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IN THE SUPREME COURT OF FLORIDA

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

Defendants-Appellants

v.

SOUTHEASTERN FIDELITY INSURANCE CORPORATION,

Plaintiff-Appellee

APPEAL NO. 78-293

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

USCA NO. 90-3359

BRIEF OF AMICI CURIAE THE AMERICAN FIBER MANUFACTURERS ASSOCIATION, THE AMERICAN PETROLEUM INSTITUTE, THE CHEMICAL MANUFACTURERS ASSOCIATION, INTERNATIONAL BUSINESS MACHINES CORPORATION and OLIN CORPORATION

Of Counsel:

WILLIAM H. ALLEN
SAUL B. GOODMAN
WILLIAM F. GREANEY
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Amici Curiae

JEFFREY A. TEW
DANIEL A. CASEY
Kirkpatrick & Lockhart
Miami Center, Suite 2000
201 South Biscayne Boulevard
Miami, Florida 33131-2305
(305) 539-3300

Counsel for Amicus Curiae
The American Fiber
Manufacturers Association

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ISSUE PRESENTED

The United States Court of Appeals for the Eleventh Circuit has certified the following question of Florida law to this Court pursuant to Article 5, Section 3(b)(6) of the Florida Constitution:

> Whether, as a matter of law, the pollution exclusion clause contained in the comprehensive general liability insurance policy precludes coverage to . . . [the policyholder] for the environmental contamination that occurred in this case.

The so-called "pollution exclusion" clause referred to by the court of appeals is a standardized provision that was unilaterally drafted by the insurance industry and written into comprehensive general liability ("CGL") policies in 1990.[1/] The clause provides that a CGL policy that contains it does not apply to "bodily injury or property damage arising out of the discharge, dispersal, release or escape of" a list of specifics "or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water." A savings clause says that the exclusion does not apply and thus there is coverage "if such discharge, dispersal, release or escape is sudden and accidental."[2/] The "environmental contamination that occurred in this case" is described in the Statement of the Case, which is based on the opinions of the district court and the court of appeals.

INTEREST OF AMICI CURIAE

The amici curiae International Business Machines Corporation and Olin Corporation are manufacturers faced with retroactive no fault liabilities for environmental cleanup

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[1/] The CGL policy is itself a standard form drafted by committees of insurers under the aegis of insurance industry trade associations. See New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1181 (3d Cir. 1991) (discussing history of CGL form). CGL policies were sold to thousands of individual consumers and businesses in Florida and throughout the country.

[2/] The clause, including the list of specific items, is quoted in the opinions of the district court, 731 F. Supp. at 1519, and the court of appeals, 935 F.2d at 242, which, however, omit the catchall "or other irritants, contaminants or pollutants."

costs under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), as amended, 42 U.S.C. § 9601 et seq., and other statutes. Amicus curiae The American Fiber Manufacturers Association ("AFMA") is a non-profit trade association whose member companies are engaged in the domestic production of manufactured fibers. Amicus curiae The American Petroleum Institute ("API") is a non-profit trade association whose member companies are engaged in all phases of the petroleum industry, including the production, marketing and refining of crude oil and petroleum products in the United States. Amicus curiae The Chemical Manufacturers Association ("CMA") is a non-profit trade association whose member companies account for more than 90 percent of the production capacity of basic industrial chemicals in the United States. A number of AFMA's, API's and CMA's member companies are, like IBM and Olin, faced with strict liability claims for environmental cleanup costs under CERCLA.

A number of the companies thus appearing or represented on this brief have submitted claims to Southeastern or other insurers seeking reimbursement for their environmental liabilities. Amici therefore have a substantial interest in ensuring that policyholders such as the appellants, whose insurer-drafted form contracts are materially identical to those purchased by amici, are not deprived of insurance coverage for CERCLA liability on the basis of restrictive interpretations of the pollution

exclusion clause. A principal theme of this brief is that the coverage-defeating temporal interpretation of the pollution exclusion offered by the insurer in this appeal is refuted by the insurance industry's contemporaneous explanation of its underwriting intent when the clause was first inserted in comprehensive general liability insurance policies.

STATEMENT OF THE CASE

Factual Background

Dimmitt Chevrolet, Inc., and Larry Dimmitt Cadillac, Inc. (hereinafter usually referred to collectively as "Dimmitt") are two automobile dealerships in Clearwater, with service departments that, among other things, drain the crankcases of their customers' cars. From 1974 until 1979, Dimmitt sold the used crankcase oil thus drained to Peak Oil Company, which had a plant in Hillsborough County where it recycled used crankcase oil for sale as used oil.

In 1983, the U.S. Environmental Protection Agency determined that Peak's recycling operations had resulted in extensive soil and groundwater pollution at and around the site of its plant. It appears that Peak had placed waste oil sludge in unlined storage ponds, from which chemicals had escaped into the soil and groundwater. Additional pollution was created by oil spills and leaks at the recycling site and by occasional runoff of contaminated rainwater.

In July 1987 the EPA notified Dimmitt that, pursuant to the federal Superfund statute, known as the Comprehensive Environmental Response, Compensation and Liability Act of

1980, it was potentially responsible for the costs of investigating and cleaning up the pollution at the Peak site. The sole basis for Dimmitt's alleged liability, an allowable basis under the federal statute, was that it was a source of the crankcase oil that, when recycled by Peak, resulted in the spillage of hazardous waste. The EPA did not allege that Dimmitt authorized or even knew of the inappropriate disposal of the oil sludge, the creation of which was a full manufacturing step removed from the draining of crankcases by Dimmitt's mechanics.[3/]

In February 1989 Dimmitt and other potentially responsible parties entered into two consent orders with the EPA under which, although not admitting liability, they agreed to pay for remedial measures at the Peak site.

Dimmitt asked that Southeastern Fidelity Insurance Corporation defend it against the EPA's claim and indemnify it for any money it was legally obligated to expend in investigating and cleaning up pollution damage at and around the Peak site. Southeastern, which had sold CGL insurance policies to Dimmitt for the years 1972-80, refused to provide defense or indemnification.

[3/] Southeastern does not dispute that Dimmitt was unaware of Peak's waste disposal activities and the releases of pollutants that allegedly occurred at the Peak Oil site. See R3-63-Exh. C at 4; R2-35-Exh. D at 7. Indeed, the district court stated that "it is undisputed that [Dimmitt] never knew or intended to cause contamination at Peak." Industrial Indem. Ins. Co. v. Crown Auto Dealerships, Inc., 731 F. Supp. 1517, 1520 (M.D. Fla. 1990).

Proceedings in the Federal Court

In October 1988, Southeastern filed suit in the United States District Court for the Middle District of Florida, seeking a declaratory judgment that it owed no duty to defend or indemnify Dimmitt under the CGL policies it had sold to Dimmitt. Dimmitt filed a counterclaim seeking a contrary declaration. Both parties filed motions for summary judgment. The court assumed for the purposes of its decision that Dimmitt's liability was within the basic coverage of the policies. 731 F. Supp. at 1519. It therefore focused on whether, in the circumstances of the case, the pollution exclusion clause excluded Dimmitt's liability for environmental cleanup costs from the coverage it assumed to exist. The court granted summary judgment for Southeastern and denied Dimmitt's cross-motion for partial summary judgment. The court held that the pollution exclusion clause in the CGL policy unambiguously barred coverage because the discharge of polluting wastes at the Peak site occurred over a number of years and therefore could not be characterized as "sudden" within the temporal meaning it attributed to that term. The court defined "sudden" to mean "pollution which occurs abruptly, instantly, or within a very short period of time." Id. at 1520. It held that an "accidental" event for the purposes of the policy is one "which is unexpected or unintended and does not take place within the usual course." Id.

On appeal, the Court of Appeals for the Eleventh Circuit found that the case "involves an important issue of Florida law that has not been addressed" by this Court and decided to certify to this Court the question whether the pollution exclusion clause precluded coverage. 935 F.2d at 241. The court directed that there be transmitted to this Court, "to assist consideration of the case," the entire record and the briefs of the parties in the court of appeals and specifically stated that "the record properly includes the extrinsic evidence submitted by Dimmitt regarding the drafting history of the pollution exclusion clause and the intent of the insurance companies." 935 F.2d at 243 n.3. As a part of its certification, the court recited the facts substantially as they are set out above, and it said that its phrasing of the question it certified (set out in the Issue Presented section of this brief) should not be taken "to limit" this Court "in its consideration of the problems posed by the entire case." Id. at 243.

SUMMARY OF ARGUMENT

For at least four reasons, this Court should answer the question posed to it by the court of appeals in the negative.

I

The pollution exclusion clause does not bar coverage of Dimmitt's strict liability for the cost of cleaning up environmental pollution caused by the activities of unrelated third parties. The clause bars coverage for liability

"arising out of" the discharge of pollutants but does not specify that it applies when, unknown to Dimmitt, pollution was created by third parties. Since the ordinary policyholder would not understand the clause to deprive it of comprehensive general liability insurance coverage because of the actions of unrelated third parties, the application of the exclusion clause is ambiguous, and, according to two established Florida principles of interpretation -- the principles that ambiguities are resolved in favor of coverage and exclusion clauses are narrowly construed to preserve coverage -- the clause must be interpreted so as to afford coverage to Dimmitt. Moreover, such an interpretation advances the purpose of the clause, as explained by the insurance industry when it was drafted, which was to promote environmental protection by ensuring that deliberate industrial polluters bear the full economic costs of their activities.

II

Even if the pollution exclusion clause did apply to pollution caused by third parties, it would not be operative in this case, as the clause itself expressly preserves coverage where the "discharge, dispersal, release or escape" of pollutants is "sudden and accidental." While the word "sudden" can bear the temporal connotation ascribed to it by the district court, it is equally, if not more, susceptible to bearing the alternative meaning of unexpectedness. In the context of a contractual clause concerning pollution damage, which can result from an abrupt event but more usually results

unexpectedly from a continuing process, the use of the word "sudden" creates ambiguity. The existence of this ambiguity is evidenced by differing dictionary definitions and large bodies of conflicting judicial opinions and academic writings concerning the correct interpretation of the word. Application of the principles of interpretation mentioned above yields the result that the exclusion clause, which was drafted entirely by the insurance industry, should be construed to preserve coverage. Thus, "sudden" must be understood to mean unexpected, and not to embody a temporal element, so that Dimmitt will be covered for damage arising from pollution which it neither expected nor intended.

III

The suggested interpretation of "sudden and accidental" is consistent with the historical record of the development of the pollution exclusion clause and with explanations of the meaning of the phrase given by the insurance industry to regulators and the public when the industry drafted the pollution exclusion clause in 1970. Representatives of the insurance industry repeatedly told regulators in Florida and elsewhere that the clause did not limit coverage to claims arising out of pollution events that occurred abruptly. On the contrary, they explained, the clause was a clarification of the existing limitation of coverage to unexpected and unintended pollution.

IV

The alternative interpretation that gives primacy to the temporal sense of the word "sudden" is unworkable when applied to most fact situations. Its adoption would enmesh the courts in complex questions concerning the characterization of the precise event that caused the pollution. Pollution rarely occurs instantaneously. There is usually a period of time in which pollutants are dispersed and damage is caused. Because the pollution process can always be characterized by insurers as "gradual" rather than "abrupt," it is possible that no pollution would be characterized as occurring abruptly or within a very short space of time. Thus, the insurers' temporal interpretation would transform a qualified pollution exclusion into an absolute exclusion for all pollution claims.

ARGUMENT

I. THE POLLUTION EXCLUSION CLAUSE DOES NOT APPLY TO POLICYHOLDERS WHO ARE SUBJECTED TO STRICT LIABILITY FOR POLLUTION DAMAGE CAUSED WITHOUT THEIR KNOWLEDGE BY UNRELATED THIRD PARTIES.

In the service departments of Dimmitt's automobile dealerships crankcases of customers' cars were drained. Dimmitt did not dispose of the used crankcase oil as waste. It did not dump or discharge the oil into rivers, streams or impoundments. In fact, Dimmitt did not engage in any polluting activities whatever. Instead, Dimmitt dealt with the oil as a usable byproduct, selling it to the reprocessor Peak. It was Peak's reprocessing operation that yielded wastes (as well as saleable used oil). Peak disposed of these

wastes in storage ponds located on its property, and pollutant chemicals later escaped into the neighboring land and groundwater. The federal Superfund statute has a very long reach, and under it Dimmitt can be held liable for the response, cleanup and remediation costs associated with the leaching of Peak's wastes -- just because it supplied Peak with the oil that Peak processed.[4/] As we shall see, Dimmitt's comprehensive general liability insurance policy reaches as far in covering Dimmitt's liability as the federal statute does in imposing liability.

But it does not follow that an exclusion has the same reach as the coverage provision it qualifies. To the contrary, under the insurance law of this state, coverage provisions of insurance policies are read broadly to promote their dominant purpose of indemnifying policyholders for unintended losses. E.g., United States Aviation Underwriters v. Van Houtin, 453 So.2d 475, 477 (Fla. 2d DCA 1984); Travelers Ins. Co. v. Smith, 328 So.2d 870, 872 (Fla. 3d DCA 1976). For exactly the same reason -- fulfilling the purpose of an insurance contract -- exclusions are read narrowly. E.g., Demshar v. AAACon Auto Transport Inc., 337 So.2d 963, 965 (Fla. 1976); Lane v. Allstate Ins. Co.,

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[4/] Cf. United States v. Aceto Agricultural Chems. Corp., 872 F.2d 1373 (8th Cir. 1989) (finding pesticide manufacturers strictly liable for environmental damage caused by disposal activities of third party that formulated their product into commercial grade pesticides); United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985) (generators of hazardous substances are strictly liable for cleanup costs even if they did not know or intend that those substances be deposited by a third party).

472 So.2d 823, 824 (Fla. 4th DCA), review denied, 482 So.2d 347 (Fla. 1985).

The insurance industry drafted the pollution exclusion clause without specifying that a policyholder who is in no sense responsible for the discharge, dispersal, release or escape of pollutants is nonetheless excluded from coverage for strict environmental cleanup liability. The clause speaks of property damage arising out of the discharge, dispersal, release or escape of pollutants. The obvious application of the exclusion clause is to a discharge, dispersal, release or escape caused by, or at least within the control of, Dimmitt. The exclusion, phrased in the amorphous way it is, could also be read as applying to the situation in which, unknown to Dimmitt, pollution resulted from the activities of a third party, with which Dimmitt had only the remotest connection and over which it had no control. But that would not be a natural or fair reading, much less the narrow reading of exclusionary language that Florida law demands.

The ordinary person purchasing a comprehensive and general policy of liability insurance would expect to have coverage for all risks not expressly excluded from its operation.[5/] The policy undertakes to "pay on behalf of the

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[5/] See Greenlaw, The CGL Policy and the Pollution Exclusion Clause: Using the Drafting History to Raise the Interpretation Out of the Quagmire, 23 Colum. J.L. & Soc. Probs. 233, 235 (1990) (insurance industry intended the CGL policy to provide broad coverage "in all instances except where the insured intentionally or recklessly caused injury to persons or damage to property") (emphasis added) (footnote omitted); Fire, Casualty & Sur., Comprehensive Liability

(continued...)

insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage caused by an occurrence." "Occurrence" is defined to comprehend "continuous or repeated exposure to conditions." In holding that these words reached an insured's strict liability for environmental cleanup costs, the California Supreme Court in a recent opinion emphasized the comprehensive nature of the policy at issue in its case -- the identical standard-form policy that is at issue in this case. AIU Ins. Co. v. Superior Court, 51 Cal. 3d 807, 822 n.8, 799 P.2d 1253, 1264 n.8, 274 Cal. Rptr. 820, 831 n.8 (1990). The court said that "it was within the insured's reasonable expectation that new types of statutory liability would be covered, as long as they were within the ambit of the language used in the coverage provision." See also Claussen v. Aetna Casualty & Sur. Co., 259 Ga. 333, 337, 380 S.E.2d 686, 689 (1989) (insurance industry's failure to foresee the "yawning extent" of liability for environmental cleanup "cannot be construed to the detriment of the insured who purchased a 'comprehensive general liability' policy"); Note, The Applicability of General Liability Insurance to Hazardous Waste Disposal, 57 S. Cal. L. Rev. 745, 757 (1984).

[5/](...continued)
Program of National Bureau Makes Its Debut, The Eastern Underwriter 32 (1941) (insurance industry publication discussing then-new CGL policy and stating that "[t]he essential difference(s) between these new comprehensive liability policies and the regular form policies . . . are that they insure against all hazards not specifically excluded").

We submit that the risk of unanticipated statutory liability for pollution caused by another is a risk within the comprehensive coverage of the policy and is not expressly excluded by the pollution exclusion clause. The question is separate and distinct from the issues customarily debated in the 100 or so reported pollution exclusion decisions. Usually, the policyholder whose insurer invokes the pollution exclusion clause to deny coverage stands in closer proximity than Dimmitt to the discharge, dispersal, release or escape of pollutants. Rarely has a policyholder that has contested coverage with its insurer been connected as remotely as Dimmitt was with the generation of pollutants that, when improperly disposed of by someone else, caused damage to the natural resources of the state.

The generator of waste who entrusts it to a hauler or authorized disposer is somewhat like Dimmitt in being far removed from the discharge, dispersal, release or escape of pollutants that is the subject of the pollution exclusion clause. In United States Fidelity & Guaranty Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 129 Ill. Dec. 306, 535 N.E.2d 1071, appeal denied, 136 Ill. Dec. 609, 545 N.E.2d 133 (Ill. 1989), the policyholder was just such a generator. A waste hauler, though described as a recycler, simply took the policyholder's wastes at the policyholder's plant, transported them, and dumped them on its own property. The policyholder later received from the EPA the customary notification that it was a potentially responsible party for cleanup costs at the

hauler's site. It sought a defense and indemnification from its insurers.

The insurers relied on the pollution exclusion clause (identical to the one in Dimmitt's policies) as a ground for denying coverage. The court held that the clause was ambiguous as to whether it was intended to apply to a mere waste generator that did not dispose of its own wastes. The court resolved the ambiguity against the insurer. The court said that:

> "those engaged in manufacturing processes would be expected to have sought other or additional insurance had they known that the mere act of engaging an independent agency such as a waste dispos[er] in the ordinary course of having industrial wastes removed from their property would result in the denial of insurance coverage." 180 Ill. App. 3d at 385, 129 Ill. Dec. at 311, 535 N.E.2d at 1076.

Similarly, in Covington Township v. Pacific Employers Insurance Co., 639 F. Supp. 793, 799 (M.D. Pa. 1986), Covington Township obtained a professional liability insurance policy from the insurer. The policy contained a pollution exclusion clause phrased in terms identical to those of the clause in Southeastern's policy. The policyholder was sued for failing to provide adequate sewage treatment, for granting sewage permits that permitted inadequate sewage treatment, and for failure properly to monitor and warn of contamination of the town drinking water supply. It was not alleged that the policyholder created any pollution itself. When the insurer sought to rely on the pollution exclusion

clause to refute its duty to indemnify, the court observed that the policyholder's liability was not predicated on its discharge of waste, and that the application of the exclusion clause in such a situation was "at best . . . ambiguous." Id. at 799. The ambiguity was resolved against the insurer.

The New York Court of Appeals did not perceive the ambiguity in Powers Chemco, Inc. v. Federal Insurance Co., 74 N.Y.2d 910, 548 N.E.2d 1301 (1989). But the court's terse opinion in that case dealt with a policyholder who was a successor landholder to a person who had intentionally dumped liquid wastes into open pits; successor liability, liability that runs with the land, is by no means uncommon in the United States. Even so, the holding of the court "that an insured's protection could be eliminated by the intentional activities of an unrelated third party" has been described as running "contrary to eighty years of insurance case law." Ballard & Manus, Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion, 75 Cornell L. Rev. 610, 641 (1990).[6/] It is also frontally inconsistent with the CGL policy's definition of a covered "occurrence," which states that damage resulting from "an accident, including continuous or repeated exposure to conditions," is covered if it is "neither expected nor intended from the standpoint of the insured." (Emphasis added.) Finally, the Powers Chemco

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[6/] In fact, the authors cite cases going back 120 years, to 1870, in which courts have rejected the argument that, for example, an intentional assault upon an insured was not an "accident" from his viewpoint. Id. at 641.

rationale cannot be squared with Florida caselaw, which holds that whether a loss is "accidental" or not for purposes of insurance coverage is viewed from the perspective of the policyholder rather than a culpable third party.[7/] If the policyholder's predecessor landowner in Powers Chemco is fairly characterized as "an unrelated third party," surely Peak, with respect to Dimmitt, is likewise an "unrelated third party" whose conduct, under traditional insurance principles, cannot deprive Dimmitt of coverage.

It must be said that there are, in addition to Powers Chemco, cases where the issue considered here has simply been assumed and the policyholder has prevailed anyway because a discharge of pollutants brought about by a third party's wrongful conduct was "sudden" by any standard and "accidental" from the standpoint of the insured. These are cases in which pollution damage was caused by vandals on the policyholder's property. In Compass Insurance Co. v. Cravens, Dargan & Co., 748 P.2d 724 (Wyo. 1988), for example, vandals opened the policyholder's oil storage tank and discharged 3,000 gallons of road oil. In Lansco Inc. v. Department of Environmental Protection, 138 N.J. Super. 275, 350 A.2d 520 (Ch. Div. 1975), aff'd, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), certif. denied, 73 N.J. 57, 372 A.2d 322 (1977), vandals opened valves on two storage tanks owned by

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7/ See, e.g., Aetna Ins. Co. v. Webb, 251 So.2d 321, 322 (Fla. 1st DCA 1971) (damage to boat caused by culpable third party covered under policy providing coverage for damage resulting from "accidents in . . . launching"; from policyholder's perspective, loss was "clearly accidental").

the policyholder, allowing thousands of gallons of oil to leak onto the ground and into storm drains that emptied into a river. And in Evans v. Aetna Casualty & Surety Co., 107 Misc. 2d 710, 435 N.Y.S.2d 933 (1981), vandals caused the escape of gasoline from the insured's retail gasoline facility onto the ground, from where it flowed into a creek emptying into Lake Erie.

In each of these cases, the court discussed the application of the pollution exclusion clause only in terms of the meaning of the "sudden and accidental" exception. In each case the court decided in favor of the policyholder; the vandals' conduct was "sudden and accidental" from the policyholder's standpoint. The result was thus the same as it would have been had the court limited the clause to cases of active, intentional pollution by the policyholder. Moreover, these cases are quite different from Dimmitt's case. There is a closer connection between the policyholder and the pollution damage in the vandal cases than in Dimmitt's. In the former cases, the discharge, dispersal, release or escape was from the policyholders' property and what was released was the policyholders' petroleum. In Dimmitt's case, however, the pollution occurred on a third party's land and was due to the release of that third party's oil sludge. Dimmitt really had nothing to do with the pollution. It did not create the oil sludge, did not dispose of the sludge, and was unaware of Peak's shoddy disposal practices. It is true -- borrowing from the tort concept of ultimate causation -- that, but for

the fact that Dimmitt sold Peak the used crankcase oil, the long chain of events leading finally to the escape of oil sludge from Peak's unlined storage ponds would not have occurred. However, Dimmitt's connection with the pollution brought about by Peak's actions is too attenuated to permit invocation of the pollution exclusion clause; Dimmitt's remote sale to Peak, borrowing tort terminology again, was not a proximate cause of the "discharge, dispersal, release or escape" that occurred when harmful chemicals leaked from Peak's waste pond.[8/]

[8/] Several Florida decisions have construed the "arising out of" language in the very different context of coverage disputes involving automobile liability policies, which typically cover liability for injury or damage "arising out of the ownership, maintenance or use" of the insured's auto. Applying the Florida rule that coverage clauses are to be construed broadly to further the policy's purpose of indemnity (see p. 11 supra), these courts have rejected insurer arguments that the "arising out of" language requires the policyholder to prove that the use of the vehicle was the proximate cause of the accident. Instead, the courts have held that only a "minimal causal connection" between the use of the auto and the injury is required for coverage to apply. National Merchandise Co. v. United Serv. Auto. Ass'n, 400 So.2d 526, 532 (Fla. 1st DCA 1981). See also Government Employees Ins. Co. v. Batchelder, 421 So.2d 59, 61 (Fla. 1st DCA 1982).

Given the settled Florida principle of construing coverage clauses broadly, it is not surprising that the "arising out of" language in the coverage clause of auto liability policies has been interpreted to require only a loose causal connection between the use of an automobile and the resulting accident. However, the "arising out of" language in Dimmitt's policies appears in an exclusionary clause, not in an affirmative grant of coverage. Thus, the construction of the "arising out of" language in the pollution exclusion is governed by the very different (but consistent) rule that exclusions must be construed narrowly against the insurer-drafter to effectuate coverage. See cases cited supra at pp. 11-12. See also Cochran v. State Farm Mutual Auto. Ins. Co., 298 So.2d 173, 175 (Fla. 4th DCA 1974) (words in the

(continued...)

Florida courts traditionally have sought to protect the reasonable coverage expectations of insurance buyers and have interpreted standardized policies to fulfill their underlying purpose of providing protection against unintentional losses. Galinko v. Aetna Casualty & Sur. Co., 432 So.2d 179, 183 (Fla. 1st DCA 1983); Schaffer v. Government Employees Ins. Co., 280 So.2d 504, 505-06 (Fla. 2d DCA), review denied, 285 So.2d 23 (Fla. 1973). An average purchaser of a CGL policy containing a pollution exclusion clause might reasonably be expected to understand that the clause would operate to foreclose coverage for liability stemming from his own polluting activity. Perhaps the same purchaser could be expected to perceive that the pollution exclusion clause would stretch far enough to bar coverage for pollution damage caused by third parties over whom the insured exercised some control, or whose improper waste disposal activities were at least known to the insured. But neither Dimmitt nor any other average insurance buyer could reasonably be expected to comprehend that its CGL policy -- which was explicitly written to cover property damage "neither expected nor intended from the standpoint of the insured" -- would strip him of coverage

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[8/](...continued)
basic coverage clause "are not necessarily used in the same context" in exclusionary provisions). At a minimum, this principle should require Southeastern to demonstrate, as a predicate to invoking the pollution exclusion against Dimmitt, that Dimmitt's own actions were a proximate cause of the contamination at the Peak Oil site. That is a showing that Southeastern cannot make.

for liability for pollution that was not of his doing and utterly beyond his knowledge or control.

Another fundamental principle of contractual interpretation in Florida is that, when one party drafts the contract using terms that are ambiguous, it will not be permitted to take advantage of its imprecise drafting. The "arising out of" language in the context of the pollution exclusion clause is the paradigm of the vague, the uncertain, the ambiguous. The insurers wrote it that way. In such a case, under Florida law, the ambiguity is resolved in favor of the other party. This principle has been enunciated by Florida courts in the context of the interpretation of insurance contracts many times. See, e.g., Triano v. State Farm Mut. Auto. Ins. Co., 565 So.2d 748, 749 (Fla. 3d DCA 1990), and the cases cited therein, particularly the decision of this Court in State Farm Mut. Auto. Ins. Co. v. Pridgen, 498 So.2d 1245, 1248 (Fla. 1986). See also Hartnett v. Southern Ins. Co., 181 So.2d 524, 528 (Fla. 1965). The principle applies with even more force to the interpretation of exclusionary clauses in all-risk policies such as those purchased by Dimmitt. Demshar, 337 So.2d at 965; Triano, supra; Wallach v. Rosenberg, 527 So.2d 1386, 1389 (Fla. 3d DCA), review denied, 536 So.2d 246 (Fla. 1988). Applying these principles to the present case, the pollution exclusion clause must be construed narrowly to afford coverage to Dimmitt. The exclusion clause applies only to pollution

discharges that are caused by, or within the control of, Dimmitt.

That interpretation not only is the one demanded by the Florida law governing the resolution of ambiguities in insurance policy exclusion clauses; it also has the virtue of conforming to the stated purpose of the insurance industry when it drafted the exclusion clause. The insurers wanted to exclude intentional polluters from coverage. In the late 1960s, several incidents prompted heightened public awareness of and concern about environmental issues. (See R4-101-Exh. 10 at 284.) The insurance industry strove to protect its public image by disassociating itself from intentional industrial polluters. It did this by creating the pollution exclusion clause and inserting it as an endorsement in CGL policies. As an insurance industry trade association explained in seeking approval of the clause from the West Virginia Insurance Commissioner:

> "It is in the public interest that willful pollution of any type be stopped . . . . If the insurance industry were to support continued pollution by providing coverage . . . , it would be considered as aiding and abetting these polluters, thereby placing the insurance industry in public disfavor." (R4-101-Exh. 10 at 287.)

The Supreme Court of Georgia, in the context of a discussion of the meaning of the "sudden and accidental" exception to the pollution clause, remarked that documents presented by the insurance industry to the Georgia Insurance Commissioner "suggest that the clause was intended to exclude only intentional polluters." Claussen, 259 Ga. at 337, 380 S.E.2d

at 689. In the same context, in Grinnell Mutual Reinsurance Co. v. Wasmuth, 432 N.W.2d 495, 498 (Minn. Ct. App. 1988), the court said:

> "[t]he intent of the exclusion clause was to deny coverage for polluting activities to those who knew or should have known their actions would cause harm. The insured should not be able to seek coverage for knowingly polluting the environment." [Citation omitted.]

In Florida, the question of the appropriate interpretation of the pollution exclusion clause has not been considered by an appellate court. However, the United States District Court for the Southern District of Florida has addressed the issue, and it recognized that the purpose of the pollution exclusion clause was to prevent industrial enterprises from purchasing insurance to insulate themselves from the consequences of deliberately disregarding environmental standards. Payne v. United States Fidelity & Guar. Co., 625 F. Supp. 1189 (S.D. Fla. 1985). The court, applying Florida law, id. at 1191, concluded that the clause was intended to buttress environmental protection standards and was to be applied only to actual polluters. Id. at 1192. The same approach should be adopted here. Since Dimmitt was not responsible for, and did not even know of, the creation of the sludge or its release into the environment, the exclusion clause cannot fairly be applied to deprive it of coverage.

II. THE PHRASE "SUDDEN AND ACCIDENTAL" IN THE EXCEPTION TO THE POLLUTION EXCLUSION CLAUSE IS AMBIGUOUS AND SHOULD BE INTERPRETED SO AS TO PRESERVE COVERAGE FOR THE POLICYHOLDER.

Even if the pollution exclusion clause were intended to apply not only to actual polluters but also to those subject to no-fault liability for pollution created by unrelated third parties, it would not relieve Southeastern of its duty to defend and indemnify Dimmitt. The discharge, dispersal, release or escape of pollutants from Peak's waste ponds was "sudden and accidental" within the meaning of the exception to the pollution exclusion clause. Because the insurance industry drafted the standard-form policy, disputes arising between insurers and policyholders concerning the proper interpretation of the terms of the policy are decided, according to standard principles of contractual interpretation, against the insurers who are responsible for any ambiguity or uncertainty. See cases cited supra at p. 21. Thus, in order to prevail in a dispute concerning the interpretation of the pollution exclusion clause, Southeastern must demonstrate that its words bear a single, unambiguous meaning in the context of the policy. As we shall show, Southeastern cannot do this. In particular, Southeastern cannot demonstrate that "sudden" in the exception to the exclusion can only mean "abrupt" or "instantaneous."

The pollution exclusion clause, as we have seen, excludes coverage of property damage arising out of the discharge, dispersal, release or escape of contaminants into the environment but preserves coverage when the discharge,

dispersal, release or escape is "sudden and accidental." The presence of this qualification of the exclusion clause means that, even if the clause does apply to policyholders who are strictly liable for pollution damage they did not create, Dimmitt is entitled to coverage under its policies.

The insurance industry left "sudden and accidental" undefined in its standard-form policy. It is therefore appropriate to consider the ordinary lay understanding of the words to ascertain their meaning in the context of the policy. See, e.g., Security Ins. Co. v. Commercial Credit Equip. Corp., 399 So.2d 31 (Fla. 3d DCA), review denied, 411 So.2d 384 (Fla. 1981); Fontainebleau Hotel Corp. v. United Filigree Corp., 298 So.2d 455, 459 (Fla. 3d DCA 1974). In common usage, the primary connotation of the word "sudden" is "unexpected onset." An army's "sudden" attack may lead to a long battle, and a "sudden" illness may begin without warning but continue for weeks. Similarly, a "sudden" turn in the road is one that clearly is a permanent feature of the road, but that the traveler did not anticipate. Nor is an event of brief duration invariably described as sudden; death is always instantaneous, but it is described as "sudden" only if it happens unexpectedly. "[T]he word has an elastic temporal connotation that varies with expectations: Suddenly, it's spring." Claussen, 259 Ga. at 335, 380 S.E.2d at 688.

This common usage is consistent with the primary definition given to the term in many dictionaries. For example, the first definition of "sudden" in one Webster's is

"happening or coming unexpectedly; not foreseen or prepared for."[9/] Significantly, the insurers' temporal definition does not even appear in the best-known law dictionary.[10/]

The leading thesaurus also refutes Southeastern's contention that it is semantically impossible to define "sudden" without a temporal component. Common synonyms for "sudden" include, inter alia, "unexpected," "unanticipated," "unlooked for," "unprepared for," "unforeseen" and "unpredictable."[11/]

In common usage, the word "accidental" also has many nuances, including happening unintentionally, fortuitously or unpredictably.[12/] To be sure, there is potential for overlap in the meaning attributed to the words "sudden" and "accidental" in the exclusion clause. However, it is clear that the nuance that "accidental" was designed to carry in the context of the clause is "unintended." Thus, "sudden and accidental" means "unexpected and unintended." This gives each word a discrete and appropriate meaning in the context of a policy in which the insurer-drafters elsewhere employed the

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9/ Webster's New World Dictionary 1422 (1986).

10/ Black's Law Dictionary 1432 (6th ed. 1990) (defining "sudden" in terms almost identical to those cited in the text).

11/ Roget's International Thesaurus § 540.10 (4th ed. 1977).

12/ See Webster's Third New International Dictionary 11 (1986) and Blacks Law Dictionary 16.

phrase "neither expected nor intended from the standpoint of the insured" in the definition of a covered "occurrence."[13/]

Even if this were not the case, and "accidental" were read to carry the notion of fortuity, as well as lack of intention, this would not render the word "sudden" superfluous. As the United States Court of Appeals for the Third Circuit recently noted in New Castle County v. Hartford Accident & Indemnity Co., 933 F.2d 1162, 1194 (3d Cir. 1991), "[i]nsurance policies routinely use words that, while not strictly redundant, are somewhat synonymous." They frequently employ several words with slightly different nuances to reinforce each other. Viewed from this common-sense perspective, the "sudden and accidental" language simply reinforces the concept of fortuity which is central to any liability insurance policy.

Numerous courts in other states have concluded that the phrase "sudden and accidental" in the standard CGL policy means "unexpected and unintended." For instance, in Broadwell Realty Services, Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987), the Superior Court of New Jersey, Appellate Division, reviewed other New Jersey trial court discussions going back to 1975. It observed that in those cases the courts construed the word "sudden" as conveying the sense of an "unexpected," "unforeseen" or

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[13/] "Occurrence" is defined as "an accident, including continuous or repeated exposure to conditions, which result in . . . property damage neither expected nor intended from the standpoint of the insured."

"fortuitous" event. The court noted that this definition was consistent with the common meaning of the word in everyday parlance. It then continued that, although the judicial interpretation of the phrase was divided, the reasoning expressed in those cases represented the prevailing view in other jurisdictions. The court provided an extensive list of decisions in support of that observation.[14/]

The Supreme Court of Colorado recently relied upon many of the same dictionary definitions discussed above in concluding that "sudden and accidental" as used in the context of the pollution exclusion means "unexpected and unintended." Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991). The court observed that "[a]lthough 'sudden' can reasonably be defined to mean abrupt or immediate, it can also reasonably be defined to mean unexpected and unintended." Id. at 1092. Resolving the ambiguity against the insurer-drafters, the court held that the clause did not bar coverage for long-term but unexpected discharges of sediment from the policyholder's mining operations.[15/]

One of this State's trial courts has likewise concluded that, in the context of the CGL policy, "sudden and

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[14/] 218 N.J. Super. at 531-32, 528 A.2d at 83-84.

[15/] Both the Georgia Supreme Court and the Wisconsin Supreme Court have relied upon common dictionary definitions to reach the same conclusion. See Claussen, 259 Ga. at 335, 380 S.E.2d at 688; Just v. Land Reclamation, Ltd., 155 Wis.2d 737, 745, 456 N.W.2d 570, 573 (1990). For a list of other decisions that have rejected insurers' efforts to read a coverage-defeating temporal limitation into the "sudden and accidental" savings clause, see Attachment A to this Brief.

accidental" means "unexpected and unintended." In Safe Harbor Enterprises, Inc. v. United States Fidelity and Guaranty Co., No. 90-1099-CA-03 (Fla. 16th Cir. Ct. May 13, 1991), the court remarked that it joined numerous other courts in concluding that the phrase "sudden and accidental" means "unexpected and unintended." In another Florida nisi prius case, State of Florida Department of Environmental Regulation v. D'Elicio, No. CL-89-9598 AF (Fla. 15th Cir. Ct. Sept. 28, 1990), the applicability of the pollution exclusion clause was placed in issue by an insurer's motion for summary judgment and it was not even argued that "sudden and accidental" meant anything other than "unexpected and unintended." In denying the insurer's motion, the court cited, among other cases, Payne v. United States Fidelity & Guar. Co., 625 F. Supp. 1189 (S.D. Fla. 1985) and Pepper's Steel & Alloys v. United States Fidelity & Guaranty Co., 668 F. Supp. 1541 (S.D. Fla. 1987).

Payne and Pepper's Steel were companion cases, both decided by the late Judge Spellman of the Southern District, applying Florida law. The policyholders in Payne were the owners of land that had been contaminated by PCBs spilled during the course of a lessee's recycling operations. As passive owners of contaminated property, the policyholders were subject to strict liability under CERCLA for the cost of government-mandated cleanup.[16/] They asked for a defense

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[16/] See, e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) (discussing CERCLA liability of current owners and operators of contaminated land); Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1280-81 (D. Del.

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against the CERCLA proceeding. The insurer declined to defend, arguing (as Southeastern does here) that the gradual spread of PCBs at the site could not be considered "sudden and accidental" within the exception to the pollution exclusion. In rejecting the insurer's argument, the court concluded that the insurer owed the defense obligation because the underlying complaint did not compel a "determination that the insured intended or expected the release of PCBs into the environment or the damages that such releases could cause." 625 F. Supp. at 1193.

In the Pepper's Steel case, where the lessee itself sought coverage for its cleanup liability under CERCLA, the court reiterated its view that the "sudden and accidental" exception to the pollution exclusion is an exception for what is "unexpected and unintended." The court once again surveyed the case law and said that the pollution exclusion did not bar coverage in the absence of evidence that the pollution damage was "actually intended or, at a minimum, substantially foreseeable" by the lessee. 668 F. Supp at 1550. Summing up, the court said that, where a release of pollutants "is neither expected nor intended from the insured's point of view, it follows that it was 'sudden and accidental.'" 668 F. Supp. at 1549.

[16/](...continued)
1987), aff'd, 851 F.2d 643 (3d Cir. 1988) (CERCLA liability extends to current owners of contaminated land even if they did not own the site during period of waste disposal).

In the present case, however, the federal district court for the Middle District of Florida decided that, in the context of the exclusion clause, "sudden" can only mean "pollution which occurs abruptly, instantly, or within a very short period of time," while "accident" means "an event which is unexpected or unintended and does not take place within the usual course." 731 F. Supp. at 1520.

The court thus baldly asserted the intended meaning of "sudden and accidental" without attempting a reasoned defense of its pronouncement. That unanalytical style also characterizes the two other federal district court decisions in Florida that support the proposition that "sudden" bears a temporal meaning. In Hudson Ins. Co. v. Double D Management Co., No. 89-1631-CIV-T-17B (M.D. Fla. June 28, 1991), the Court stated perfunctorily that it agreed with the result in this case and noted additionally that rules of stare decisis required that it follow the precedent set in this case. The federal court for the Northern District in Hayes v. Maryland Casualty Co., 688 F. Supp 1513 (N.D. Fla. 1988), impliedly adopted a temporal interpretation when it said, ruling for an insurer, that the evidence makes it "clear beyond cavil that the damage was not sudden -- the pollution had to be carried on over a considerable period of time." 688 F. Supp. at 1515. That was the extent of its discussion of the point.

The effect of the bald assertions in this case and the two district court decisions that are like it is that the other equally tenable meaning of "sudden" is overlooked, and

the ambiguity this creates goes unrecognized. The Florida rules for resolving ambiguities are not invoked, and the evidence that the insurance industry intended "sudden" to mean "unexpected" is never even considered.

It is true that, although the primary meaning of "sudden" is free of any temporal connotation, the word can also bear the coverage-defeating temporal meaning ascribed to it by the federal district court in this case. In addition to the primary definition given above, for example, Webster's New World Dictionary defines "sudden" to mean "sharp or abrupt; done, coming, or taking place quickly or abruptly; hasty."[17/] But the presence of temporal and non-temporal definitions of "sudden" in widely-utilized dictionaries merely confirms that the word embodies many nuances. These nuances in turn create the possibility of ambiguity when the contract language is applied to concrete facts. The existence of alternative definitions in some dictionaries is evidence of the multiple nuances and the ambiguity.

The Supreme Court of Georgia noted all this in Claussen, 259 Ga. at 335, 380 S.E.2d at 688. It went on to say:

> "Perhaps, the secondary meaning is so common in the vernacular that it is, indeed, difficult to think of 'sudden' without a temporal connotation: a sudden flash, a sudden burst of speed, a sudden bang. But, on reflection one realizes that, even in its popular usage, 'sudden' does not usually describe the duration of an event, but rather its unexpectedness:

17/ Webster's New World Dictionary 1422 (1984).

> a sudden storm, a sudden turn in the road, sudden death. . . . Thus, it appears that 'sudden' has more than one reasonable meaning."

The Supreme Court of Wisconsin reached the identical conclusion in Just v. Land Reclamation, Ltd., 155 Wis. 2d 737, 746, 456 N.W.2d 570, 573 (1990).

> "We conclude that the phrase 'sudden and accidental' is susceptible to more than one reasonable meaning, including abrupt and immediate as Bituminous claims [the insurer] as well as unexpected and unintended as the property owners [the policyholder] claim. Thus the phrase 'sudden and accidental' contained in the pollution exclusion clause is ambiguous."

In Florida, too, courts have recognized the possibility of ambiguity in the phrase "sudden and accidental." In Safe Harbor, supra, the Circuit Court for Monroe County announced that it was persuaded by the reasoning of the Georgia Supreme Court in the Claussen case. It explained that, although the temporal meaning of the phrase "sudden and accidental" "is not necessarily an incorrect one, the Court concludes that the phrase is equally susceptible to meaning unexpected and unintended." Slip op. at 8. The court therefore found the phrase to be ambiguous.

Additional evidence of ambiguity lies in the fact that, although the majority of courts reject the contention that "sudden" is exclusively temporal, there is a significant body of contrary judicial authority. Likewise, the burgeoning

academic literature is divided on the issue.[18/] In Security Ins. Co. v. Investors Diversified Ltd., 407 So.2d 314, 316 (Fla. 4th DCA 1981), the Fourth District Court of Appeal found a policy term ambiguous and offered "as proof of that pudding" the fact that two respected appellate courts had examined the same standard language and reached opposite conclusions as to its meaning. (Emphasis in original). The court's observation is even more compelling in the context of the comprehensive judicial and scholarly debate that continues to rage over the meaning of the pollution exclusion.

Ambiguity leads to the same result as a decision that the primary meaning of "sudden" -- "unexpected" -- governs. Southeastern can prevail only if it can demonstrate that the phrase "sudden and accidental" unambiguously means instantaneous and not unexpected. The Applemans' well-known treatise explains that "the insured need only offer an interpretation which is not in itself unreasonable." 13 J.A. & J. Appleman, Insurance Law and Practice § 7403, at 312 (rev. ed. 1976). On the other hand, "to sustain its

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18/ For some examples of commentators who have concluded that "sudden and accidental" means "unexpected and unintended," see Greenlaw, supra note 5; Averback, Comparing the Old and the New Pollution Exclusion Clauses in General Liability Insurance Policies: New Language -- Same Results?, 14 B.C. Envtl. Aff. L. Rev. 601 (1987); Chesler, Rodburg & Smith, Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability, 18 Rutgers L.J. 9 (1986); 3 R. Long, The Law of Liability Insurance App. 65 (1986).

Commentators who have concluded that the phrase has an exclusively temporal meaning include Note, The Pollution Exclusion Clause Through the Looking Glass, 74 Geo. L.J. 1237 (1986); and Note, The Pollution Exclusion in the Comprehensive General Liability Insurance Policy, 1986 Ill. L. Rev. 897.

construction of the contract, the insurer has the burden of establishing not only that the words used in the policy are susceptible of its construction, but also that such construction is the only construction that can fairly be placed on the language in question." Id. at 312-13.

If, in the context of the pollution exclusion clause, "sudden and accidental" unambiguously means unexpected and unintended, Dimmitt prevails. And, if this Court finds the phrase ambiguous, Dimmitt still prevails because the principle of interpretation set forth in the Appleman treatise, which as stated above (p. 21 supra) this Court has made the Florida rule, is that any ambiguity in an insurance policy is strictly construed against the insurer and in favor of the insured. And, in Florida, this is particularly so when the ambiguity occurs in an exclusionary clause. (See pp. 11-12, 21 supra.) The phrase "sudden and accidental" either means "unexpected" on its face or must be taken to mean "unexpected and unintended." The policy thus provides coverage for pollution that is neither expected nor intended by Dimmitt, regardless how extended is the period over which the contaminants escaped from the Peak site.

III. THE COVERAGE-PROMOTING INTERPRETATION OF THE EXCLUSION CLAUSE IS CONSISTENT WITH THE HISTORICAL RECORD OF THE DEVELOPMENT OF THE CLAUSE AND CONTEMPORANEOUS REPRESENTATIONS BY THE INSURANCE INDUSTRY TO REGULATORS AND POLICYHOLDERS.

When the circumstances surrounding the drafting and adoption of the pollution exclusion clause, and subsequent statements by insurance industry representatives about its

intended meaning and effect, are considered, the meaning that dictionaries suggest and Florida law demands is confirmed. The drafting history reveals that the understanding of the phrase "sudden and accidental" gained through the analysis set out in section II above is exactly the understanding that the insurance industry, which selected the words, conveyed to state regulators and consumers when the clause was introduced.

A. The Insurance Industry's Shift From "Accident" To "Occurrence" Coverage

Before 1966, the standard-form CGL policy provided coverage for bodily injury and property damage "caused by accident." Broadwell, 218 N.J. Super. at 532, 528 A.2d at 84 (citing Hourihan, Insurance Coverage For Environmental Damage Claims, 15 Forum 551, 552 (1980)). Since "accident" was not defined by the policy, it was for the courts to decide what it meant. The great majority of courts concluded that the phrase "caused by accident" encompassed damage caused by gradual processes if the damage was unexpected and unintended by the policyholder.[19/] A few courts, however, were of the opinion

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[19/] See, e.g., Anchor Casualty Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949) (finding coverage under accident policy for oil flowing from well onto neighboring properties for about two days); Moffat v. Metropolitan Casualty Ins. Co., 238 F. Supp. 165 (M.D. Pa. 1964) (finding coverage for damage caused by gradual release of gases from policyholder's coal burning banks); Employers Ins. Co. v. Rives, 264 Ala. 310, 87 So.2d 653 (1955), cert. denied, 264 Ala. 696, 87 So.2d 658 (1956) (finding coverage for property damage resulting from a gradual leakage of gasoline into well); Moore v. Fidelity & Casualty Co., 140 Cal. App. 2d 967, 969-71, 295 P.2d 154 (1956) (finding coverage for property damage to third party caused by lint blown from laundromat onto neighboring building, clogging roof drains and resulting in water leaks); Travelers v.

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that only discrete events that occurred rapidly were covered.[20/]

In order to make explicit the fact that coverage was intended to be afforded for long-term "exposure" cases as well as abrupt events, the insurance industry amended the policy in 1966. The new policy substituted the words "caused by an occurrence" for the previous "caused by accident." "Occurrence" was defined 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." (Emphasis added.) Higher premiums were charged for the supposedly broader coverage that was provided by this explicit formulation. Broadwell, 218 N.J. Super. at 532, 528 A.2d at 84.[21/]

[19/](...continued)
Humming Bird Coal Co., 371 S.W.2d 35, 38 (Ky. 1963) (noting that "[t]he accident mentioned in the policy need not be a blow but may be a process"). See also Bean, The Accident Versus the Occurrence Concept, 1959 Ins. L. J. 550, 555 (insurance industry executive stating that "[t]he courts have repeatedly torn down the fences which the phrase 'caused by accident' was intended to build around the scope of standard coverage"); Chesler, Rodburg & Smith, supra note 18, at 26-31 (citing additional cases).

[20/] See, e.g., Gillett v. Prairie Brass & Metal Co., 179 S.W.2d 494 (Mo. Ct. App. 1944); Huchens v. McClure, 176 Kan. 43, 269 P.2d 473 (1954); Viking Automatic Sprinkler Co. v. Pacific Indem. Co., 19 Wash. 2d 294, 142 P.2d 394 (1943).

[21/] Citing Tyler & Wilcox, Pollution Exclusion Clauses: Problems in Interpretation and Application Under the Comprehension General Liability Policy, 17 Idaho L. Rev. 497, 499 (1981). See also Pfennigstorf, Environment, Damages and Compensation, 1979 Am. B. Found. Res. J. 349, 438.

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Numerous insurance industry representatives publicly announced at the time that the new "occurrence" terminology covered liability due to gradually occurring, unintended and unexpected damage resulting from exposure to pollution,[22] and the courts took the insurers at their word and ruled accordingly in disputes concerning the extent of the new coverage.[23]

B. The Development Of The Pollution Exclusion

Following a spate of environmental disasters, in the late 1960s and early 1970s, there was considerable public concern about industrial pollution.[24] The insurance industry sought to protect its public image by demonstrating

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[21] (...continued)
Some of the commentators cited in this section (e.g., Messrs. Anderson, Bradbury, Chesler, Pendygraft and Reiter) represent policyholders in insurance coverage disputes. These articles are cited only as public sources of the insurance industry's own drafting history documents.

[22] The Wisconsin Supreme Court noted:

> "This change in the policy language was widely touted as an important expansion of CGL insurance coverage. Numerous representatives of insurance industry trade associations and the insurance companies that drafted the revised standard form CGL [occurrence] policy actively promoted this policy as providing new, broadened coverage for liabilities arising from gradual pollution." Just, 155 Wis. 2d at 748, 456 N.W.2d at 574 (citation omitted).

[23] See, e.g., Steyer v. Westvaco Corp., 450 F. Supp. 384 (D. Md. 1978) (coverage for damage to trees caused by discharges of pollutants over four-year period); Grand River Lime Co. v. Ohio Casualty Ins. Co., 32 Ohio App. 2d 178, 289 N.E.2d 360 (1972) (coverage for insured's liability for property damage caused by emission of air pollutants over a seven year period).

[24] See discussion at pp. 21-22 supra.

its aversion to intentional pollution through the explicit denial of insurance protection for liability arising out of it.[25/] Although liability for intentional pollution was already excluded from coverage by virtue of the definition of "occurrence," this was not obvious, since pollution was not expressly mentioned. Good public relations required that the insurance industry make that exclusion clear.

Accordingly, in 1970, the Insurance Rating Board ("IRB"), a trade association of stock insurance companies, and the Mutual Insurance Rating Bureau ("MIRB"), which represented the interests of mutual companies, jointly drafted an endorsement to the standard CGL policy, which was eventually incorporated into the policy as the pollution exclusion clause. The minutes of the March 17, 1970 meeting of the IRB's General Liability Governing Committee ("GLGC") clearly show that the IRB wanted to reaffirm existing limits on pollution coverage in the face of growing public concern about the environment. The GLGC took up the endorsement

> "having in mind that pollutant caused injuries were envisioned to some extent in the adoption of the current 'occurrence' basis of coverage, and some protection is afforded by way of the definition of this term."[26/]

Because coverage for intentional pollution damage already was excluded under the "occurrence" definition, the GLGC

[25/] Id.

[26/] Agenda and Minutes -- Meeting of the General Liability Governing Committee, IRB, Mar. 17, 1970, quoted in Reiter, Strasser & Pohlman, The Pollution Exclusion Under Ohio Law: Staying the Course, 59 Cinn. L. Rev. 1165, 1197 (1991).

recognized that the adoption of an explicit limitation on pollution coverage "could be said to be a clarification, but a necessary one in order to avoid any question of intent."[27/]

The words that the GLGC chose for the pollution exclusion were not unfamiliar to the insurance industry. The "sudden and accidental" terminology had been used in boiler and machinery policies for many years.[28/] These policies provided coverage for a "sudden and accidental breakdown" or a "sudden and accidental tearing asunder of machinery and equipment." The phrase "sudden and accidental" had been routinely interpreted by the courts to mean "unexpected and unintended" and not to convey the sense of abrupt or instantaneous.[29/] The deliberate choice of this familiar

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[27/] Id., quoted in Bradbury, Original Intent, Revisionism and the Meaning of CGL Policies, 1 Envtl. Cl. J. 279, 283 (1989).

[28/] Richard Schmaltz, who played an integral part in the drafting process, has testified that the drafters wanted "language that at least some people in the insurance industry had seen before," and therefore used the "analogous concept" in the boiler and machine policies. See Anderson & Passannante, Insurance Industry Doublethink: The Real and Revisionist Meanings of "Sudden and Accidental," 12 Insur. Litigation Rep. 186, 190 (1990) (copy included in Appendix G of Dimmitt's Opening Brief in the Eleventh Circuit).

[29/] See, e.g., Anderson & Middleton Lumber Co. v. Lumbermen's Mutual Casualty Co., 53 Wash.2d 404, 408-09, 333 P.2d 938, 941 (1959); New England Gas & Elec. Ass'n v. Ocean Accident & Guar. Corp., 330 Mass. 640, 652-53, 116 N.E.2d 671, 680-81 (1953); Sutton Drilling Co. v. Universal Ins. Co., 335 F.2d 820, 824 (5th Cir. 1964); Cyclops Corp. v. Home Ins. Co., 352 F. Supp. 931, 935 (W.D. Pa. 1973).

A well-known treatise that preceded the arrival of the pollution exclusion stated that in boiler and machinery policies "the word 'sudden' should be given its primary meaning as a happening without previous notice, or as something coming or occurring unexpectedly, as unforeseen or

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phrase with its settled meaning in the insurance business clearly demonstrates the intended operation of the pollution exclusion clause. As one insurance treatise explains, "[t]he judicial construction placed upon particular words or phrases made prior to the issuance of a policy employing them will be presumed to have been the construction intended to be adopted by the parties."[30/]

The State Filings -- Acting on behalf of their members, the IRB and the MIRB submitted the pollution exclusion clause for approval to state regulatory authorities around the country, including the Florida Insurance Commissioner. (R4-101-Exhs. 7-9.)[31/] They did so without proposing any reduction in premiums, as one would suppose would accompany any genuine reduction of coverage. In accompanying explanatory letters the IRB and the MIRB stated that the clause merely clarified the occurrence definition and that "[c]overage is continued for pollution or contamination

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[29/](...continued)
unprepared for. That is, 'sudden' is not to be construed as synonymous with instantaneous." 11 G. Couch, Couch on Insurance 2d § 42:383 (1963). To the same effect, see, e.g., 1 Cozen, Insuring Real Property, § 5.03[2][b] (1989); Hoey, The Meaning of 'Accident' in Boiler and Machinery Insurance and New Developments in Underwriting, 19 Forum 467, 469 (1984).

[30/] 2 G. Couch, Couch on Insurance 2d § 15:20, at 195-96 (rev. 2d ed. 1982). Accord, e.g., New Castle County, 933 F.2d at 1197; 13 J.A. & J. Appleman, supra § 7404 at 336-37.

[31/] See Fla. Stat. Ann. tit. 37, § 627.410 (requiring advance approval of policy forms and endorsements by Florida Department of Insurance).

caused injuries when the pollution or contamination results from an accident." Letter to Florida Insurance Commissioner from St. Paul Fire and Marine Insurance Co., dated May 28, 1970 (R4-101-Exh. 7).[32/] This was written in 1970, at which time, as we have seen, "accident" -- as a part of the definition of "occurrence" -- was itself defined to include "injurious [later "continuous or repeated"] exposure to conditions." (See p. 37 supra.) The word "accident" was, thus, a term of art that by the insurance industry's own definition already encompassed long-term exposure to pollutants.

A few state regulatory officials were suspicious of the industry's explanation and asked directly whether the real impact of the pollution exclusion clause would be to limit coverage rather than merely clarify it. The IRB responded to the George Insurance Commissioner's initial refusal to approve the exclusion by reiterating that:

> "The impact of the proposals on the vast majority of risks would be no change. It is rather a situation of clarification which will make for a complete understanding by the parties to the contract of the intent of coverage."[33/]

On the basis of those representations, the exclusion was approved for use in Georgia.

[32/] See also Just, 155 Wis.2d at 750-52, 456 N.W.2d at 575 (quoting explanatory memorandum submitted to state insurance departments).

[33/] IRB letter to Emory Lipscomb (Ga. Insurance Dept.), June 10, 1970, reprinted in Claussen v. Aetna Casualty & Sur. Co., 676 F. Supp. 1571, 1583 (S.D. Ga. 1987), rev'd, 888 F.2d 747 (11th Cir. 1989).

The West Virginia Insurance Commissioner went so far as to hold a public hearing to determine whether the proposed exclusion was "inconsistent, ambiguous or misleading, or [would] . . . limit the overall insurance coverage to the extent that such coverage is no longer sufficiently broad to be in the public interest."[34/] Based on the emphatic representations of the IRB, MIRB and other insurers attending the hearing that the proposed endorsement was merely a clarification of existing coverage,[35/] the Commissioner approved the endorsement in a written order that stated:

> "[T]o the extent that said exclusions are mere clarifications of existing coverages, the Insurance Commissioner finds that there is no objection to the approval of such exclusions."[36/]

34/ In re: "Pollution and Contamination" Exclusion Filings, Adm. Hrng. No. 70-4 (W. Va. Insurance Dept.), Aug. 19, 1970, quoted in Ballard & Manus, supra p. 16, at 626-27.

35/ For example, the MIRB insisted that "[i]t is in the public interest that willful pollution of any type be stopped," Letter from David E. Kuizenga, Secretary, MIRB, to Samuel H. Weese, July 30, 1970, quoted in Greenlaw, supra note 5, at 248, and noted that the endorsement "is actually a clarification of the original intent, in that the definition of occurrence excludes damages that can be said to expected or intended." Id., quoted in Pendygraft, Plews, Clark & Wright, Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation, 21 Ind. L. Rev. 117, 154 (1988). Similarly, after observing that many pollution injuries are "directly relatable to intention or expectation," the IRB stated that its members "fail to understand why certain [policyholder] trade associations would be against such a clarification." Letter from Graham V. Boyd to Samuel H. Weese, July 31, 1970, cited in Greenlaw, supra note 5, at 248 n.84.

36/ In re: Pollution and Contamination" Exclusion Filings, Adm. Hrng. No. 70-4 at 3 (W. Va. Insurance Dept.), Aug. 19, 1970, quoted in Pendygraft, supra note 31, at 154-55.

Statements to Consumers -- The insurers made the same kind of representations to their customers about the intent of the "pollution exclusion" as they had made to state officials. Francis X. Bruton, an Aetna lawyer who was a member of the IRB committee that drafted the "pollution exclusion," made the point as simply and forcefully as we could hope to do. In an American Bar Association symposium in 1971 he said that the "sudden and accidental" exception to the pollution exclusion clause allows underwriters "to perform their traditional function as insurers of the unexpected event or happening and yet . . . [does] not allow an insured to seek protection from his liability insurer if he knowingly pollutes."[37/]

The American Insurance Association, a trade association of over 175 property/casualty insurers, weighed in with a similar interpretation of the new endorsement. The AIA stated in July 1970 that, despite the endorsement, "[i]nsured companies would generally be considered covered . . . if they could show continuing efforts to maintain compliance with local, state and federal pollution codes and standards."[38/] An industry-wide underwriting publication stated the point with the utmost clarity in May 1971. It said that, "in one important respect, the exclusion simply reinforces the

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37/ Bruton, Historical Liability and Insurance Aspects of Pollution Claims, 1971 A.B.A. Proc. Sec. Ins. Negl. & Compensation L. 303, 311, quoted in Soderstrom, The Role of Insurance in Environmental Litigation, 11 Forum 762, 768 (1976).

38/ Journal of Insurance, at 17 (July-Aug. 1970).

definition of occurrence." It went on to point out the parallel between the basic coverage, "the policy states that it will not cover claims where the 'damage was expected or intended,'" and the exclusion, which was said to state, "in effect, that the policy will cover incidents which are sudden and accidental -- unexpected and not intended."[39/]

Many courts have relied on the history of the drafting and marketing of the pollution exclusion clause in rejecting a temporal reading of the clause.[40/] Whether the insurance industry's original statements to insurance commissioners and policyholders were truthful or not is, in a sense, beside the point. What matters is that the insurers publicly marketed the exclusion as a clarification rather than a restriction of coverage and publicly stated, in numerous articles, speeches and formal state filings, that the exclusion applied only to damage resulting from willful or intentional pollution. These historical explanations confirm that Dimmitt's interpretation of the pollution exclusion -- which would preclude coverage only if the pollution at the

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[39/] Fire, Casualty & Sur. Bulletin, Casualty & Sur. Section, Pub. Liab., at Cop-3 (May 1971) (emphasis added). The same industry publication reiterated in 1978 (when Dimmitt's coverage with Southeastern was still in effect) that the pollution exclusion would preserve coverage if a pollution event occurred "without the insured's foresight or expectation." Fire, Casualty & Sur. Bulletin, Pub. Liab., at Occ-2 (Jan. 1978).

[40/] See, e.g., New Castle County, 933 F.2d at 1196-98; Claussen, 259 Ga. at 336-37, 380 S.E.2d at 688; Just, 155 Wis. 2d at 747-50, 456 N.W.2d at 573; Specialty Coatings, 180 Ill. App. 3d at 387-88, 535 N.E.2d at 1077; Broadwell Realty, 218 N.J. Super. at 532-34, 528 A.2d at 84-86.

Peak Oil site was expected or intended by Dimmitt -- is at least reasonable. Under Florida law, that ends the inquiry. Southeastern's temporal interpretation must be rejected, and Dimmitt is entitled to coverage in the absence of any showing that it expected or intended the escape of pollutants from the Peak Oil site.

IV. ADOPTION OF THE ALTERNATIVE TEMPORAL DEFINITION WOULD CREATE PRACTICAL DIFFICULTIES.

Another reason why the Court should interpret "sudden and accidental" to mean "unintended and unexpected" is that the alternative temporal definition is unworkable. If "sudden" is understood to mean "pollution which occurs abruptly," as the district court said, the Florida courts will become enmeshed in a futile and impractical debate concerning the proper characterization of the event that caused the pollution.

Consider, for example, the gradual seepage of contaminants into groundwater following the abrupt rupture of an underground tank. From the insurers' perspective, the rupture of the tank would appear to be the paradigm of a temporally "sudden" event. On the other hand, the subsequent leaching of contaminants into groundwater would appear to be anything but temporally sudden, although it surely could be unforeseen and unexpected.

Alternatively, an abrupt release of contaminants could result from a crack in the tank caused by a gradual corrosive process. While the discharge itself would appear to

meet the insurers' requirement of an instantaneous polluting event, the slow corrosive process that preceded the pollution might render it ineligible for coverage under the temporal construct.

Landfills present another problem. In most cases, latent groundwater contamination from active landfill operations occurs over the course of years or even decades before it is discovered -- a process that clearly is not instantaneous. But the initial escape of contaminants from the landfill, or the initial act of disposal, could have occurred in a brief period. Intermittent spills and other "abrupt" incidents, such as heavy rains, that often occur during the course of a landfill's operations further complicate the scenario.

New Jersey's Appellate Division clearly foresaw this kind of problem when it rejected the temporal reading of "sudden." "If the word 'sudden' is defined as 'rapid' or 'instantaneous,'" the court asked, "how is the exclusion to be applied to the abrupt escape of a pollutant from a fissure in a tank caused by a gradual corrosive process?" Broadwell, 218 N.J. Super. at 535-36, 528 A.2d at 86. These are but a few examples of the questions that would have to be asked and answered were "sudden" given a temporal reading.

Furthermore, if the temporal meaning of "sudden" were adopted, it is possible that it would preclude coverage of pollution damage altogether. Pollution rarely occurs instantaneously. There is usually a period of hours, days,

weeks, or years over which dispersal occurs and damage is caused. Even an explosion or spill -- examples of instantaneous polluting events commonly cited by insurers -- is usually followed by an extended period of dispersal of the pollutant in the environment. Thus, it is conceivable that if the insurers' interpretation were adopted, no pollution would be characterized as occurring abruptly or within a very short space of time. The "sudden and accidental" exception to the pollution exclusion clause would except nothing, and the qualified "pollution exclusion" would become an absolute exclusion of coverage. But that result is inconsistent with the existence of an exception to the exclusion, which clearly seeks to preserve coverage in specified circumstances. Far from eliminating surplusage, then, the insurers' interpretation actually exacerbates it; their temporal reading of "sudden" would reduce the entire "sudden and accidental" exception to surplusage.

As the foregoing examples suggest, courts that have construed the exclusion as a temporal limitation have encountered difficulty in bridging the gap between abstract pronouncements and practical application.[41/] For this

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[41/] See, e.g., Wagner v. Milwaukee Mut. Ins. Co., 145 Wis.2d 609, 616, 427 N.W.2d 854, 857-58 (Wis. Ct. App. 1988) (finding coverage for gradual leakage of gasoline from cracked underground pipe, ostensibly because the initial discharge of gasoline was "immediate"); Travelers Indem. Co. v. Dingwell, 414 A.2d 220, 224-25 (Me. 1980) (distinguishing between "gradual permeation" of pollutants into groundwater and "initial release" of pollutants, which could have been caused by "spills" and "leaks"). The Supreme Court of Wisconsin recently overruled the temporal interpretation of the

(continued...)

reason, certainty of application (to say nothing of the purpose of liability insurance) requires that the "sudden and accidental" exception focus on the knowledge, expectation and intent of the insured, not on an impractical and often elusive analysis of the duration or frequency of the alleged contamination.

CONCLUSION

For the foregoing reasons, this Court should hold that the pollution exclusion clause does not bar coverage of Dimmitt's strict statutory liability. The certified question should be answered in the negative.

Respectfully submitted,

Of Counsel:

WILLIAM H. ALLEN
SAUL B. GOODMAN
WILLIAM F. GREANEY
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Amici Curiae

JEFFREY A. TEW
DANIEL A. CASEY
Kirkpatrick & Lockhart
Miami Center, Suite 2000
201 South Biscayne Boulevard
Miami, Florida 33131-2305
(305) 539-3300

Counsel for Amicus Curiae
The American Fiber
Manufacturers Association

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[41]/(...continued)
"pollution exclusion" adopted in Wagner. See Just, 155 Wis.2d 737, 456 N.W.2d 570.

INDEX TO ATTACHMENTS