IN THE SUPREME COURT OF FLORIDA

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

Defendants, Appellants,

vs. CASE NO. 78,293

SOUTHEASTERN FIDELITY
INSURANCE CORPORATION,

Plaintiff, Appellee.

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

USCA NO. 90-3359

BRIEF OF AMICUS CURIAE JOHN RICHARD LUDBROOKE YOUELL ON BEHALF OF UNDERWRITERS AT LLOYD'S, LONDON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE

Underwriters at Lloyd's, London ("Underwriters") adopt the Statement of Facts found in Judge Wm. Terrell Hodges' opinion, Industrial Indemnity Insurance Co. v. Crown Auto Dealerships, Inc., 731 F.Supp. 1517 (M.D. Fla. 1990).

Underwriters would point out that the policy covers:

> PROPERTY DAMAGE to which this insurance applies, caused by an occurrence....

The policy further defines an "occurrence" as

> An accident including continuous or repeated exposure to conditions, which result in BODILY INJURY or PROPERTY DAMAGE neither expected or intended from the standpoint of the INSURED...

The "pollution exclusion" does not modify the definition of occurrence, but rather it separately excludes from the damage "to which this insurance applies," all damage:

> arising out of the discharge...of...toxic chemicals, liquids or gases, waste materials...into or upon land...; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of Amicus Curiae John Richard Ludbrooke Youell, an underwriter at Lloyd's, London, on his own behalf and as a representative of similarly situated casualty underwriters at Lloyd's, London ("Underwriters").

Underwriters have two significant interests in this case.

First, as the underwriters of numerous insurance policies in force in Florida, Underwriters have an interest in this Court's adherence to its time-honored rule that insurance policies are to

be construed by giving a plain meaning to each word of the policy.

Second, Underwriters are significant casualty underwriters of third-party liability insurance policies which, in language similar although not identical to that at issue here, exclude coverage for damages arising from pollution. They thus have an interest in the enforcement of pollution exclusion clauses like the one at issue in this case.

SUMMARY OF THE ARGUMENT

1. The overwhelming majority of appellate courts of last resort, i.e. highest state courts and federal appeals courts whose decisions on state law issues are seldom reviewed by the U.S. Supreme Court, have said the plain meaning of the pollution exclusion clause excludes coverage for discharges like those in issue here. Thus, by either authoritative pronouncement of the state's highest court or by the prediction of a federal court of appeals, the states of Massachusetts, Michigan, North Carolina, Maine, New York, Pennsylvania, Kentucky and Tennessee have rejected the arguments Dimmitt makes in this case and only Colorado, Georgia, Wisconsin and Delaware have accepted them.

2. This court has repeatedly enforced the plain language in an insurance exclusion where, after applying rules of construction, no genuine ambiguity exists. Here there is no ambiguity in the phrase "sudden and accidental" once the Court gives each word in the insurance policy its plain meaning and

construes the policy so that every provision in the contract is given meaning and effect.

The plain meaning of "sudden" is "abrupt." While many abrupt events are unexpected, this does not exclude the concept of abruptness from the meaning of the word "sudden." Moreover, if "sudden" is construed to mean something different from "accidental," then "sudden" must be construed to mean "abrupt." The gradual waste seepage at issue here was not abrupt and so the policy does not cover it.

Nor can Dimmitt argue that an occasional abrupt spill triggers coverage for an ongoing pattern of polluting activity. Regularly occurring liabilities are commonly regarded as a cost of doing business, not a risk to be insured. In the context of an ongoing pattern of polluting activity, the courts have refused to view spills in isolation and have held an individual egregious spill does not make the polluting activity "sudden and accidental."

Both the text of the pollution exclusion clause and drafting history marshalled by Dimmitt demonstrate that Dimmitt's intent has no bearing on the operation of the pollution exclusion clause. Unlike the quite different occurrence definition, the pollution exclusion does not contain any reference to what is "expected or intended from the standpoint of the insured." The courts that follow the plain meaning doctrine in construing the pollution exclusion clause have concluded that the intent of a generator of hazardous waste is irrelevant to the operation of

that clause. This is consistent with the drafting history marshalled by Dimmitt, which states the purpose of the pollution exclusion clause was "to avoid any question of intent." There is no merit to Dimmitt's effort to change the "question of intent" from one "to be" avoided to a question which "cannot be" avoided.

3. There is no "public policy" reason to refuse to enforce the plain language of the pollution exclusion. The Court's role is simply to determine the meaning of a private contract between these parties, and not to foster or retard environmental goals. The Court should therefore disregard pleas by the State of Florida and the City of Delray Beach that their tax base is insufficient to clean up past pollution.

Adherence to the plain meaning of the policy is particularly important with respect to the interpretation of the pollution exclusion clause. If the courts decide to twist the policy language here in order to raid the supposed "deep pocket" of the insurers, such a raid could place the stability of the entire property and casualty industry in severe peril. Sound "public policy" does not include judicial rewriting of insurance contracts to bankrupt the property and casualty insurance industry.

ARGUMENT

I. The overwhelming majority of appellate courts of last resort, i.e. highest state courts and federal appellate courts deciding state law issues, have said the plain meaning of the pollution exclusion clause excludes coverage for discharges like those in issue here.

The overwhelming majority of appellate courts of last resort, including federal appeals courts whose decisions on state law issues are seldom reviewed by the U.S. Supreme Court, have rejected the contentions Dimmitt advances here. They have held that neither a gradual discharge nor repeated spills in the normal course of business can be "sudden and accidental."

The following nine cases from the state courts of last resort and the federal courts of appeals have held that "sudden and accidental" discharges means only those discharges which are both abrupt and unexpected:

Massachusetts. Lumbermens Mutual Casualty Co. v. Belleville Industries, Inc., 555 N.E.2d 568, 572 (Mass. 1990) (no coverage for ongoing contamination of waterway near plant; sudden "must have a temporal aspect to its meaning, and not just the sense of something unexpected"). See also Lumbermens Mutual Casualty Co. v. Belleville Industries, 938 F.2d 1423 (1st Cir. 1991) (opinion after certified question answered).

Michigan. Upjohn Co. v. New Hampshire Insurance Co., 438 Mich. 197, ___ N.W.2d ___, 1991 WL 207890 (Mich. Nos. 86906-86908, Aug. 26, 1991) (no coverage for leak in underground storage tank; sudden "joins together conceptually the immediate and the unexpected").

North Carolina. Waste Management of Carolinas, Inc. v. Peerless Insurance Co., 340 S.E.2d 374, 381 (N.C. 1986) (no coverage for vicarious liability of waste transporter arising out of leaks at landfill; policy excludes liability for "damage caused by the gradual release" of pollutants).

First Circuit. A. Johnson & Co., Inc. v. Aetna Casualty & Surety Co., 933 F.2d 66, 72 (1st Cir. 1991) (**Maine** law) (policy did not cover insured's vicarious liability as generator of hazardous waste for leaks at disposal site; "sudden" should be accorded the "unambiguous, plain and commonly accepted meaning of temporally abrupt").

Second Circuit. State of New York v. Amro Realty Corp., 936 F.2d 1420, 1428 (2nd Cir. 1991) (**New York** law) (no coverage for owner of site where solvents dumped for 30 years; sudden discharge must "occur over a short period of time"). See also Ogden Corporation v. Travelers Indemnity Co., 924 F.2d 39 (2nd Cir. 1991) (**New York** law) (continuous discharges not "sudden and accidental"). Cf. Technicon Electronics Corp. v. American Home Assurance Co., 542 N.E.2d 1048 (N.Y. 1989) ("both requirements must be met"); Powers Chemco Inc. v. Federal Insurance Co., 548 N.E.2d 1301, 1302 (N.Y. 1989) (exclusion applies even when insured had no knowledge of discharge).

Third Circuit. Northern Insurance Co. of New York v. Aardvark Associates, Inc., 942 F.2d 189, 192 (3rd Cir. 1991) (**Pennsylvania** law) (no coverage for transporter of hazardous

waste who had vicarious liability arising out of practices at disposal site; "sudden" refers to "abruptness or brevity).

Sixth Circuit. U.S. Fidelity and Guaranty Co. v. Star Fire Coals, Inc., 856 F.2d 31, 34 (6th Cir. 1988) (**Kentucky** law) (no coverage for coal dust discharged in normal business operations; sudden "joins together conceptually the immediate and the unexpected").

Sixth Circuit. United States Fidelity and Guaranty Co. v. Murray Ohio Manufacturing Co., 875 F.2d 868 (6th Cir. 1989) (text in Westlaw) (**Tennessee** law), aff'g 693 F.Supp. 617 (M.D. Tenn. 1988) (no coverage for generator of hazardous waste held vicariously liable for practices at disposal site; follows Star Fire Coals, supra).

Sixth Circuit. FL Aerospace v. Aetna Casualty and Surety Co., 897 F.2d 214, 219 (6th Cir. 1990) (**Michigan** law) (no coverage for generator of hazardous waste vicariously liable for contaminated storage site; "a sudden and accidental event happens quickly, without warning, and fortuitously or unintentionally").

Only four cases from the state courts of last resort or federal courts of appeals have held that "sudden and accidental" is ambiguous and could mean only "unexpected or unintended."

Colorado. Hecla Mining Co. v. New Hampshire Insurance Co., 811 P.2d 1083, 1092 (Colo. 1991) (insurer of mining company has duty to defend; "sudden and accidental" means only "unexpected and unintended").

Georgia. Claussen v. Aetna Casualty & Surety Co., 380 S.E.2d 686, 688 (Ga. 1989) (owner of land used for landfill has coverage because "sudden" means unexpected and has no temporal connotation). See also Claussen v. Aetna Casualty and Surety Co., 888 F.2d 747 (11th Cir. 1989) (opinion after certified question answered).

Wisconsin. Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 578 (Wisc. 1990) (landfill covered because "sudden" means only "unexpected and unintended").

Third Circuit. New Castle County v. Hartford Accident and Indemnity Co., 933 F.2d 1162, 1192-99 (3rd Cir. 1991) (**Delaware** law) (sudden means nothing more than "unexpected" and the case should be remanded to determine whether discharge was unexpected).[1]

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[1] The assertion in Appellant's Initial Brief on the Merits ("Dimmitt Brief") at 10, that its conclusions are supported by the "majority of the cases that have interpreted the scope of the exclusion," is seriously flawed. Dimmitt's Appendix B cites no less than 13 cases from a single jurisdiction, Georgia, to bolster its claim to the weight of authority. Moreover, Dimmitt also cites cases from inferior courts in jurisdictions whose supreme courts have now clearly rejected the Dimmitt position, e.g. Massachusetts and Michigan. Finally, both Dimmitt and the Brief of Amici Curiae the American Fiber Manufacturers Associates, et al. ("American Fiber Brief"), rely heavily on certain decisions from New Jersey, e.g. Broadwell Realty Services, Inc. v. Fidelity and Casualty Co. of New York, 218 N.J. Super. 516, 528 A.2d 76 (A.D. 1987), even though a federal district court has predicted with confidence that the New Jersey Supreme Court will not follow those cases. See CPC International, Inc. v. Northbrook Excess and Surplus Insurance Co., 759 F.Supp. 966 (D.R.I. 1991) (New Jersey law) (predicting that New Jersey Supreme Court would rely on the plain meaning of the policy and give all parts of the policy reasonable meaning and so would not follow Broadwell). See also Lumbermens Mutual Casualty Co., supra, 555 N.E. 2d at 571 n. 2 (collecting federal cases predicting that the highest courts of Kentucky, New York

The courts have denounced in the strongest terms the attempt to read ambiguity into the phrase "sudden and accidental" and have refused to limit the exclusion to deliberate pollution. They have said the ambiguity argument "strains at logic," Waste Management of Carolinas, supra, 340 S.E.2d at 379, because the language "is clear and plain, something only a lawyer's ingenuity could make ambiguous." Star Fire Coals, supra, 856 F.2d at 34, quoting American Motorists Insurance Co. v. General Host Corp., 667 F.Supp. 1423 (D. Kan. 1987).[2]

The courts have also cited with approval the District Court's opinion at issue here. During this appeal, several courts have followed that opinion, and none have criticized it. See Lumbermens Mutual Casualty Co. v. Belleville Industries, Inc., supra, 938 F.2d at 1430; A. Johnson & Co., supra, 933 F.2d at 75; Anaconda Minerals Co. v. Stoller Chemical Co., ___ F.Supp. ___, 1991 WL 183324 (D. Utah Sept. 13, 1991); CPC International, Inc., supra, 759 F.Supp. at 975 (D.R.I. 1991); Hudson Insurance Co. v. Double D Management Co., 768 F.Supp. 1542, 1544 (M.D. Fla. 1991); Outboard Marine Corp. v. Liberty Mutual Ins. Co., 570 N.E.2d 1154 (Ill. App. 2nd Dist. 1991), appeal allowed, 575 N.E.2d 917 (Ill. 1991).

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and Ohio would not follow intermediate appellate court decisions favoring the policyholders).

[2] See also, Northern Insurance Co., supra, 942 F.2d 189, 192 (3rd Cir. 1991) (ambiguity argument "blatantly unreasonable"); Lumbermens Mutual Casualty, supra, 555 N.E.2d 568, 573 (Mass. 1990) (ambiguity argument not a "reasonable alternative").

The predominant reason the courts have given for rejecting the arguments Dimmitt makes here, and for following the District Court's opinion, is that canons of insurance contract interpretation require i) that words be given their plain and ordinary meaning, and ii) that each word be given effect and no word be interpreted as mere surplusage. These courts have held the plain meaning of "sudden" includes "abrupt" and sudden must be given the meaning "abrupt" if it is to have a meaning independent of "accidental" and is not to be considered mere surplusage. See pp. 13-16, infra.

Moreover, when confronted with the question, these courts have concluded the pollution exclusion clause excludes coverage for the generators of hazardous waste even if they have no knowledge of the improper methods ultimately used to dispose of their waste. The pollution exclusion turns solely on the nature of the ultimate discharge. Unlike the occurrence definition, it makes no reference to "the standpoint of the insured." See pp. 21-27, infra.

Because the principle that a plain meaning must be given to each and every word in a contract is a fundamental principle of Florida insurance law, this Court should find that the pollution exclusion clause here excludes any liability for any coverage of the Dimmitt liability.

II. Under established principles of Florida insurance policy interpretation, the gradual waste seepage was not "sudden," and the repeated spills as part of business operations were not "accidental."

A. This Court will enforce the plain meaning of an insurance policy where, after ordinary rules of construction are applied, there is no genuine ambiguity.

This Court has repeatedly enforced the plain language of an insurance exclusion where, after applying rules of construction, no genuine ambiguity exists. In State Farm Mutual Automobile Insurance Co. v. Pridgen, 498 So.2d 1245, 1248 (Fla. 1986), this Court enforced an exclusion for loss caused by "conversion" and rejected a contention that the failure to specify criminal or civil conversion resulted in ambiguity. It said:

> [O]nly when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction is the rule [of construing ambiguity against the insurer] apposite. It does not allow courts to rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intention of the parties.

498 So.2d at 1248, quoting Excelsior Insurance Co. v. Pomona Park Bar & Package Store, 369 So.2d 938, 942 (Fla. 1979) (enforcing exclusion for illegal sale of alcoholic beverages). Moreover, policy terms are not ambiguous simply because analysis is required to comprehend them fully. Hess v. Liberty Mutual Ins. Co., 458 So.2d 71, 72 (Fla. 3d DCA 1984) (insured did not "rent" daughter's apartment by merely co-signing her note). See also O'Conner v. Safeco Ins. Co. of North America, 352 So.2d 1244, 1246 (Fla. 1st DCA 1977) (coverage for "vacant land" did not include clay road; "though the questions were real and pressing,

the answer was clear."). "No amount of judicial alchemy can change...fundamental distinctions in policy language," National Union Fire Insurance Co. of Pa. v. Carib Aviation, Inc., 759 F.2d 873, 877 (11th Cir. 1985) (Florida law).

Here the applicable rules of construction which are to be applied before determining whether a "genuine ambiguity" remains are as follows:

* Each word in a contract will be given plain meaning. See State Farm Mutual Automobile Insurance Co., supra, 498 So.2d at 1248 ("[b]y its plain meaning the clause excludes from coverage"); Simmons v. Provident Mutual Life Ins. Co., 496 So.2d 243, 245 (Fla. 3d DCA 1986) (exclusion for "medical...treatment" excluded liability for diagnostic test; court would give "practical, sensible interpretations in accordance with the natural meaning of the words"); Morrison Assurance Co. v. School Board, 414 So.2d 581 (Fla. 1st DCA 1982) (exclusion for "physical training" applies to physical education class; "exclusionary clause is plain and unambiguous on its face, leaving no room for construction"); United States Fire Ins. Co. v. Morejon, 338 So.2d 223, 225 (Fla. 3d DCA 1976) (coverage for "personal injury" did not include liability as recipient of liquidated corporate assets for injuries caused by the corporation; court would not extend coverage "beyond that plainly set forth").

* Every provision in a contract should be given meaning and effect and apparent inconsistencies reconciled if possible. See Excelsior Insurance Co., supra, 369 So.2d at 941 (every

provision given meaning and effect); American Employers' Ins. Co. v. Taylor, 476 So.2d 281, 284 (Fla. 1st DCA 1985) (prohibition against "concealment and fraud" applies to proof of loss; "every provision in a contract should be given meaning and effect").

When these principles are applied to the pollution exclusion clause, that clause is not ambiguous and it excludes coverage for Dimmitt.

B. "Sudden" means "abrupt."

1. The plain meaning of "sudden" is "abrupt."

Judge Hodges held that the plain meaning of "sudden" here is "pollution which occurs abruptly, instantly, or within a very short period of time." 731 F.Supp. at 1520.

Resorting to definitions in a dictionary, Dimmitt argues that "sudden" does not necessarily mean "abrupt" but can mean simply "unexpected and unintended." Dimmitt also relies on the Georgia Supreme Court's claim that "sudden" "does not usually describe the duration of event, but rather its unexpectedness," Claussen, supra, 380 S.E.2d at 688. Dimmitt Brief at 39.

The very examples, however, that Claussen gives - a sudden storm, a sudden turn in the road, a sudden death - are abrupt events:

* A "sudden storm" is not "slowly building."
* A "sudden turn" is not a "gradual turn."
* A "sudden death" is not a "death by lingering illness."

Moreover, while sudden has a "sense of the unexpected," 731 F.Supp. at 1520, a sudden event can also be an expected event:

* The weatherman can predict a "sudden storm."

* We can see a turn on a map, or drive it every day, and still describe it as a "sudden turn."

* We both expect and intend that a "sudden death" playoff will end but it is its abruptness that makes it "sudden."

Thus, neither the Dimmitt Brief nor the cases on which it relies give an example of the usage of "sudden" that is consistent with Dimmitt's narrow definition of the word. This shows, at the very least, that it is Judge Hodges, not Dimmitt, who has correctly captured the "plain meaning" of "sudden." See A. Johnson & Co., supra, 933 F.2d at 72 ("sudden" means "abrupt" when language interpreted "according to its plainly and commonly accepted meaning"); Northern Insurance Co., supra, 942 F.2d at 192 n. 3 (same); Upjohn, supra, Slip Op. at 10. (same).

2. The meaning of "sudden" which is different from "accidental" is "abrupt."

Even if "sudden" could, in some contexts, mean "unexpected and unintended," in the phrase "sudden and accidental" it must mean "abrupt." This is because the word "accidental" means "an event which is unexpected or unintended and does not take place within the usual course." 731 F.Supp. at 1520. In order to keep sudden from being mere surplusage in the phrase "sudden and accidental," "sudden" must mean something other than "unexpected and unintended." It must mean "abrupt."

In Northern Insurance Co., supra, the federal Third Circuit Court of Appeals used exactly this reasoning in applying the

pollution exclusion to a transporter of waste ultimately left at a defective landfill:

> To read "sudden and accidental" to mean only unexpected and unintended is to rewrite the policy by excluding one important pollution coverage requirement--abruptness of the pollution discharge. The very use of the words "sudden and accidental" reveal a clear intent to define the words differently, stating two separate requirements. Reading "sudden" in its context, i.e. joined by the word "and" to the word "accident", the inescapable conclusion is that "sudden", even if including the concept of unexpectedness, also adds an additional element because "unexpectedness" is already expressed by "accident". This additional element is the temporal meaning of sudden, i.e. abruptness or brevity. To define sudden as meaning only unexpected or unintended, and therefore as a mere restatement of accidental, would render the suddenness requirement mere surplusage.

Northern Insurance Co., supra, 942 F.2d at 192 (emphasis added). See also Lumbermens Mutual Casualty Co., supra, 555 N.E.2d at 571 (criticizing Claussen for construing sudden "in isolation without recognizing the significance of the companion word 'accidental'"); Waste Management of Carolinas, supra, 340 S.E.2d at 382 (criticizing cases which construe sudden "to be no more than another synonym for 'accidental'"); A. Johnson & Co., supra, 933 F.2d at 73 (if sudden is synonymous with accidental, then one of the words would be "nothing more than redundant surplusage"); Technicon Electronics Corp., supra, 542 N.E.2d at 1050 ("both requirements must be met for the exception to become operative"); Just, supra, 456 N.W.2d at 579-580 (Steinmetz, J., dissenting); CPC International, Inc., supra, 759 F.Supp. at 973 (no portion of the policy should be left "useless or inexplicable," so sudden

should be interpreted as meaning "abruptly, precipitantly, or over a short period of time").

3. Court decisions construing other policies provide no basis for not adhering to the plain meaning of "sudden" here.

In an attempt to impeach the plain meaning of "sudden" the Dimmitt brief argues that, in other contexts, "sudden" has been held to mean "unexpected and unintended" and not "abrupt."

Dimmitt's reliance on the interpretation of "sudden settlement or collapse" in Zimmer v. Aetna Ins. Co., 383 So.2d 992, 994 (Fla. 5th DCA 1980) is misplaced. See Dimmitt Brief at 41. There, in order to give meaning to "settlement," it was necessary to construe the phrase to mean something more gradual than "sudden collapse." Id. at 993. The principle upon which Zimmer relies - that every word must be given meaning - here supports a finding that sudden means "abrupt" when coupled with "accidental."

Dimmitt also argues that "sudden and accidental" had an accepted meaning of "unexpected and unintended" in the insurance industry in 1970. Dimmitt Brief at 28-33. This is simply wrong. See e.g. Bean, The Accident Versus the Occurrence Concept, 1959 Ins. L. J. 550, 553 (1959) (arguing that insurance should be confined to "sudden accidents" to exclude coverage for "gradual property damage" from waste disposal). Dimmitt argues that the words "sudden and accidental" in boiler and machinery policies were held not to preclude coverage for gradual events. Dimmitt Brief at 28-33. However, "[p]roperly read, the boiler and

machinery cases all confirm, either explicitly or implicitly, that 'sudden' includes a temporal element." Johnstone & Ansell, Insured Counsel Doubletalk: The Fallacies in Anderson and Passannante's Arguments Concerning the Interpretation of 'Sudden and Accidental' in Boiler and Machinery Policies, 5 Mealey's Lit. Rep. No. 10 at 22 (1991).[3] In Lumbermens Mutual Casualty Co., supra, 555 N.E.2d at 573, the Massachusetts Supreme Judicial Court expressly refused to read its boiler and machinery case on which Dimmitt relies here, New England Gas & Elec. Ass'n. v. Ocean Accident & Guar. Co., 116 N.E.2d 671 (Mass. 1953), as precluding its holding that, in the pollution exclusion clause, "sudden" means "abrupt." See Dimmitt Brief at 29 n. 35.

C. "Accidental" means "unexpected and unintended," i.e. not a normal part of business operations.

Dimmitt argues that at least some spills on the Peak Oil property were "sudden" and therefore Southeastern should be required to afford coverage even if this Court should agree that

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[3] Lawyers on both sides of the pollution exclusion clause litigation have conducted a spirited debate over the meaning of the boiler and machinery cases. Dimmitt cites the first article, by policyholder counsel. See Anderson & Passannante, Insurance Industry Doublethink: The Real and Revisionist Meanings of "Sudden and Accidental", 12 Mealey's Ins. Lit. Rep. 186 (1990). The article cited above responds to the article cited by Dimmitt. Johnstone & Ansell, Insured Counsel Doubletalk: The Fallacies in Anderson and Passannante's Arguments Concerning the Interpretation of 'Sudden and Accidental' in Boiler and Machinery Policies, 5 Mealey's Lit. Rep. No. 10 at 18 (1991). See also Anderson & Passannante, 'Dishonesty' and the 'Sudden and Accidental' Con Game: It's a Beautiful Thing, the Destruction of Words, 5 Mealey 's Lit. Rep. No. 17 at 11 (1991); Johnstone & Ansell, Anderson and Passannante: 'Dishonesty' and 'Destruction' - Who's Conning Whom?, 5 Mealey's Lit. Rep. No. 20 at 14 (1991). The articles in this debate not cited by Dimmitt are reproduced in an Appendix to this brief.

sudden means "abrupt." See Dimmitt Brief at 46-47. The Dimmitt argument, however, ignores entirely the requirement that the spills also be "accidental."

The District Court's definition of "accidental," which Dimmitt has not disputed, is "an event which is unexpected or unintended and which does not take place within the usual course." 731 F.Supp. at 1520. Because these spills were "common place events which occurred in the course of daily business," Judge Hodges reasoned that they were "just the kind of pollution which the pollution exclusion clause was meant to exclude from coverage," 731 F.Supp. at 1521. He therefore refused to find that they were "sudden and accidental," even though, viewed in isolation, some of the spills might have been unexpected or unintended at the precise moment they took place. Numerous courts around the country have followed his reasoning on this point.[4]

In A. Johnson & Co., supra, the federal First Circuit Court of Appeals denied coverage to a generator of hazardous waste who, like Dimmitt, faced CERCLA liability for the disposal practices of a contractor. Following Judge Hodges' opinion, the Court held that individual spills and leaks could not make the discharges "sudden and accidental":

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[4] See Lumbermens Mutual Casualty Co., supra, 938 F.2d at 1430; A. Johnson & Co., supra, 933 F.2d at 75; Anaconda Minerals, supra, ___ F.Supp. ___, 1991 WL 183324; CPC International, Inc., supra, 759 F.Supp. at 975; Hudson Ins. Co., supra, 768 F.Supp. at 1547; Outboard Marine, supra, 570 N.E.2d at 1166.

> Mere speculation under these circumstances that any individual instance of disposal, including leaks, occurred "suddenly" cannot contradict a reasonable reading of the allegations that the entire pattern of conduct was not a "sudden and accidental" occurrence.

933 F.2d at 75. In Lumbermens Mutual Casualty Co., supra, the same court again cited Judge Hodges' opinion with approval and rejected the policyholder's contention that an isolated fire or flood could trigger coverage for a pattern of recurrent polluting events. Refusing to let a "very small tail" wag "a very large dog," the Court said:

> [I]n the case of a pollution-prone operation, where the emission of pollutants is part and parcel of the daily conduct of business, there is the possibility of infinite variations on the usual theme; i.e. polluting incidents are likely to occur that are on the fringe of normal operations but that the company seeks to characterize as sudden and accidental.... We think it illogical to believe that insurers intended through the "sudden and accidental" exception to buy into a risk and/or litigation package of this nature.

938 F.2d at 1428 (emphasis added). The court thus refused to "eviscerate the exclusion for pollution" and rejected a "microanalytical viewpoint." See also Star Fire Coals, supra, 856 F.2d at 35 (releases "taking place on a regular basis or in the ordinary course of business" are excluded); CPC International, Inc., supra, 759 F.Supp. at 976 (clause excludes contamination "caused by a combination of leaks, spills and disposal methods - in short, the kind of gradual process that the pollution exclusion clause was designed to exclude"); Barmet of Indiana v. Security Insurance Group, 425 N.E.2d 201, 203 (Ind. Ct. App. 1st Dist. 1981) (regular malfunctions of pollution

control system not covered); Weber v. IMT Insurance Co., 462 N.W.2d 283 (Iowa 1990) (repeated spills of manure not covered).

Sound underwriting practices mandate the exclusion of coverage for occurrences which are a recurring aspect of business operations. This is the principle behind many of the exclusions typically found in a comprehensive general liability policy, e.g. the exclusion for the risk of repairing damaged products or the endorsement excluding coverage for completed operations. Many risks are insurable, but the costs of doing business are not. Because regularly occurring liabilities are commonly regarded as a cost of doing business, not a risk to be insured, "liability resulting from such longstanding [improper disposal] practices should not be covered by liability insurance." Brett, Insuring Against the Innovative Liabilities and Remedies Created by Superfund, 6 J. Envt'l L. 1, 55 (1986). This principle undergirds the interpretation of the pollution exclusion clause adopted by the District Court here: The policy does not insure "common place events which occured in the course of daily business," 731 F.Supp. at 1521.

The Dimmitt dealerships profited from selling oil to Peak, which cut its costs by using improper waste disposal methods. The Dimmitt dealerships should not now be allowed both to keep their profits from doing business with Peak and to shift the liability of doing business with Peak to their insurers.

D. The pollution exclusion clause turns on the nature of the discharge and avoids any reference to the insured's intent.

1. The pollution exclusion excludes "occurrences" otherwise covered.

There is no linguistic or legal merit to Dimmitt's arguments that the occurrence language should be "read into" the policy exclusion or that the policy exclusion is to be construed as nothing more than a restatement of the occurrence definition.

First, the pollution exclusion is, above all, an "exclusion." The declared and well-understood purpose of an exclusion is to exclude. As the Michigan Supreme Court recently held in Upjohn, supra:

> We disagree with the assertion that the pollution-exclusion clause simply clarified the definition of an "occurrence" in the coverage section of the policy. Simply stated, it is our belief that exclusions exclude.

Upjohn, supra, Slip Op. at 9 n. 6.

Second, the pollution exclusion clause must be given meaning independent of the occurrence definition or else the pollution exclusion clause is rendered superfluous. See CPC International, Inc., supra, 759 F.Supp. at 973 (predicting the New Jersey Supreme Court will not follow the decisions of its intermediate appellate courts because those decisions render the language of the pollution exclusion clause superfluous.)

Third, the pollution exclusion clause uses different language than the occurrence definition. If the drafters had wanted to restate the occurrence definition, they could have easily done so by using identical language. Their use of

different language surely signals a difference in meaning. In this regard, it is noteworthy that the pollution exclusion clause does not even modify the term "occurrence." Rather, it is a limit on the damage "to which this insurance applies." The differences in language between the clauses include at least the following:

* In the pollution exclusion clause "sudden" is coupled to "accidental" and there is no reference to "continuous exposure." Thus while the occurrence clause broadens the concept of "accident" by including "continuous or repeated exposure to conditions," the drafters of the pollution exclusion clause did not use this language with reference to discharges of waste. Instead, they coupled to the word "accidental" the conjunctive requirement that the accident be "sudden." With respect to pollution, this eliminates coverage for continuous or repeated exposure and limits coverage to only a subset of those discharges which might otherwise be termed "accidental." There is no merit to Dimmitt's attempt to stand this distinction on its head by arguing that the occurrence definition "defines" accident for all purposes in the policy. Dimmitt Brief at 14-15. See Star Fire Coals, supra, 856 F.2d at 34 (use of forms of word "accident" in both clauses does not create ambiguity); Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 702 F.Supp. 1317, 1324 (E.D. Mich. 1988) (same).

* It is the "discharge" which triggers the pollution exclusion, not the resulting "damage." See Star Fire Coals,

supra, 856 F.2d at 34; Lumbermens Mutual Casualty Co., supra, 555 N.E.2d at 571; Technicon, supra, 542 N.E.2d at 1051; New Castle County, supra, 933 F.2d at 1200.

* There is no reference in the pollution exclusion clause to matters "expected or intended from the standpoint of the insured." See A. Johnson & Co., supra, 933 F.2d at 72 n. 9 (contrasting language in clauses). As Dimmitt repeatedly emphasizes in discussing the drafting history of the pollution exclusion clause, a principal purpose of the pollution exclusion clause announced by the Insurance Rating Board ("IRB") was "to avoid any question of intent." Dimmitt Brief at 21 (emphasis added). See also Dimmitt Brief at 22, 27; Florida Brief at 14 ("to avoid any question of intent"). The IRB drafters deliberately rejected a proposal to include "standpoint of the insured" language in the pollution exclusion clause because, as one drafter wrote, the clause "does not itself attempt to address the state of mind of the insured but rather is pitched to a particular physical event." Harwood, Coyle & Zampino, The "Frivolity" of Policyholder Gradual Pollution Discharge Claims, 5 Mealey's Lit. Rep. No. 40 at 19 (1991)[5].

The pollution exclusion thus excludes the discharge of wastes unless that discharge was both sudden and accidental. It

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[5] A reply article by policyholder counsel does not question this drafting history. See Sayler, The Emperor's Newest Clothes/Revisionism and Retreat: The Insurers' Last Word On The Pollution Exclusion, 5 Mealey's Lit. Rep. No. 46 (1991). A copy of both articles is included in the Appendix to this brief.

is the nature of the discharge, and not the insured's intent, that triggers the exception to the exclusion.

2. The intent of a generator of hazardous waste is irrelevant in determining the application of the pollution exclusion clause.

The scarcity of cases construing the pollution exclusion clause prior to 1980 strongly suggests that the decision to make the insured's intent irrelevant to coverage had little practical effect prior to the adoption of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C.A. §9601 et seq. (1983), in 1980. Thus, it cannot be said to have been a misrepresentation in the early 1970s for the insurance industry to have predicted that the pollution exclusion clause would not have a major effect on coverage for polluting events. See Dimmitt Brief at 16.

CERCLA, of course, changed the liability picture dramatically by imposing strict liability for pollution irrespective of intent. Perhaps the best illustration of the new strict liability imposed by CERCLA is presented by the facts of this case. The Dimmitt policyholders are generators of hazardous waste whose liability under CERCLA arises out of their prior ownership of waste oil which they sold to Peak Oil for recycling and disposal. CERCLA holds them vicariously liable for the cost of cleaning up Peak's site based on the presumption that they have profited in the past from Peak's slipshod disposal practices and so should now be required to pay for the cleanup. See CERCLA §107, 42 U.S.C.A. §9607 (1983).

Stung by CERCLA liability, the Dimmitt parties now seek a judicial rewriting of the insurance policy to add to the pollution exclusion clause language deliberately omitted in 1970. The Dimmitt Brief adopts the slogan "intentional polluters" and seeks to paste it onto the pollution exclusion clause as a substitute for the quite different policy language. In other words, Dimmitt now seeks to make the "question of intent" no longer a question "to be" avoided but instead one which "cannot be" avoided.

The state courts of last resort and federal courts of appeal that follow the plain meaning doctrine in construing the pollution exclusion clause have concluded that the intent of a generator of hazardous waste is irrelevant to the operation of that clause. In Northern Insurance Co., supra, the federal Third Circuit Court of Appeals applied the pollution exclusion clause to a transporter of industrial waste vicariously liable under CERCLA for the discharge of hazardous waste at sites by companies to whom it transported waste:

> We have scrutinized this language for any hint that it is limited to "active" polluters or those who "actually release pollutants," but we find no ambiguity and no support for Aardvark's argument. The clause unambiguously withholds coverage for injury or damage "arising out of the discharge, dispersal, release or escape" of pollutants (emphasis added), not merely the insured's discharge, dispersal, release or escape "of pollutants." As the district court aptly wrote in Federal Insurance Co. v. Susquehanna Broadcasting Co., 727 F. Supp. at 177, "the exclusion clause makes no reference at all to active polluters or passive polluters. The terms are foreign to the policies in question." See also Powers Chemco, Inc. v. Federal Insurance Co., 74 N.Y.2d 910, 548 N.E.2d 1301, 549 N.Y.S.2d 650 (1989).

942 F.2d at 194. See also A. Johnson & Co., supra, 933 F.2d at 72 n. 9 (clause excludes coverage for generator held vicariously liable; clause "unlike the 'occurrence' definition, does not by its terms take account of an insured's status as a passive polluter"); FL Aerospace, supra, 897 F.2d at 220 (clause excludes coverage for generator held vicariously liable; no proof that EPA cleanup was caused by a "sudden or accidental" discharge at the disposal site); Waste Management of Carolinas, supra, 340 S.E.2d at 381 (clause excludes coverage for transporter of waste held vicariously liable; placing liability on insured puts it on party "with the most control over the circumstances"); Powers Chemco Inc., supra, 548 N.E.2d at 1302 (clause excludes coverage for purchaser of contaminated land; "Simply put, there is nothing in the language of the pollution exclusion clause to suggest that it is not applicable when liability is premised on the conduct of someone other than the insured").

Further support for this conclusion is found in the text of other exclusions in the CGL policy. These exclusions operate irrespective of the insured's intent. For example, they exclude damage arising out of the use of an automobile or water craft owned by the insured. See Exclusions (b), (c), (d).[6] It would

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[6] For example, Exclusion (b) says the CGL coverage does not apply to damage:

> arising out of the ownership, maintenance, operation, use, loading or unloading of
>
> (1) any AUTOMOBILE or aircraft owned or operated by or rented or loaned to any INSURED, or

defeat the plain language of these exclusions and upset years of case law to read the occurrence definition as a gloss on these exclusions and to apply them only when the insured expected or intended the damage caused by the operation of the vehicle. See Cesarini v. American Druggist Ins. Co., 463 So.2d 451, 452 (Fla. 2d DCA 1985) ("[t]he use to which the vehicle was being put at the time of the injury governs the application of the exclusion"). It is thus the insurer's position, not that of Dimmitt, which is consistent with traditional insurance law.[7]

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(2) any other AUTOMOBILE or aircraft operated by any person in the course of his employment by any INSURED;

but this exclusion does not apply to the parking of an AUTOMOBILE on premises owned by, rented to or controlled by the NAMED INSURED or the ways immediately adjoining, if such AUTOMOBILE is not owned by or rented or loaned to ANY INSURED;

Dimmitt had separate coverage for automobiles.

[7] The American Fiber Brief at n. 6 contends that the pollution exclusion must be viewed from the insured's standpoint to avoid upsetting established case law holding that an intentional assault on an insured is accidental from the insured's point of view. Here, however, the excluded "damage" is not damage to the insured, but rather damage to the environment for which the insured is vicariously liable. Exclusion of that liability is no more inconsistent with insurance law than the other liability exclusions which operate irrespective of the insured's intent.

Moreover, in an analogous context, a Florida court has held that coverage for "personal injury" liability does not extend coverage for the insured's statutory vicarious liability, as the recipient of a liquidated corporation's assets, for personal injuries caused by the liquidated corporation. United States Fire Ins. Co., supra, 338 So.2d at 224-25. Thus, it may be questioned whether this case involves "property damage" at all, as opposed to uninsured statutory vicarious liability arising out of Dimmitt's corporate agreements with Peak.

II. There is no "public policy" reason to refuse to enforce the plain language of the pollution exclusion.

Amici curiae State of Florida and City of Delray Beach urge this Court to respond to "far-reaching public policy ramifications" in interpreting the pollution exclusion clause. Brief of Amicus Curiae City of Delray Beach at 2. Specifically, the City of Delray Beach complains that a company which polluted its water supply is now insolvent and insurance coverage is needed to save taxpayers the expense of the cleanup. Id. at 10. In a similar vein, the State of Florida declares that "insurance corporations should bear the cost of protecting our state's natural resources from environmental damage." Brief of Amicus Curiae State of Florida at 3. Public funds, the State of Florida says, are insufficient to finance cleanup activities. Id. at 10-11.

These amici ignore, however, that insurers may also not have sufficient funds to finance environmental clean-ups. Court decisions that distort the plain language of policies in order to create "judge-made insurance" threaten the solvency and stability of the entire property and casualty insurance industry. See Abraham, Environmental Liability and the Limits of Insurance, 88 Col. L. Rev. 942, 960 (1988); Cheek, Site Owners or Liability

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It is also worth noting that the article on which the Fiber Manufacturers' Brief relies, Ballard and Manus, Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion, 75 Cornell L. Rev. 610 (1990), concludes on other issues that the pollution exclusion precludes coverage for "unsecured land disposal" because such discharges are not "sudden and accidental."

Insurers: Who Should Pay for Cleaning Up Hazardous Waste?, 8 Va. J. Nat. Res. L. 75, 87 (1988).

At a 1990 Congressional hearing, the Environmental Protection Agency estimated the average cleanup costs per Superfund site to be $25.5 million. See Insurer Liability for Cleanup Costs of Hazardous Waste Sites, Hearing Before the Sub-Comm. on Policy Research and Insurance of the House Comm. on Banking, Finance and Urban Affairs, House of Representatives, 101st Cong., 2nd Sess., (1990). Total cleanup costs for all environmental liabilities were estimated as high as $750 billion. By comparison, the entire surplus of the American property and casualty insurance industry in 1990 was $137 billion. Id. at 75.

In the final analysis, however, the Court's role is not to tailor liability to the size of the parties' pocketbooks, but "is simply to determine the meaning of a private contract between these parties, not to foster or retard environmental goals." A. Johnson & Co., supra, 933 F.2d at 73 n. 10, quoting Patrons Oxford Mutual Insurance Co. v. Marois, 573 A.2d 16, 17 (Me. 1990). See also Lumbermens Mutual Casualty Co., supra, 555 N.E.2d at 571 ("[w]e, of course, reject any temptation to let our own ideas of public policy concerning the desirability of insurance coverage for environmental damage guide our legal conclusions"). As one Florida Court of Appeal has cogently observed, the rule that ambiguity is to be construed in favor of an insured "is not license for our raiding the deep pocket."

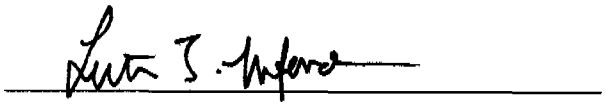
State Farm Fire and Casualty Co. v. Oliveras, 441 So.2d 175, 178 (Fla. 4th DCA 1983).

No matter now laudable a goal the environmental "cleanup" may be, it cannot justify retroactive rewriting of private insurance contracts. The State of Florida's pursuit of its environmental goals cannot support the wholesale impairment of private contracts. Cf. U.S. Const. Art. I §10. Underwriters do not ask that this Court twist the policy language in the insurer's favor. Rather, they contend that this Court should simply adhere to the "plain meaning" of the policy and hold that the pollution exclusion clause excludes coverage for the Dimmitt pollution liabilities at issue here.

CONCLUSION

For these reasons, this Court should hold that the gradual waste seepage and repeated spills were not "sudden and accidental" and the pollution exclusion clause precludes coverage of the Dimmitt pollution liabilities at issue in this case.

Respectfully submitted,



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CERTIFICATE

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