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IN THE SUPREME COURT OF FLORIDA

Case No. 78,293

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

Defendants, Appellants,

vs.

SOUTHEASTERN FIDELITY
INSURANCE CORPORATION,

Plaintiff, Appellee.

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

USDC NO. 90-3359

AMICUS CURIAE, CITY OF DELRAY BEACH, BRIEF ON THE MERITS

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INTRODUCTION

Appellee, Southeastern Fidelity and Insurance Company (hereinafter, "Southeastern") filed a declaratory judgment action against Appellants, Dimmitt Chevrolet, Inc. and Dimmitt Cadillac, Inc. (hereinafter, the "Dimmitts") in the United States District Court for the Middle District of Florida. Southeastern sought a declaration that it owed no duty to defend or indemnify the Dimmitts under a series of comprehensive general liability (hereinafter, "CGL") insurance policies which Southeastern sold to the Dimmitts from 1974 through 1981. The district court (Hodges, J.) entered an order granting Southeastern's motion for summary judgment and denying the Dimmitts' cross-motion for summary judgment. The Dimmitts appealed the order of the district court to the Eleventh Circuit Court of Appeals, which certified the question on appeal to this Court on July 10, 1991. The Dimmitts seek an order of this Court that under Florida law, the qualified pollution exclusion clause (hereinafter, the "pollution exclusion") in the standard form CGL policies at issue does not bar coverage for gradual pollution, but rather, only excludes coverage for deliberate, i.e., intentional polluters.

Amicus is a municipality organized under the Constitution and laws of Florida. The City of Delray Beach (hereinafter, "Delray") has obtained a judgment against a company which discharged highly toxic chemical pollutants over an eight year period, which resulted in substantial contamination of the aquifer beneath the City. After taking steps to provide its citizens with a short term source of clean water and a long term cleanup of the aquifer, Delray sued

the polluter and obtained a judgment for past and future expenditures associated with the cleanup. The judgment debtor has become insolvent and with no assets to cover its obligations, has filed for protection under Chapter 11 of the Bankruptcy Statute.

Meanwhile, all of the insurance carriers who sold CGL policies to the polluter to cover risks occurring during the eight year period of discharge have refused to indemnify the polluter, due at least in part to their reliance on the pollution exclusion. Delray has filed a declaratory judgment action against the various insurance carriers, which is currently pending in the United States District Court for the Southern District of Florida.

Amicus is interested in the outcome of this case because this Court, in addressing the certified question, will reach a determination under Florida law whether the pollution exclusion in the standard-form CGL policies issued by the insurance carriers in its declaratory judgment action only excludes coverage for intentional polluters. If this Court were to hold that the pollution exclusion also bars coverage for gradual pollution, this Court's decision could also be used to deny coverage to Delray in its declaratory judgment action. Amicus submits this brief in order to invite this Court's attention to the far-reaching public policy ramifications which inhere to its disposition of the certified question. Delray will confine its analysis principally to the outcome of the certified question as it relates to its declaratory judgment action. However, the same public policy concerns would apply to the countless other past and future

instances of toxic pollution and the efforts of the victims to quickly address potential environmental catastrophes.

SUMMARY OF THE ARGUMENT

This case is before this Court on certification from the Eleventh Circuit. This Court is called upon to interpret and construe the pollution exclusion clause found in most Comprehensive General Liability insurance policies. For reasons of public policy, as well as well-established rules of construction of insurance policies, this Court must conclude that the clause is ambiguous at best and the policies provide coverage for all but intentional pollution. The City of Delray Beach has a direct interest in the outcome because it is seeking damages and has obtained a judgment against a corporation which polluted its water supply. That corporation's insurers have denied coverage based upon their improper and incorrect reading of the pollution exclusion.

ARGUMENT

THE DISTRICT COURT IMPROPERLY CONSTRUED THE POLLUTION EXCLUSION BY FAILING TO RESOLVE THE INHERENT AMBIGUITY OF THE CLAUSE IN FAVOR OF THE INSURED.

Delray fully agrees with the arguments presented by the Appellants in their Brief on the Merits with respect to the law pertaining to the pollution exclusion clause in the standard-form CGL insurance policy. Thus, the City agrees that the only reasonable interpretation of the pollution exclusion under Florida law is that it does no more than bar coverage for deliberate

polluters.[1] It is the far-reaching public policy ramifications which inhere in this Court's disposition of the pollution exclusion which the City seeks to address. Specifically, Delray would present the practical point of view of the innocent victim of toxic pollution with regard to the pollution exclusion.

Without a doubt, the party with the greatest risk to its pecuniary and proprietary interests upon the release, by whatever means, of hazardous or toxic pollution, is the innocent victim of pollution. While various laws exist to hold the polluter accountable for its action by a variety of means, the consequences to the typical polluter amount to no more than a measure of pecuniary liability somewhere down the road.[2] By contrast, the victim of the pollution suffers an immediate devastation of both its pecuniary and proprietary interests, the results of which are often catastrophic. For instance, the discharge of even modest amounts of hazardous wastes may not only contaminate the surface and immediate subsurface soil surrounding the site of discharge, but can, under certain circumstances, migrate over time into the

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[1] In addition to the authorities cited by the Appellants and the other amici, Delray would further call this Court's attention to the opinion in Pepper's Steel and Alloys, Inc. vs. USF&G Co., 668 F.Supp. 1541 (S.D. Fla. 1987) (holding that where a spill or release of toxic substances "is neither expected nor intended from the insured's point of view, it was 'sudden and accidental'" for the purposes of the CGL pollution exclusion).

[2] State and federal laws now contain provisions for criminal liability under certain circumstances. However, since criminal liability is generally predicated on intentional acts which would be excluded from coverage in any case, this fact is irrelevant for the purposes for an analysis of public policy surrounding the interpretation of the pollution exclusion.

aquifer well below the surface and contaminate the water supply for an entire city. Given the delay from the time of discharge until the pollutants reach the aquifer and can be detected in the municipal water supply, pollution which occurs continuously over time is the most serious kind because the pollution will continue to migrate into the aquifer even after the source of the pollution is detected and terminated. This scenario is precisely what occurred to Delray, and this Court's disposition of the pollution exclusion will have a direct impact on how the City and other similarly situated victims of toxic pollution will be able to cope with the consequent devastation.

Aero-Dri Division of Davey Compressor Company (hereinafter, "Aero-Dri") operated an industrial air compressor overhauling and refurbishing facility at 1180 S.W. 10th Street in Delray Beach, Florida from mid-1981 through January 31, 1989. In the course of conducting its business of cleaning and reconditioning used air compressors at the facility, Aero-Dri used highly toxic solvents including trichloroethylene, tetrachloroethylene (also known as perchloroethylene) and 1,1,1-trichloroethane. These solvents are "hazardous wastes" within the meaning of the Federal Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq., and its implementing regulations, as well as the Florida Resource Recovery and Management Act, Section 403.701-403.73, **Fla.Stat.** (1980), and its implementing regulations. These highly toxic chemicals are lethal in high concentrations and can cause cirrhosis of the liver and cancer of the liver in low concentrations.

Furthermore, these chemicals tend to degrade in ground water to form vinyl chloride, another carcinogenic substance. Aero-Dri, through its employees, routinely dumped these toxic chemicals onto the ground at the 10th Street property behind the Aero-Dri building more or less continuously throughout the eight year period of operation of the facility.

The Aero-Dri site is within the "cone of depression" or zone of influence of the 20-series wells which taps into the aquifer below the City of Delray Beach. The 20-series wells supplies approximately 50% of the City's potable water. This means that the ground water in the vicinity of the site flows towards the 20-series wells, which is a northeasterly direction, influenced by the force created by the pumping of the 20-series wells. Multiple analyses performed on samples from the City's 20-series drinking water wells demonstrate that these wastes have migrated to and contaminated those wells. The levels of perchloroethylene and trichloroethane found in the wells substantially exceeded the drinking water standards established by the Florida Department of Environmental Regulation of three parts per billion for these solvents.

Delray was forced to shut down five of the six wells in the 20-series well field until treatment of the water could be provided. The City retained an engineering firm to design and install a treatment system to remove the solvents from the 20-series well field. As an interim remedial measure, the City leased and installed four carbon adsorption units at four of the 20-series

wells, which enabled the City to bring these wells back on line on a short-term basis until the cleaning of the aquifer could be completed. Subsequently, the City purchased and installed at the City's water treatment plant four custom designed air stripping towers to provide long-term treatment of the contaminated water. The City will be required to continue to expend substantial monetary resources in the future to continue to operate the air stripping towers for the period of time that will be necessary to clean up the ground water drawn into the 20-series wells.

After substantial litigation, Delray obtained a judgment against Aero-Dri for approximately 3.1 million dollars in past compensatory damages, and 5.6 million dollars to compensate the City for the amount likely to be expended in the future in order to complete the cleanup of the pollution, for a total award of $8,697,488.00. Some fourteen insurance carriers issued policies of primary and excess insurance coverage to Aero-Dri during the eight year period in which the toxic pollution was discharged by their insured. The total amount of available insurance coverage is well in excess of the judgment obtained by Delray.[3] Amicus, and the growing class of innocent victims of toxic pollution which it

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[3] The theoretical total amount of available coverage is $59,600,000.00. However, since Mission Insurance Company, Mission National Insurance Company, and Mission American Insurance Company have become insolvent, this figure is reduced to $33,600,000.00 discounting any potential payout from the Mission Insurance Trust. This remaining amount of insurance coverage is nearly four times the amount of the judgment against Aero-Dri, yet all of the insurance carriers who sold policies of Aero-Dri have refused to satisfy the judgment rendered in favor of Delray and against their insured.

represents, must shoulder the primary burden of coping with and cleaning up discharges of hazardous chemicals into the environment. From a practical point of view, however, Amicus would point to the well-settled public policy regarding the resolution of questions of insurance coverage as it applies in the case at bar.

The Florida courts have consistently applied a public policy favoring a rule of liberal construction of contracts of insurance in favor of the insured. One application of this public policy is the rule that ambiguities in the language of insurance contracts must be resolved in favor of the interpretation which affords the greatest amount of coverage. ***Demshar vs. AAACon Auto Transport, Inc.***, 337 So.2d 963 (Fla. 1976); ***Hodges vs. National Indemnity Co.***, 249 So.2d 679 (Fla. 1971); ***Gulf Life Insurance Co. vs. Nash***, 97 So.2d 4 (Fla. 1957); ***New York Life Insurance Co. vs. Bird***, 152 Fla. 532, 12 So.2d 454 (Fla. 1943); ***New York Life Insurance Co. vs. Kincaid***, 136 Fla. 120, 186 So. 675 (Fla. 1939); ***Price vs. Prudential Insurance Co.***, 98 Fla. 1044, 124 So. 817 (Fla. 1929); ***Queen Insurance Co. vs. Patterson Drug Co.***, 73 Fla. 665, 74 So. 807 (Fla. 1917); ***State Farm Mutual Auto Insurance Co. vs. Mallard***, 548 So.2d 733 (Fla. 3d DCA 1989); ***Herring vs. First Southern Insurance Co.***, 522 So.2d 1067 (Fla. 1st DCA 1988); ***Lane vs. Allstate Insurance Co.***, 472 So.2d 823 (Fla. 4th DCA); ***Financial Fire and Casualty Co. vs. Callaham***, 199 So.2d 529 (Fla. 2d DCA 1967). This general rule applies with particular force to clauses which exclude coverage under certain circumstances. ***Stuyvesant Insurance Co. vs. Butler***, 314 So.2d 567 (Fla. 1975); ***General Accident Fire and Life***

Assurance Corp., Ltd. vs. Kellin, 391 So.2d 305 (Fla. 4th DCA 1980); ***Ward vs. Nationwide Mutual Fire Ins. Co.***, 364 So. 2d 73 (Fla. 2d DCA 1978); ***Blue Shield of Florida, Inc. vs. Woodlief***, 359 So.2d 883 (Fla. 1st DCA 1978). A recognized reason for this rule is that insurance policies are prepared by experts in this complex field, and the interplay of their various provision is intricate and difficult for the average unsophisticated purchaser of insurance to understand. ***Hartnett vs. Southern Insurance Co.***, 181 So.2d 524 (Fla. 1965) (so long as insurance contracts are drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied therein, the courts should and will construe them liberally in favor of the insured and strictly against the insured); ***Praetorians vs. Fisher***, 89 So.2d 329 (Fla. 1956); ***Sovereign Camp, W.O.W. vs. Lee***, 125 Fla. 736, 171 So.2d 526 (Fla. 1936); ***New York Life Insurance Co. vs. Kincaid***, 122 Fla. 283, 165 So. 553, rehearing denied, 123 Fla. 678, 167 So. 365 (Fla. 1935). Even where the purchaser of insurance may be more sophisticated than a layman by virtue of its general business experience, it still stands on an unequal field with respect to the insurance carrier which drafted the insurance agreement.

Furthermore, the entire business of the insurance industry is closely regulated by statutes and administrative regulations, many of which are designed to protect insureds and the public in general. Insurance policies partake of many aspects of ordinary contracts between consenting parties but more importantly the legislature and the courts have recognized that the public in

general, and injured or potentially injured third parties specifically have interests which must be protected. As the briefs of the Appellants and other amici have demonstrated, any ambiguity in the pollution exclusion must be construed against the insurer and construed in such a way as to afford maximum protection to insureds and the public. Especially in light of general principles of insurance law, coupled with the drafting history of the pollution exclusion, this Court must determine that the pollution exclusion means what the insurance industry claimed that it meant when it tried to convince regulators to allow its inclusion in policies.

The insurers have their perspective; the insureds have their perspective; and the City of Delray Beach, an innocent victim of pollution of its water supply, has an entirely different perspective from which to view the problem. To the extent that public policy guides decisions of this Court in areas open to interpretation, this Court should bear in mind the incalculable damage already done, and yet to be discovered, to the natural resources of Florida. Either insurers who accepted premiums to protect against risks will be responsible to respond when their insureds are guilty of pollution or the innocent citizens, residents, and taxpayers of Florida will bear the cost. The insurance industry could have written a pollution exclusion clause which would have excluded the type of pollution at issue in this case. It did not do so when it drafted and promulgated the pollution exclusion clause at issue and it remains to be seen

whether recent changes in the pollution exclusion clause will vary the outcome. That is for another time and place but it is critical that at this time and in this place, this Court reaches agreement with the arguments made by Appellants and determines that there is coverage under the circumstances presented.

CONCLUSION

Based upon the foregoing reasons and authorities as well as those contained in the brief of Appellants and other amici, the City of Delray Beach respectfully requests this Honorable Court to answer the certified questions in such a way as to afford maximum protection to the citizens and residents of the State of Florida.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 4th day of October, 1991 to **Thomas Bick, Esquire, Joseph Dorn, Esquire**, Kilpatrick & Cody, Suite 800, 700 Thirteenth Street, N.W.,

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By_____
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