coverage for all environmental property damage not arising out of an abrupt or instantaneous event.

The insurance industry made another attempt to disavow their previous statements in Florida by filing a purported "absolute pollution exclusion" for the approval of the Florida Department of Insurance, without a commensurate rate reduction. This bold

attempt to take coverage away from the policyholders of Florida was rebuffed by the Department(See Letter of Clyde L. Eriksen, Administrator, Commercial Lines Section, Bureau of Policy & Contract Review, Florida Department of Insurance, dated June 27, 1985 to Carl L. Leo, Regional Manager, Insurance Services Office, Inc., Appendix, Exhibit L of State's Eleventh Circuit amicus curiae brief).

The Florida Department of Insurance disapproved because the Department clearly saw that this was an attempt to reduce coverage without any corresponding reduction in the premiums that were to be charged.

The Florida Department of Insurance recognized that "(p)ollution coverage has long been an integral part of general liability policies, and it is the Department's position that the best interest of the insurance-buying public is not being served by approval of a form which excluded coverage." With that, the Department disapproved the policy change(See Ericksen Letter, Appendix, Exhibit L, State's amicus curiae brief).

Good, sound public policy dictates that insurance companies who wish to do business in the State of Florida, be required to honor the policies they write in this State. The State has an obligation to protect its citizens and ensure that policyholders who paid premiums for policies like those at issue here, receive coverage for unintended environmental pollution.

Without question, the temporal interpretation of the standard form pollution exclusion advocated by the insurance industry, is contrary to the drafting history of the exclusion

and contrary to the 1970 representations the insurance industry made to state insurance regulators to obtain approval to add the pollution exclusion as a mandatory endorsement to the standard form CGL policy (for a more detailed discussion of the drafting history please review the State's Amicus brief and the Appellant's Brief and Reply Brief, filed in the 11th Circuit Court of Appeals).

The court in Claussen v. Aetna Casulty & Surety Co., 676 F.Supp. 1571 (S.D. Ga. 1987), found "dishonesty in the representation made to the Georgia Insurance Department in 1970 that the pollution exclusion clause would have little effect on preexisting coverage." 676 F.Supp. at 1573, fn. 4. The identical pollution exclusion clause was interpreted by the Georgia Supreme Court. The Court held that the pollution exclusion did not preclude liabilty coverage for environmental damage that happened over time, so long as that damage was not expected or intended by the policyholder. Claussen v. Aetna Casulty & Sur. Co., 259 Ga. 333, 380 S.E.2d 686 (1989).

The Supreme Court should hold the insurance industry and the insurance companies in this case to those representations and not permit these companies, twenty-years later, to repudiate the interpretation of the pollution exclusion clause that their industry explained to Florida's Insurance Commissioner and others across the land. The insurance companies should not be permitted to profit from their dishonesty. To do otherwise would seriously undermine the integrity of Florida's insurance regulatory system. The record is replete with citations of similar positions and

cases that support coverage(See Exhibit A and L in Appendix to State of Florida's Amicus Brief filed in 11th Cir.).

As the parties in this lawsuit have demonstrated through the extensive briefs submitted, the meaning of the term "sudden and accidental" has led to two reasonable interpretations, which has in turn created a good amount of confusion. The District Court incorrectly held under Florida law that the word "sudden" in the exception to the exclusion means "pollution which occurs abruptly, instantly, or within a short period of time," denying policyholders coverage.

Florida law is clear on the manner in which ambiguous terms in an insurance policy are handled. Ambigous terms in an insurer drafted policy must be resolved against the insurance company and in favor of coverage. National Merchandise Co., Inc. v. United Service Automobile Association, 400 So. 2d 526 (Fla. 1st DCA 1981); Tropical Park v. United States Fidelity & Guaranty Co., 357 So.2d 253 (Fla. 3d DCA 1978); Gulf Life Ins. Co. v. Nash, 97 So.2d 4 (Fla. 1957); Valdes v. Smalley, 303 So.2d 342, 345 (Fla. 3d DCA 1974), cert. dismissed sub nom.; Hodges v. National Idem. Co., 249 So.2d 679 (Fla. 1957); Demshar v. AAACon Transp. Inc., 337 So.2d 963, 965 (Fla. 1976); National Ben Franklin Insur. Co. v. Valdes, 341 So.2d 975 (Fla. 1976).

An insurance policy term is ambiguous when it is susceptible of two reasonable interpretations, in which case, the interpretation which will sustain coverage must be adopted. Tropical Park, 357 So.2d at 256.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's Order and judgment and hold that the standard form pollution exclusion does not preclude liability coverage for environmental damage that happens over an extended period of time, so long as that damage is unexpected and unintended by the policyholder.

Respectfully submitted,

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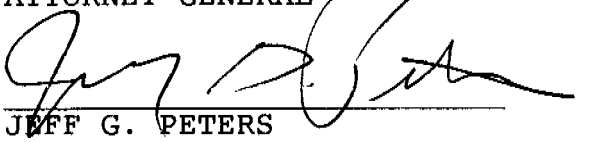

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CERTIFICATE OF SERVICE

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