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In The
Florida Supreme Court

No. 78,293

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

Defendants-Appellants,

v.

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 *AMICI CURIAE* INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION, SERVICE INSURANCE COMPANY, FLORIDA FARM BUREAU INSURANCE COMPANY, AND AMERICAN SURETY & CASUALTY COMPANY

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INTEREST OF AMICI CURIAE

The Insurance Environmental Litigation Association ("IELA") is an association of major property and casualty insurance companies. It appears as amicus curiae to assist courts in resolving environmentally related insurance law disputes. Service Insurance Company, Florida Farm Bureau Insurance Company, and American Surety and Casualty Company are Florida-based property and casualty insurance companies. The member companies of IELA and these Florida-based companies (the "insurer amici") have issued, in Florida and elsewhere, insurance policies that contain provisions similar to those at issue here. The Florida-based insurers write a high proportion of their business in this state and are heavily dependent on the integrity of judicial interpretation of insurance contracts in Florida. The insurer amici's extensive experience with the interpretation and application of the policy provisions at issue in this case provide them with a broad background and unique perspective on insurance coverage questions. The insurer amici believe that the proper interpretation of insurance contracts serves the public interest, as well as the interests of both insurers and insureds.[1]

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[1] In addition to the Florida insurers, this brief is submitted on behalf of IELA's member companies: Aetna Life and Casualty Company, Allstate Insurance Company, American International Group, Chubb Group of Insurance Companies,

(continued...)

IELA has appeared as amicus curiae in numerous environmental coverage cases, including this case in the Eleventh Circuit and several state court pollution exclusion cases.[2]

STATEMENT OF THE CASE

IELA adopts as its statement of facts the district court opinion, published at 731 F. Supp. 1517 (M.D. Fla. 1990).

At issue is whether contracts of insurance that bar coverage for all pollution related property damage except for that caused by "sudden and accidental" polluting discharges preclude coverage for pollution claims arising out of

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[1](...continued)
CIGNA Property and Casualty Companies, Continental Insurance Company, Crum & Forster Corporation, Fireman's Fund Insurance Companies, Hanover Insurance Company, Hartford Insurance Group, Home Insurance Company, Liberty Mutual Insurance Company, Maryland Casualty Company, Prudential Reinsurance Company, Royal Insurance Company, St. Paul Companies, Selective Insurance Group, State Farm Fire & Casualty Company, The Travelers Insurance Companies, and United States Fidelity & Guaranty Company. Appellee Southeastern Fidelity Insurance Corporation is not a member of IELA.

[2] See, e.g., Upjohn Co. v New Hampshire Ins. Co., 438 Mich. 174, to be published 496 N.W.2d 392 (1991) (slip op. attached at Appendix Tab 8); Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc., 407 Mass. 675, 555 N.E.2d 568 (1990); Lower Paxton Township v. United States Fidelity & Guar. Co., 383 Pa. Super. 558, 557 A.2d 393 (1989), review denied, 93 M.D. Allocatur Dkt. 1989 (Pa. Sept. 22, 1989). IELA has been granted leave to appear as amicus in Lone Star Indus., Inc. v. Liberty Mut. Ins. Co., No. 87-05683 (Fla. 11th Cir.).

Unpublished opinions referred to herein are supplied in alphabetical order in the Appendix to this brief.

longstanding discharges that regularly occurred over a long period of time as part of normal business operations. The district court granted summary judgment to the insurer, concluding that "sudden" contained a temporal element and that "accidental" referred to "an event which is unexpected or unintended and does not take place within the usual course." 731 F. Supp. at 1520. Thus, the exclusion precluded coverage for pollution caused by 25 years of routine waste disposal practices, primarily the discharge of oil waste into unlined settling lagoons. The insureds ("the Dimmitts") appealed.

The U.S. Court of Appeals for the Eleventh Circuit certified to this Court the question of "WHETHER, AS A MATTER OF LAW, THE POLLUTION EXCLUSION CLAUSE CONTAINED IN THE COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICY PRECLUDES COVERAGE TO ITS INSURED FOR THE ENVIRONMENTAL CONTAMINATION THAT OCCURRED IN THIS CASE." 935 F.2d 240, 243 (11th Cir. 1991) (emphasis in original).

SUMMARY OF ARGUMENT

This appeal presents this Court with its first opportunity to address important legal issues that are part of a nationwide battle over insurance coverage for businesses that routinely generated pollution as part of their normal business activities. Although this particular case involves relatively small commercial policyholders, giant industrial

companies regularly bring identical actions against insurers across the country on identical grounds.[3] Thus, the legal issues in this appeal are of enormous significance well beyond the confines of the present dispute.[4]

The insurance policies at issue specifically exclude coverage for pollution. The only exception to this exclusion is when the contaminating "discharge . . . is sudden and accidental." As the district court found, the discharges in this case, which took place routinely, continuously, and over 25 years, were neither "sudden" nor "accidental."

"Sudden" and "accidental" are not ambiguous, especially when read together in context. Although "sudden" includes an element of unexpectedness, it cannot be understood without reference to its temporal aspect; it modifies discharges that are also "accidental." By its plain language, the "sudden and accidental" exception does not encompass the discharges

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[3] Representative examples include Monsanto Co. v. Aetna Casualty & Sur. Co., No. 88C-JA-118 (Del. Super. Ct.); Dupont v. Admiral Ins. Co., No. 89-C-AV-99 (Del. Super. Ct.); Occidental Chemical Corp. v. Hartford Accident & Indem. Co., No. 41009/90 (N.Y. Sup. Ct.); Texaco, Inc. v. Allianz Ins. Co., No. BC036974 (Cal. Super. Ct. Los Angeles County).

[4] Currently pending in Florida courts are Lone Star Indus., Inc. v. Liberty Mut. Ins. Co., No. 87-05683 (Fla. 11th Cir.), and Safe Harbor Enters., Inc. v. United States Fidelity & Guar. Co., No. 90-1099-CA-03 (Fla. 16th Cir.). Lone Star involves the policyholder's liability for environmental damage it caused by operating a wood treatment facility for many years. In Safe Harbor, the insured leased its premises to a junkyard, which caused pollution for at least eight years. The policies in both cases contain the same "sudden and accidental" pollution exclusion.

relevant here, "common place events which occurred in the course of daily business." 731 F. Supp. at 1521.

The pollution exclusion cannot be read as simply a restatement of the policies' "occurrence" definition and thereby be rendered superfluous. Whether there is an "occurrence" turns on whether the damage resulting from the insured's activities is "expected" or "intended." By contrast, the exception to the pollution exclusion focuses solely on whether the polluting discharge, rather than the resulting damage, is "sudden and accidental." If the discharge is not both "sudden" and "accidental," the exception to the exclusion does not come into play. The exclusion therefore bars coverage for the long-term and deliberate discharges at issue in this case. These discharges were neither "sudden" nor "accidental." Either fact bars coverage.

Because the pollution exclusion is unambiguous, the parol evidence rule prohibits consideration of extrinsic evidence to construe it. Moreover, the materials offered by the insureds are not "evidence." They consist largely of articles and memoranda by lawyers for insureds in these types of cases, as well as partial statements by nonparties not subject to cross-examination or impeachment. Assuming, arguendo, that this Court does consider such materials, far from contradicting the plain language of the exclusion, the principal materials on which the policyholders and their

amici rely state that the pollution exclusion was drafted to eliminate the issue of intent in determining coverage for pollution claims. The extrinsic materials are thus consistent with the position of the insurer, not that of the insured.

Interpreting the exclusion to bar coverage for liability arising from pollution except where the contaminating discharge or release is both "sudden" and "accidental" will give each party to the insurance contract precisely the benefit of its bargain. There is no reason why insurers (who never agreed or received premiums to do so) should pay to clean up pollution caused by the routine, long-term handling of the waste products of policyholders. Upholding the contract as written furthers sound public policy because it is necessary to the functioning of the risk-allocation system that is the basis of insurance.

ARGUMENT

I. THE POLLUTION EXCLUSION'S SOLE EXCEPTION FOR "SUDDEN AND ACCIDENTAL" DISCHARGES DOES NOT APPLY TO THE RELEASE OF POLLUTANTS OVER MANY YEARS IN THE REGULAR COURSE OF BUSINESS OPERATIONS.

The pollution exclusion appears in the section of the insurance policy that defines those risks that are excluded from coverage. By the exclusion, the parties agreed that "this insurance does not apply" to liability:

> arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental. (emphasis added).

Thus, the policy does not provide coverage for the insured's liability based on pollution damage unless the insured demonstrates that the polluting "discharge" (by whomever made) on which liability is premised is both "sudden" and "accidental."[5] The discharges here were neither.

All the parties agree that the liability arises "out of the discharge . . . of . . . waste materials or . . . pollutants." The issue before this Court is whether the exception applies, that is, whether the polluting discharges were both "sudden" and "accidental." Because the

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[5] Although an insurer generally must prove the applicability of an exclusion, it is the insured's burden to prove the existence of coverage. See Grand Assembly of Lily White Security Benefit Ass'n v. New Amsterdam Casualty Co., 102 So. 2d 842, 844 (Fla. 2d DCA 1958). Where, as here, the existence of coverage depends entirely upon the applicability of the exception to the exclusion, the insured has the burden of demonstrating that the exception has been satisfied. Hudson Ins. Co. v. Double D Management Co., 768 F. Supp. 1542, 1545 (M.D. Fla. 1991) (insured has burden of proving that polluting discharges were "sudden and accidental"); see also Northern Ins. Co. of New York v. Aardvark Assocs., Inc., 942 F.2d 189, 195 (3d Cir. 1991) (same); FL Aerospace v. Aetna Casualty & Sur. Co., 897 F.2d 214, 219 (6th Cir.), cert. denied, 111 S. Ct. 284 (1990) (same); Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 702 F. Supp. 1317, 1328 (E.D. Mich. 1988) (explaining why insureds have burden).

discharges that caused the pollution at Peak Oil occurred continuously over a period of 25 years, they plainly do not qualify as "sudden." Moreover, Peak's routine disposal into unlined waste lagoons was a knowing, deliberate and, therefore, "non-accidental," act.

A. Florida Rules Of Construction Require That Terms Of An Insurance Policy Be Given Their Plain Meaning In The Context Of The Contract As A Whole.

Under established principles of Florida law, interpretation of an insurance policy starts with the policy language. "[I]n construing an insurance policy for the purpose of determining coverage, courts must consider the policy in its entirety, and accord clear and unambiguous language its natural meaning." Associated Elec. & Gas Ins. Servs., Ltd. v. Houston Oil & Gas Co., 552 So. 2d 1110, 1113 (Fla. 3d DCA 1989); accord Alpha Therapeutic Corp. v. St. Paul Fire & Marine Ins. Co., 890 F.2d 368, 370 (11th Cir. 1989). Words and phrases must be construed in context and all must be accorded an interpretation that renders them meaningful. See Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 941 (Fla. 1979); Guarantee Abstract & Title Ins. Co. v. St. Paul Fire & Marine Ins. Co., 216 So. 2d 255 (Fla. 2d DCA 1968). Courts avoid any construction that deems policy language mere "surplusage." Treasure Salvors, Inc. v. Tilley, 534 So. 2d 834, 836 (Fla.

2d DCA 1988); see also Supreme Int'l Corp. v. Home Ins. Co., 428 So. 2d 295, 296 (Fla. 3d DCA 1983); Volker Stevin Constr., Inc. v. Seaboard Sur. Co., 673 F. Supp. 1563, 1565 (S.D. Fla. 1987).

Florida courts do not lightly find ambiguity in insurance policies. Before doing so, a Florida court must resort to all of the rules of construction and seek an interpretation that comports with them. See Excelsior, 369 So. 2d at 942; Pastori v. Commercial Union Ins. Co., 473 So. 2d 40 (Fla. 3d DCA 1985). The existence of more than one possible interpretation compels neither a finding of ambiguity nor a presumption against the insurer; the construction that considers all words in context and gives meaning to all policy provisions will be adopted, even if less favorable to the insured.[6] Excelsior, 369 So. 2d at

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[6] The Dimmitts' and their amici's briefs do not mention these fundamental rules of construction. Instead, they rely on the proposition that if "sudden and accidental" "can readily be shown to have at least two distinct and equally reasonable meanings," contra proferentum will mandate selection of the one that provides coverage. Appellants' Brief ("Br.") at 37-38, 40. This Court has rejected that proposition, and requires that all rules of construction be applied. See Excelsior, 369 So. 2d at 942; St. Paul Guardian Ins. Co. v. Canterbury School of Florida, Inc., 548 So. 2d 1159, 1159-1160 (Fla. 2d DCA 1989); see also Harnischfeger Corp. v. National Union Fire Ins. Co., 927 F.2d 974 (7th Cir. 1991) ("Rules of interpretation are tie-breakers even when the words being interpreted appear in insurance policies.") (citation omitted). Contra proferentum "does not allow courts to rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intention of the parties." Ideal Mutual Ins. Co. v. C.D.I. Constr., Inc., 640 F.2d 654, 658 (5th Cir. 1981) (Florida law).

942; Travelers Ins. Co. v. C.J. Gayfer's & Co., 366 So. 2d 1199 (Fla. 1st DCA 1979). "Only when a genuine inconsistency, uncertainty or ambiguity in meaning remains after resort to the ordinary rules of construction is the rule [contra proferentum] apposite." Excelsior, 369 So. 2d at 942 (emphasis added) (citations omitted).[7]

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[7] "When determining whether a policy is ambiguous, we must bear in mind that insurance contracts are complex instruments. Consequently, 'the fact that any analysis is required for one to fully comprehend them does not mean the contracts are ambiguous.'" Alpha Therapeutic, 890 F.2d at 370 (quoting State Farm Fire & Cas. Co. v. Oliveras, 441 So. 2d 175, 178 (Fla. 4th DCA 1983)); see also American Motorists Ins. Co. v. Farrey's Wholesale Hardware Co., 507 So. 2d 642, 645 (Fla. 3d DCA 1987), review denied, 518 So. 2d 1274 (Fla. 1987); Gulf Tampa Drydock Co. v. Great Atlantic Ins. Co., 757 F.2d 1172, 1175 (11th Cir. 1985). "Particularly with respect to insurance policies, a court needs to view the contract provisions in light of the character of the risks assumed by the insurer." South Carolina Ins. Co. v. Heuer, 402 So. 2d 480, 481 (Fla. 4th DCA 1981), review denied, 412 So. 2d 465 (Fla. 1982). Further, "the mere fact that a provision in an insurance policy could be more clearly drafted does not necessarily mean that the provision is otherwise inconsistent, uncertain or ambiguous." State Farm Mut. Auto Ins. Co. v. Pridgen, 498 So. 2d 1245, 1248 (Fla. 1986). Finally, the fact that a term is not defined does not render it ambiguous. See Morgan v. Continental Casualty Co., 382 So. 2d 351 (Fla. 3d DCA 1980).

Nor is a contract rendered ambiguous simply because a clear minority of courts have interpreted it contrary to its plain meaning. See Upjohn, slip op. at 13 n.8 (using difference in judicial opinions as proof of ambiguity "merely begs the question"); Lower Paxton Township, 557 A.2d at 402 n.4 ("we would be abdicating our judicial role were we to decide such cases by the purely mechanical process of searching the nation's courts to ascertain if there are conflicting decisions").

B. Utilizing Florida Rules, The Pollution Exclusion Bars Coverage For The Routine And Long Term Discharges At Issue In This Case.

Properly applied, Florida's rules of construction mandate that the plain language of the pollution exclusion bars coverage for the pollution in this case, because the discharges were not "sudden" and "accidental." In the words of New York's highest court:

> Since the exception is expressed in the conjunctive, both requirements must be met for the exception to become operative. Stated conversely, discharges that are either nonsudden or nonaccidental block the exception from nullifying the pollution exclusion.

Technicon Elecs. Corp. v. American Home Assurance Co., 74 N.Y.2d 66, 75, 542 N.E.2d 1048, 1050, 544 N.Y.S.2d 531 (1989) (emphasis added). These two words can only be read in context with one another,[8] and they bar coverage for the damage arising out of the deliberate discharge into unlined lagoons of 25 years of waste oil.

1. The Discharges Were Not "Sudden."

The term "sudden" in the pollution exclusion has a temporal component -- it denotes an event that occurs quickly, hastily, immediately, or abruptly, particularly when contrasted with "accidental." See Waste Management of the

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[8] See Pridgen, 498 So. 2d at 1248 (must analyze words in policy with words "used in connection" with them).

Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374, 382 (1986). Only by reading "sudden" to convey its plain temporal sense can the word be given its "natural meaning" within the context of the policy. See Associated Elec. & Gas Ins. Servs., 552 So. 2d at 1113. As the great majority of recent decisions have held, a "sudden" escape of pollutants is instantaneous or nearly so; it cannot occur gradually or continue over any significant period of time, as did the discharges at Peak Oil. See Lower Paxton Township, 557 A.2d at 402 ("Any other interpretation . . . is blatantly unreasonable").

Most recently, based on this clear language and applying contract principles the same as those of Florida, the Michigan Supreme Court[9] held that the word "sudden" is "unambiguous" and includes "a temporal element." See Upjohn, slip op. at 4; Protective National Ins. Co. v. City of Woodhaven, 438 Mich. 154, to be published 476 N.W.2d 374 (1991) (slip op. attached at Appendix Tab 6); Polkow v. Citizens Ins. Co. of America, 438 Mich. 174, to be published 476 N.W.2d 382 (1991) (slip op. attached at Appendix Tab

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[9] As in Florida, Michigan courts apply the plain and common meaning of contractual language and eschew creating ambiguity where none exists. Upjohn, slip op. at 10. Thus, the Michigan Supreme Court "rejecte[d] the temptation to rewrite the plain and unambiguous meaning of the policy under the guise of interpretation." Id. at 13 n.8.

5).[10] Rejecting the very arguments urged by the appellants here, the Court "conclude[d] that when considered in its plain and easily understood sense, 'sudden'" includes "immediate" and therefore precludes coverage for gradual, long term, or continuous pollution. Upjohn, slip op. at 11 (citations omitted); Lumbermens, 555 N.E.2d at 572 (Massachusetts Supreme Judicial Court reaching same conclusion).[11]

Thus, the exception to the pollution exclusion allows coverage only for pollution claims that stem from discharges that are mishaps, accidental events occurring over a short time that are "sudden" and "accidental". In contrast, covered non-pollution claims include liability for damage arising from "continuous or repeated exposure to conditions" -- a gradual cause. At Peak Oil, waste sludge was continuously discharged into unlined lagoons for 25

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[10] E.g., Lumbermens, 555 N.E.2d at 572 ("when used in describing the release of pollutants, 'sudden' in conjunction with 'accidental' has a temporal element"). For other cases accepting the plain meaning of sudden, see Aardvark, 942 F.2d at 193; A.J. Johnson & Co. v. Aetna Casualty & Sur. Co., 933 F.2d 66, 72 (1st Cir. 1991); Ogden Corp. v. Travelers Indem. Co., 924 F.2d 39, 42 (2d Cir. 1991); FL Aerospace, 897 F.2d at 219; cases listed at Addendum Tab A.

[11] The Dimmitts and their amici rely mostly on older decisions that ignore the exclusion's plain language and do not reflect the current state of the law. As noted by the highest court of Massachusetts, "the better reasoned, and particularly the more recent, judicial interpretations of the pollution exclusion clause" hold that "sudden" is "unambiguous" and "has a temporal quality." Lumbermens, 555 N.E.2d at 572.

years.[12] This presents no temporal element and clearly is not sudden.

2. The Discharges Were Not "Accidental."

Although the Dimmitts focused almost exclusively on the alleged complexities of "sudden," the Court need not reach this issue. The district court correctly recognized an independent ground for barring coverage. The discharges here were not "accidental." E.g., Lumbermens, 555 N.E.2d at 572. Judge Hodges defined "accidental" as that "which is unexpected or unintended and does not take place within the usual course." 731 F. Supp. at 1520. Peak's regular waste disposal activities, which were an everyday part of its business operations, cannot be deemed "accidental." Because the spills, leaks, and run-off were also regular and routine consequences of the waste oil business, they too were neither "sudden" nor "accidental," and coverage for the resulting damage is excluded by the pollution exclusion.

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[12] The Dimmitts argue that the policy must cover continuous discharges that cause pollution because "occurrence" is defined as an "accident including continuous or repeated exposure to conditions." They contend that "sudden and accidental," then, must include gradual pollution. Br. at 14. This argument blurs an important distinction. Not all accidents involve "continuous or repeated exposure to conditions;" some are classical accidents, "boom"-type events. The occurrence definition encompasses both, but the pollution exclusion limits coverage for pollution liability to "boom"-type accidents.

The Dimmitts do not really contend that the waste disposal discharges were "accidental." Instead, without any authority, they ask this court to provide coverage because spills and leaks, which occurred in the regular course of business over a long period of time, also contributed to the contamination at the Peak Oil site. They argue that each individual spill or leak would have been covered under the insurers' interpretation of the exclusion, so the entire liability must be covered under the doctrine of concurrent causes. Br. at 45-49. The Dimmitts cite no case in support of this theory, because the cases expressly reject it.[13]

The district court found that the pollution "resulted primarily from chemicals from the waste sludge leaching into the soil and aquifer." 731 F. Supp. at 1520 (emphasis

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[13] E.g., EAD Metallurgical, Inc. v. Aetna Casualty & Sur. Co., 905 F.2d 8, 11 (2d Cir. 1990) (denying coverage despite insured's argument that occasional spills produced coverage where pollution damage generally arose from gradual and non-accidental "purposeful conduct"); Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30, 33 (1st Cir. 1984) (pollution exclusion applies where pollution results from "regular business activity"); Techalloy Co. v. Reliance Ins. Co., 338 Pa. Super. 1, 487 A.2d 820, 827 (1984) (discharges occurring on a regular or sporadic basis from time to time during the past 25 years cannot be sudden), review denied, 338 E.D. Allocatur Dkt. 1985 (Pa. Oct. 31, 1985). For other cases reaching the same conclusion, see American Mut. Liability Ins. Co. v. Neville Chemical Co., 650 F. Supp. 929, 933 (W.D. Pa. 1987); Fischer & Porter Co. v. Liberty Mut. Ins. Co., 656 F. Supp. 132 (E.D. Pa. 1986); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 212 Ill. App. 3d 231, 570 N.E.2d 1154 (Ill. App. 2d 1991), appeal pending, Nos. 71753, 71761 (Ill.); Barmet of Indiana, Inc. v. Security Insurance Group, 425 N.E.2d 201 (Ind. Ct. App. 1981); Weber v. IMT Ins. Co., 462 N.W.2d 283, 286-287 (Iowa 1990).

added). In addition, regular and routine business practices entailed frequent "spills and leaks [that were] common place events which occurred in the course of daily business, . . . recurring events that took place in the usual course of recycling the oil." 731 F. Supp. at 1521. Further, rain sometimes caused run-off of polluted waste from the lagoons, which were exposed to the elements (id.), and at one point a dike gave way, causing the lagoon to overflow. 935 F.2d at 242 n.1.

The Dimmitts improperly attempt to view each spill in isolation. When evaluating a series of spills, leaks, and similar incidents, courts (as did the district court) uniformly hold that even unintentional releases, either when repeated as a matter of course or attendant to gradual and routine discharges, are not "sudden and accidental" as a matter of law.[14]

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[14] The Dimmitts ignore the cases that directly rule on this specific situation and reject coverage and instead attempt to force "concurrent causes" cases onto facts to which they do not apply. Here, all of the pollution damage was caused by discharge of the same contaminants. See Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc., 938 F.2d 1423, 1428 (1st Cir. 1991). The nature and timing of this singular cause is the subject of the pollution exclusion. Compare Wallach v. Rosenberg, 527 So. 2d 1386, 1387-88 (Fla. 3d DCA) (weather (excluded) and negligence (covered) combined to cause collapse of sea wall), review denied, 536 So. 2d 246 (1988). In addition, because the leaks and spills were de minimis compared to the contamination caused by the lagoons, the concurrent cause doctrine, even if relevant, would not provide coverage here. Lumbermens, 938 F.2d at 1428.

As explained by the First Circuit in Lumbermens (after the Massachusetts Supreme Judicial Court's ruling on "sudden and accidental"), microanalyzing so-called discrete events ignores the true nature of the cause of the pollution damage, the regular business activity. 938 F.2d at 1428-29.

Indeed, the Peak Oil affidavit, quoted by the district court, demonstrates the reason for this. For 25 years, employees continuously spilled oil during transfers and other routine functions. In the context of routine business practices, the spills and leaks at Peak Oil simply were not "sudden" or "accidental." 731 F. Supp. at 1521. Similarly, the overflow caused by the dike was made possible only by the routine business practice of discharging waste into the unlined lagoon. See, e.g., Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 750 F. Supp. 1340 (E.D. Mich. 1990) (in context of business, tank spill and pipe rupture not unexpected). Likewise, Peak exposed the waste to the elements; rainwater run-off was not unexpected and therefore not accidental. On facts like these, courts refuse to find coverage, despite assertions of discrete unintentional polluting events. See Lumbermens, 938 F.2d at 1428 (action of weather on waste exposed to elements is clearly foreseeable); Anaconda Minerals Co. v. Stoller Chemical Co., Civ. No. 87-C-118W, slip op. at 23 (D. Utah Sept. 13, 1991), to be published 773 F. Supp. 1498 (1991), appeal pending sub nom. ARCO v. Stoller Chemical Co., No. 9-4187 (10th Cir.) (waste was exposed to

air and environment, and any consequences of that were neither sudden, accidental, unexpected, or unintended); n. 14 supra.

Finally, expanding coverage to encompass "occasional" spills amidst regular intentional releases into the pits would allow the most egregious polluter to obtain coverage so long as one spill or leak, viewed in isolation, could be characterized as sudden and accidental. This could eviscerate the exclusion, because in a "pollution-prone" operation (such as an oil recycling facility), "there is the possibility of infinite variations" of the release of pollutants. Lumbermens, 938 F.2d at 1428. Such a result is contrary to the "natural meaning" of the policy, Associated Elec. & Gas Ins. Servs., 552 So. 2d at 1113, and "the character of the risks assumed by the insurer," South Carolina Ins. Co. v. Heuer, 402 So. 2d at 481; Lumbermens, 938 F.2d at 1429 (contrary to policy if a few-hour event could make insurer liable to pay for clean up caused by years of pollution).

C. The Pollution Exclusion Is Clear And Unambiguous And Addresses Only The Nature Of The Polluting Discharge.

The Dimmitts try to change the insurance contract, creating new policy provisions out of thin air by raising illusory ambiguities. They first try to create an ambiguity by viewing the words "sudden" and "accidental" in isolation

from each other and the rest of the policy, rendering individual words and whole clauses superfluous. That failing, appellants contend that the pollution exclusion should be limited to "active" and "deliberate" polluters. These arguments, however, are in direct conflict with Florida principles of contract interpretation. Where, as here, the interpretation of the contract is clear, apparent, and comports with general understanding, Florida courts look no further; in this situation it is improper for a court to attempt to amend, alter, or enlarge the insurance contract. See Pridgen, 498 So. 2d at 1248; Excelsior, 369 So. 2d at 942.

1. The Pollution Exclusion Is Not A Restatement Of The Occurrence Definition.

"The [pollution exclusion's] exception thus focuses on the release. In deciding whether there was an occurrence, on the other hand, the focus is on the property damage, asking whether it was expected or intended from the insured's point of view." Lumbermens, 555 N.E.2d at 571. The Dimmitts fail to acknowledge this distinction. Relying on the controversial decision of a sharply divided Georgia Supreme Court in Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686, 687 (Ga. 1989),[15] appellants wrench the words "sudden"

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[15] The Georgia Supreme Court, on certification from the Eleventh Circuit, held 4-3 that "sudden and accidental" in the pollution exclusion could be construed to mean (continued...)

and "accidental" from context, each other, and the rest of the policy. Br. at 13. Their reasoning proceeds as follows: (1) The phrase "sudden and accidental" suggests an event that is in some sense "unexpected;" (2) accordingly, the exception to the pollution exclusion must be merely a "restatement" of the definition of "occurrence" -- that is, an event resulting in injury "that is neither expected nor intended from the standpoint of the insured."[16] Id. at 13-15; 38-39. This position violates Florida rules of construction and ignores plain policy language.[17]

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[15](...continued)
"unexpected and unintended." 380 S.E.2d at 690. Although amici here submit that Claussen was wrongly decided, it is nonetheless inapposite because the Eleventh Circuit there, unlike here, did not ask for a ruling applying the pollution exclusion to the facts of the case. Id. at 687.

[16] The Georgia court and the Dimmitts also rely on the policy name to support reading the pollution exclusion out of the policy. However, although the policies are "comprehensive general liability" policies, "[t]he coverage clause, not the policy titles, controls . . . and these admittedly broad labels cannot override the express provisions of the coverage paragraph so as to protect the insured against all possible risks." Action Ads, Inc. v. Great Am. Ins. Co., 1984 Fire and Casualty Cas. 619, 620 (Wyo. 1984) (citing Fresno Economy Import Used Cars, Inc. v. United States Fidelity & Guar. Co., 76 Cal. App. 3d 272, 142 Cal. Rptr. 681, 686 (1977)). The purpose of general liability policies is to categorize risk; the title cannot eviscerate policy provisions. See Gulf Tampa Drydock Co., 757 F.2d at 1175. Moreover, the pollution exclusion is clearly identified in the policy as an exclusion from coverage. See also Weber, 462 N.W.2d at 286 ("pollution exclusion does not eliminate . . . purpose" of liability policies).

[17] Claussen has been judicially criticized. See Lumbermens, 555 N.E.2d at 571; see also Upjohn, slip op. at
(continued...)

For support, the Georgia Supreme Court cited the "primary dictionary definition" of "sudden" as "happening without previous notice . . . unexpected[]" and, noting that another definition of "sudden" is "abrupt," 380 S.E.2d at 688, found that "sudden" has more than one reasonable meaning.[18] It then applied a meaning without a temporal component to the pollution exclusion.[19] The Dimmitts argue likewise, ignoring the fact that this reading makes no sense in the exclusion or in the policy as a whole, and even though Florida law precludes such a strained interpretation.

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[17](...continued)
12 n.8 (criticizing Just v. Land Reclamation, Ltd., 155 Wisc. 2d 737, 456 N.W.2d 570 (1990), which adopted Claussen's reasoning).

[18] Ironically, the Court suggested that "abrupt" would precisely convey a temporal sense, 380 S.E. 2d at 688. The "primary" definition of "abrupt" is "unexpectedly sudden." Webster's II New Riverside University Dictionary 68 (1984); see also Webster's Third New International Dictionary (first two definitions of "abrupt" include "sudden": "**1:** broken off: suddenly terminating as if cut or broken **2a:** characterized by or producing the effect of a sharp break or sudden ending").

[19] The examples cited in Claussen to prove that "sudden" can mean "unexpected," without a temporal component, are both unconvincing and irrelevant. A tie football or hockey game decided by "sudden death" ends rapidly, immediately when a score occurs, not gradually or over a period of time. A "sudden" storm arrives hastily. Spring is always expected to follow winter; it can arrive "suddenly" only if it occurs abruptly. The examples submitted by amicus American Fibers Manufacturers' Association also prove this point: A "sudden" attack is abrupt, regardless of the length of the subsequent battle; the same applies to the "sudden" onset of an illness. See Brief at 25. All of these examples contain a temporal element. More importantly, regardless of these uses, no one would employ the word "sudden" to describe a business' routine and regular discharge of waste over the course of 25 years.

The Dimmitts' construction ignores the word "sudden," the pollution exclusion's place in the policy, and the command of Florida law to construe policy terms in context.[20] This is wrong as a matter of law, linguistically incorrect and contrary to the only way words are commonly understood -- as part of the text in which they appear. Most words have more than one meaning; that fact alone does not make them ambiguous and does not entitle one to select any meaning at all, without reference to the context in which the word is used.[21] See Harnischfeger, 927 F.2d at 976. Dictionary order does not and cannot override the context in which a word is found and does not signify relative importance.[22]

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[20] Unlike Georgia, in Florida the existence of two possible interpretations does not automatically mandate adoption of the one that grants coverage. See Excelsior, 369 So. 2d at 942. Safe Harbor, which relied on Claussen, was wrongly decided on this basis as well as those discussed in the text.

[21] The importance of reading words in context cannot be overstated.

> Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purported form from the setting in which they are used . . . .

NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.).

[22] For example, the explanatory statement to Webster's Third New International Dictionary (unabridged) (1986), emphasizes: "The best sense [of a word] is the one that most aptly fits the context of a genuine utterance."

(continued...)

Thus, as a chorus of decisions have held, the Dimmitts' reasoning is fundamentally flawed. It reads the word "sudden" out of the contract altogether. The word "accidental" denotes an event that is neither expected nor intended. An interpretation that equates "sudden and accidental" with "unexpected and unintended" can only be accomplished by assigning "sudden" no meaning or significance whatever. See, e.g., Lumbermens, 555 N.E.2d at 572 ("For the word 'sudden' to have any significant purpose, and not be surplusage when used generally in conjunction with the word 'accidental,' it must have a temporal aspect to its meaning, and not just the sense of something unexpected"); Lower Paxton Township, 557 A.2d at 402 ("To define sudden as meaning only unexpected or unintended, and therefore as a mere restatement of accidental, would render the suddenness requirement mere surplusage"); United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31, 34 (6th Cir. 1988)

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[22](...continued)
Id. at 17a. In addition, it explains:

> The system of separating by numbers and letters reflects something of the semantic relationship between various senses of a word. It is only a lexical convenience. It does not evaluate senses or establish an enduring hierarchy of importance among them.

Id. (emphasis added). Other dictionaries place definitions in historical order, with the current definition last. See id. preface at 5a.

(same); C.L. Hauthaway & Sons Corp. v. American Motorists Ins. Co., 712 F. Supp. 265, 268 (D. Mass. 1989) (same).[23]

The Dimmitts' construction also renders the pollution exclusion duplicative of the "occurrence" definition. They improperly urge the Court to construe both the pollution exclusion and the occurrence definition as barring coverage only where the pollution damage is "unexpected or unintended," making the clauses duplicative and the pollution exclusion irrelevant. See, e.g., Upjohn, slip op. at 9 n.6 (Michigan Supreme Court concluding that "[w]hen reading the policy as a whole, it is clear that the [occurrence and 'sudden and accidental'] clauses have a natural and separate focus"); Waste Management, 340 S.E.2d at 381-82 (North Carolina Supreme Court reaching same conclusion).

Finally, appellants' reasoning ignores the "natural" and commonly accepted meaning of the word "sudden." See Associated Elec. & Gas., 552 So. 2d at 1113; Star Fire Coals, 856 F.2d at 34 ("[w]e do not believe that it is possible to define 'sudden' without reference to a temporal element that joins together conceptually the immediate and the

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[23] For this and other reasons, Judge Spellman's decisions in Payne v. United States Fidelity & Guar. Co., 625 F. Supp. 1189 (S.D. Fla. 1985), and Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co., 668 F. Supp. 1541 (S.D. Fla. 1987), are wrong. Compare Hayes v. Maryland Casualty Co., 688 F. Supp. 1513, 1515 (N.D. Fla. 1988).

unexpected"); Crown Auto, 731 F. Supp. at 1520 (same).[24] It offends common sense to conceive of pollution resulting from Peak's many years of reprocessing waste oil as being "sudden." Given the judicial obligation to interpret language in an insurance contract consistent with its ordinary and common sense meaning, appellants' effort to strip "sudden" of all temporal significance is wholly untenable. See Star Fire Coals, 856 F.2d at 34 ("this 'language is clear and plain, something only a lawyer's ingenuity could make ambiguous.'") (quoting American Motorists Ins. Co. v. General Host Corp., 667 F. Supp. 1423 (D. Kan. 1987)).

2. The Pollution Exclusion Focuses On The Nature of the Discharge, Not The Activities Of The Insureds, And Thus Bars Coverage Here.

The Dimmitts also ask this Court to relieve them from the plain language of the pollution exclusion because they sold their waste oil to Peak and did not themselves discharge it. They wish to turn the pollution exclusion into a "polluter's" exclusion with coverage barred only for "active" polluters and not for allegedly "innocent" waste generators.

This argument ignores the plain language of the policy and imputes to it new terms ("active" versus "innocent"

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[24] Even the Claussen court recognized this, noting that "it is difficult to think of 'sudden' without a temporal connotation." 380 S.E.2d at 688.

polluters) and concepts (moral culpability or wrongful intent). The pollution exclusion explicitly precludes coverage for the policyholder's liabilities arising out of "the" (not "its") discharge of pollutants, regardless of who caused the discharge. Likewise, as already demonstrated, the insureds' intent cannot be relevant under the language of the exclusion; this is encompassed by the "occurrence" definition. The point of the exclusion is not to address moral culpability, but to restrict the categories of losses that the insurer must weigh in setting its premium and deciding whether to accept the risk.

Numerous courts have properly rejected the "active polluter" argument. "The pollution exclusion makes no reference at all to active polluters or passive polluters. These terms are foreign to the policies in question." Federal Insurance Co. v. Susquehanna Broadcasting Co., 727 F. Supp. 169, 172 (M.D. Pa. 1989), aff'd, 928 F.2d 1131 (3d Cir. 1991). In Powers Chemco, Inc. v. Federal Ins. Co., 74 N.Y.2d 910, 548 N.E.2d 1301, 549 N.Y.S.2d 650 (1989), the insured acquired land contaminated by a previous owner and contended that, because it was not the actual polluter, the pollution exclusion did not bar coverage. Unlike here, the insured had not generated the material that ultimately contaminated the site. The highest court of New York held that "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." 74 N.Y.2d at 911, 548 N.E.2d at 1302, 549 N.Y.S. 2d at 651. In Aardvark, the federal appeals court enforced the exclusion against a transporter who had neither generated nor released the wastes. 942 F.2d at 194 (Pennsylvania law);[25] see also Hayes, 688 F. Supp. at 1515 (applying exclusion when the insured had no role in the polluting activity) (Florida law).

Because the focus of the pollution exclusion is on the character of the discharge, as opposed to who made it, the level of appellants' moral fault is completely beside the point. So long as the polluting discharge, even if caused by another, was either non-sudden or non-accidental, coverage is excluded.[26] Here, there is no question that Peak Oil's

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[25] As recognized even in Claussen (380 S.E.2d at 688), the policy language provides coverage if the "discharge" of polluting substances is "sudden and accidental." Amicus American Fibers Manufacturers' Association ignores the policy and states that "sudden and accidental" refers not to the polluting discharge, but instead to the resulting damage. See Brief at 46-49. From this false premise, it contends that interpreting the exclusion to bar coverage for 25 years of continuous discharges will involve courts in complex and unnecessary factual determination about the nature of the pollution damage. Id. This argument, with no support in the policy language, should be summarily dismissed. "The behavior of the [pollutant] in the environment, after this initial release, is irrelevant." City of Woodhaven, slip op. at 9. There is no ambiguity in the application of the pollution exclusion to this case, and the complexities feared by the Fiber Manufacturers are the product of their lawyers' over-fertile imaginations.

[26] See also New York v. AMRO Realty Corp., 936 F.2d 1420, 1428 (2d Cir. 1991) ("that certain of the defendants (continued...)

routine discharge of waste sludge into unlined lagoons from 1954 to 1979 was neither sudden nor accidental, so coverage for liability arising from it is barred by the exclusion. As Powers Chemco makes clear, the pollution exclusion bars coverage even when the insured had no role whatever in the chain of events leading to the pollution. The insured waste generator here cannot claim coverage based on its asserted lack of intent to pollute.[27]

Moreover, even if relevant, the relationship between the insured and Peak Oil is not attenuated. The insured created the contaminant and then sold it. The waste oil is no less

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[26](...continued)
may not have known . . . where the waste would end up, does not make the 'release' . . . any more 'accidental'") (citations omitted); United States Fidelity & Guar. Co. v. George W. Whitesides Co., 932 F.2d 1169 (6th Cir. 1991) (pollution exclusion barred coverage for generator of waste who delivered it to transporter for disposal); United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co., 693 F. Supp. 617, 621 (M.D. Tenn. 1988) (pollution exclusion bars coverage regardless of whether the policyholder had knowledge of faulty disposal practices), aff'd per curiam, 875 F.2d 868 (6th Cir. 1989); Waste Management, 340 S.E.2d at 376-377 (pollution exclusion applies where the policyholder is liable for cleanup costs of landfill to which its waste had been transported).

[27] The American Fibers Manufacturers contends, with no support, that the term "arising out of" in the pollution exclusion is ambiguous and should be construed to require a deliberate polluter. Brief at 21. This argument is entitled to no weight. Indeed, the Fibers Manufacturers use this phrase in their own brief. E.g., Brief at 24; see League of Minnesota Cities Ins. Trust v. City of Coon Rapids, 446 N.W.2d 419, 422 (Minn. App. 1989) ("'arising out of' not ambiguous and "'means originating from,' or 'having its origins in,' 'growing out of,' or 'flowing from.'") (quoting Associated Indep. Dealers, Inc. v. Mutual Service Ins. Co., 304 Minn. 179, 229 N.W.2d 516, 518 (1975)).

waste because sold for cash. Further, the waste oil was handled by Peak Oil just as expected by the Dimmitts. That Peak Oil's routine waste disposal caused pollution liability is a risk of doing business borne by the Dimmitts and not their insurers.[28]

Refusing to find coverage by adding the "active polluter" term to the plain language of the policies is consistent with this Court's precedent. In Prigden, 498 So. 2d at 1249, for example, this Court rejected the district court's attempt to "read into" the policy a concept that was not there, even though the district court's construction may have provided coverage.[29] Likewise, in National Union Fire Ins. Co. v. Carib Aviation, Inc., 759 F.2d 873, 877 (11th Cir. 1985), the Eleventh Circuit held that Florida law would not permit it to impute a "hidden requirement" necessary to

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[28] The "vandal" cases cited by the Fibers Manufacturers (at 17-18) are not to the contrary. First, unlike here, vandalism was not found to be in the ordinary course of business, but fortuitous; thus, it falls within the concept of "accidental." Second, in those cases there is no relationship between the polluter and the insured. However, the extent these cases rely on the insured's expectation or intent, they are against the great weight of authority and are wrongly decided. See Powers Chemco, 549 N.Y.S.2d at 651.

[29] The court refused to adopt the insured's contention that the term "conversion" excluded conversions engendered by fraudulent inducement; limiting "conversions" to those where the object was legally received and then converted would have provided coverage. 498 So. 2d at 1247.

avoid an exclusion from coverage.[30] See also Aardvark, 942 F.2d at 194 ("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").[31]

II. THE PURPORTED "DRAFTING HISTORY" OF THE POLLUTION EXCLUSION SHOULD NOT BE CONSIDERED UNDER FLORIDA LAW AND DOES NOT, IN ANY EVENT, SUPPORT COVERAGE.

A. Florida Law Does Not Permit Consideration Of The Materials Proffered By Appellants.

The insureds' reliance on extra-record materials is improper as a matter of Florida law, because the exclusion is clear and unambiguous in the circumstances of this claim.[32]

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[30] The court refused to hold that the term "possession" meant only "lawful possession" or "entrustment," even though doing so would have afforded coverage. 759 F.2d at 877.

[31] The Fibers Manufacturers go even further, asking the Court to find coverage because the policies do not expressly exclude liability based on another party's actions. See Brief at 8. This argument is silly; insurers cannot be held to a standard requiring them to specifically predict all future enactments creating new liability. See Harnischfeger 927 F.2d at 976 ("Drafters cannot anticipate all possible interactions of fact and text, and if they could attempt to cope with them in advance would leave behind a contract more like a federal procurement manual than like a traditional insurance policy. Insureds would not be made better off in the process."). Insurance deals in categories and where, as here, a precise category excludes the liability, it must be given effect. See part III, infra.

[32] Numerous courts have found the exclusion unambiguous and refused to consider the extrinsic evidence offered by the appellants and amici here. For example, the (continued...)

No "latent ambiguity" exists which would justify resort to materials extraneous to the contract itself.

At the most general level, there is a recognition that "[a] latent ambiguity exists where a document is rendered ambiguous by some collateral matter," and that in these circumstances a court can consider parol evidence. See Hashwani v. Barbar, 822 F.2d 1038, 1040 (11th Cir. 1987) (Florida law). But this is a far cry from appellants' assertions that a court can always consider anything going to the meaning of terms in the contract in order to show ambiguity. Br. at 33. To the contrary, the proponent of the evidence must make an initial showing of ambiguity from facts and circumstances, not from generic materials that are alleged to change the meaning of policy words. Indeed, in no case cited by appellants did a court consider the types of materials, wholly unrelated to either party or the contract between them, offered here.

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[32](...continued)
Michigan Supreme Court found it to be wholly irrelevant. Upjohn, slip op. at 9 n.6; see also Aardvark, 743 F. Supp. 379 (W.D. Pa. 1990) (same), aff'd, 942 F.2d 189 (3d Cir. 1991); Ogden Corp. v. Travelers Indemnity Co., 740 F. Supp. 963, 967 (S.D.N.Y. 1990) (same), aff'd, 924 F.2d 39 (2d Cir. 1991); Inland Waters Pollution Control, Inc. v. National Union Fire Ins. Co., No. 89-CV-70584-DT (E.D. Mich. May 17, 1990) (denying discovery into alleged drafting history, as "sudden" and "accidental" are unambiguous), aff'd in part, rev'd in part, 943 F.2d 52 (6th Cir. 1991); American Motorists Insurance Co. v. General Host Corp., 120 F.R.D. 129 (D. Kan. 1988) (rejecting extrinsic evidence, which nonetheless supports holding that pollution exclusion has independent, objective meaning); see also cases listed in Addendum Tab B.

Courts resort to the latent ambiguity formulation only in limited situations, not applicable here. Florida courts sometimes permit introduction of evidence on the parties' course of dealings when the contract looks clear on its face, but the manner in which the claim arose shows that the contract was missing a term. Other evidence of routine conduct, such as the facts surrounding the specific claim or dispute between the parties, may be used to show ambiguity; only after the finding of ambiguity will a court admit evidence on the meaning of policy terms. See, e.g., Bunnell Medical Clinic, P.A. v. Banera, 419 So. 2d 681 (Fla. 5th DCA 1982); Drisdom v. Guarantee Trust Life Ins. Co., 371 So. 2d 690 (Fla. 3d DCA 1979); Landis v. Mears, 329 So. 2d 323 (Fla. 2d DCA 1976); Hashwani, 822 F.2d at 1040. Where, as here, there is no ambiguity as to the application of this policy to the facts, and the appellants do not even purport to introduce evidence about their dealings with their insurer, Florida courts refuse to find a latent ambiguity and refuse to consider extrinsic evidence.

For example, in Hashwani, on which the Dimmitts rely, the court rejected plaintiff's attempt "to introduce parol evidence to establish that the agreement contained a latent ambiguity" because the plain language of the contract was clear. 822 F.2d at 1040. Likewise, in Landis, 329 So. 2d at 324-25, the court first found an ambiguity in the capacity of the executor of the agreement, and only then permitted

extrinsic evidence on the issue of capacity for that particular contract. In Drisdom, 371 So. 2d at 693, the court first found a latent ambiguity from the facts of the claim and only then admitted testimony by the insurance agent about the purchase of the policy to clarify the meaning of a term. In Bunnell Medical Clinic, 419 So. 2d at 638, the court sharply limited its finding of latent ambiguity, holding that although the contract appeared to be complete, circumstances showed it was actually missing a term.[33] Hence, parol evidence was admissible, though narrowed to the parties' knowledge of and dealings with each other. Id. at 683.[34]

In stark contrast, appellants here seek to vary the plain meaning of the pollution exclusion by reference to material wholly unrelated to themselves, their claims, and

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[33] There, the contract stated that the company would "furnish and carry" malpractice insurance. The court permitted evidence on which party would procure the insurance. 419 So. 2d at 683.

[34] In Carey Canada, Inc. v. Columbia Casualty Co., 940 F.2d 1548 (D.C. Cir. 1991), the D.C. Circuit held that evidence about the parties' dealings was insufficient for a finding of latent ambiguity and that evidence of commercial use was necessary. Id. at 1557. In Carey Canada, the issue was whether the insurer would have excluded asbestosis but not diseases that are its later manifestations. Here, in contrast, there is no similar dispute, and the purported evidence does not address the nature or limitation of the claim. Moreover, it is arguable whether the Carey court actually followed Florida law, although it claimed to; it relied on a decision of the Seventh Circuit, failed to cite relevant cases and, as noted, devalued evidence about the dealings between the parties.

appellee. The Dimmitts tie none of the information to any party in this case, which is sufficient reason to reject its use. See AIU Ins. Co. v. FMC Corp., 799 P.2d 1253, 1265 n.9 (Cal. 1990).

B. In Any Event, The Materials Upon Which Appellants Rely Do Not Support Their Reading Of The Pollution Exclusion.

Even if the Court were to consider the extrinsic materials profered by the Dimmitts, the result is the same. The vast majority of the submission is unreliable or argumentative and the remainder supports the insurers' position.[35]

First, although the insureds label them "irrefutable evidence," the materials are not evidence at all. They were not tested in accordance with the discovery rules, through the calling of witnesses, testimony, impeachment and cross-examination.[36] They consist of partial documentation, one-

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[35] The Dimmitts' statement that every court to consider these materials has ruled in the insured's favor (Br. at 17) is both irrelevant and wrong. See, e.g., American Motorists Ins., 120 F.R.D. at 132-34 (after reviewing drafting history proffered by policyholder, court concluded that pollution exclusion has independent, objective meaning); North Pacific Ins. Co. v. United Chrome Products, Inc., No. CV89-0777, slip op. (Or. Cir. Ct. Sept. 30, 1991) (same).

[36] Much, if not all, of the material is rank hearsay by nonparties which, even if properly tendered to the district court, would not have been admissible. The absence of full examination by recognized discovery tools inevitably leads to numerous factual distortions which cannot be fully (continued...)

sided legal briefs by others and quotations from articles written by lawyers who make a living representing insureds in coverage litigation. See, e.g., Br. nn. 14, 17 & 20.[37] This material is argument, not fact. Its repetition and cross-citation by policyholder attorneys, or even by courts (e.g., id. nn. 15, 16 & 19), does not make it correct, nor does it substitute for the only truth-seeking process allowed in American courts. See Upjohn, slip op. at 8-9 n.6.

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[36](...continued)
analyzed on appeal. For example, the appellants refer to Federated Mutual Insurance Company, a former party in the case, as "one of the nation's largest insurance companies." Br. at 43. Federated is only the 77th largest insurance company. Best Insurance Reports Property-Casualty 1990, p. 46B. Federated issues unusual policies to oil-related companies and frequently has the same financial interest as insureds with regard to interpretation of the pollution exclusion. Accordingly, a court errs "in allowing parol evidence to elucidate, explain or clarify the intention of the parties." Treasure Salvors, Inc. v. Tilley, 534 So. 2d at 836; Royal American Realty, Inc. v. Bank of Palm Beach & Trust Co., 215 So. 2d 336 (Fla. 4th DCA 1968).

[37] For the purpose of argument only, insurer amici point out that much extrinsic evidence concerning the pollution exclusion supports the insurer's position. For example, in one article the authors survey policyholder documents over the years and demonstrate that policyholders and their large brokers were well-aware that the pollution exclusion eliminated coverage for liability from gradual pollution. Contemporaneous materials, contemporaneous and subsequent broker documents, material from policyholder industry organizations (such as the Chemical Manufacturers' Association), contemporaneous and subsequent insurance trade publications, policyholder government submissions, and various insurers' regulatory filings all demonstrate that from 1970 onward, policyholders, insurers, and brokers all recognized that the pollution exclusion excluded coverage for long-term gradual pollution. See Harwood, Coyle & Zampino, The "Frivolity" of Policyholder Gradual Pollution Discharge Claims, 5 Mealey's Litigation Reports: Ins. 19 (Aug. 27, 1991) (copy attached at Appendix Tab 9).

Moreover, these documents do not represent the intention of the parties to the insurance contracts at issue. There is no suggestion that the insurer or insureds ever saw or relied on these documents before entering into their contracts.

The alleged drafting history, even if complete or relevant, does not support the contention that the pollution exclusion merely restates the "unexpected or unintended" language of the policies' "occurrence" definition.[38] Instead, shorn of counsel's argument and policyholder articles, the documents on which the Dimmitts and their amici rely reveal the following about the pollution exclusion: 1) it was drafted to eliminate the issue of intent, which was encompassed in the occurrence definition; and 2) it was meant to continue coverage for "classical" accidents, or "boom"-type events.

As previously demonstrated, the argument that the exclusion merely restates the definition of "occurrence" simply cannot be squared with the actual language of the pollution exclusion. Moreover, both the 1970 explanations and documents (discussed in articles) and the 1970 letter to the Florida Insurance Commissioner from a representative of St. Paul Insurance Companies contradict the insureds' 1991 arguments. For example, the letter reproduced in Claussen v.

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[38] Insurer amici address this material only because of appellants' reliance on it. We contend that the pollution exclusion is plain and clear, making any reference to outside materials improper.

Aetna Casualty & Sur. Co., 676 F. Supp. 1571, 1583 (S.D. Ga. 1987), states that the exclusion will not change coverage for "the vast majority of risks" because "[c]overage for accidental mishaps is continued." Contrary to the Dimmitts' characterization, this suggests that coverage will not change for most risks -- covered classical accidents and non-covered deliberate pollution -- but that it will change for other risks -- namely, unintentional gradual pollution. The Dimmitts' construction of the exclusion allows for no change to any risk, and thus could not have been contemplated by the writer of this letter.

Similarly, the Florida letter quoted in the State's brief, which was not written by Southeastern Fidelity, makes clear that far from repeating the "expected or intended" provision, the pollution exclusion was drafted "'so as to avoid any question of intent'" (Florida Br. at 14 (emphasis added)), and thus cannot be construed as a restatement of occurrence, which expressly includes the concept of intent.

In sum, these documents start with the assumption that pre-exclusion policies did not provide coverage for pollution "in most cases" because the damage would be "expected or intended." However, recognizing that such an intent requirement often entails difficulty of proof, the authors of these documents reflect the desire to create a different and clearer way to achieve this result, one that would "avoid any question of intent." They did this through the pollution

exclusion by eliminating coverage for all gradual or long-term pollution, regardless of intent.[39] The exclusion retained coverage for "mishaps," i.e., "boom"-type events, and insureds understood this at that time.[40] See American Motorists Ins., 120 F.R.D. at 133-34 (the 1970 materials "support the court's previous interpretation that the pollution exclusion has an independent, objective meaning and is not simply a restatement of the subjective definition of occurrence").[41]

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[39] This gap in coverage eventually led to the creation of Environmental Impairment Liability ("EIL") insurance. See Harwood, Coyle, & Zampino, supra n. 37, at 26-27, 29-32.

[40] One broker, in the leading publication for corporate insurance buyers, stated that the exclusion retains coverage only "for some very short-term phenomenon, for example, a breakdown in some filtering apparatus which permits the discharge of a pollutant into a river or a lake." Bromwich, Pollution and Insurance, 1971 Risk Management 15, 19 (Apr.). Similarly, an insurance consultant wrote at the time that "the exception to the [pollution] exclusion states that the dispersal, release or escape must be sudden and accidental. In other words, it must be both 'sudden and accidental' rather than either sudden or accidental." 12 For the Defense 77, 79 (1971) (emphasis in original). See also Diamond Shamrock Chemicals Co. v. Aetna Casualty & Surety Co., No 3939-84, slip op. at 27 (N.J. Super. Ct. Ch. Div. Apr. 12, 1989) (insured's risk managers and brokers were at all times "clearly of the view that the pollution exclusion barred recovery for claims arising out of gradual pollution"), appeal pending (N.J. Super. Ct. App. Div.); Harwood, Coyle, Zampino, supra n. 37.

[41] See also Note, The Pollution Exclusion Through the Looking Glass, 74 Geo. L.J. 1237, 1247-1252 (1986). This article offers an independent commentator's neutral analysis of statements made by various insurance companies and organizations in connection with the adoption of the pollution exclusion. Cf. Lumbermens, 555 N.E.2d at 571 n.3 (citing article); Crown Auto, 731 F. Supp. at 1520 n.5

(continued...)

The historical context, ignored by appellants, also sheds light on the exclusion. At the time of the introduction of the pollution exclusion, many years before the enactment of CERCLA, pollution liability generally required that the insured act intentionally. E.g., Phillips v. Sun Oil Co., 121 N.E.2d 249, 251 (N.Y. 1959); Wright v. Masonite Corp., 368 F.2d 661, 663-65 (4th Cir. 1966), cert. denied, 386 U.S. 934 (1967); Restatement (Second) of Torts §§ 158 (trespass) & 822 (nuisance). Therefore, pollution liability as then imposed would not have been covered and, as reflected in the 1970 letters, the Insurance Rating Board then had reason to believe that the pollution exclusion would not affect coverage "in most cases" and was not a major restriction in coverage. Thus, there is no basis for the attacks on the insurance industry's integrity found in the briefs of the Dimmitts and their amici.

Appellants' other citation to history, contending that boiler and machinery policies' use of "sudden" governs here, actually undercuts their argument.[42] The cases (which are

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[41](...continued)
(same); United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co., 693 F. Supp. at 621 (same). A copy of the article is attached hereto at Appendix Tab 10.

[42] In any event, there is a factual dispute about whether the pollution exclusion's drafters took the phrase "sudden and accidental" from boiler-and-machinery policies. See Deposition of Francis X. Bruton (one of the principal drafters), Aetna Casualty & Sur. Co. v. Morton Thiokol, Inc., No. L-41046-87 (N.J. Super. Ct., Bergen County Jan. 23-24, 1990), at 172, 173, 385.

not discussed by appellants) make clear that courts interpreting boiler and machinery policies recognized the temporal meaning of "sudden."

In the overwhelming majority of the cases, courts contrasted "sudden" with "gradual" or "slow." Even in New England Gas & Electric Ass'n v. Ocean Accident & Guar. Corp., 330 Mass. 640, 116 N.E.2d 671, 680 (1953), on which the Dimmitts rely (Br. at 29 n. 35), the court noted that although "sudden" carried the meaning "unexpected," it also had a temporal dimension. "[W]e do not agree with the auditor's inference that the cracking of the spindle was gradual." 116 N.E.2d at 680.[43] Similarly, Cornell Wood Products Co. v. Hartford Steam Boiler Inspection & Insurance Co., 62 F. Supp. 303, 305 (N.D. Ill. 1945), denied coverage because damage due to a "sixty-hour submersion in [flood] water" was not "sudden."[44]

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[43] When presented with this same argument relying on its New England Gas decision, the Massachusetts Supreme Judicial Court rejected the notion that its decision in New England Gas is precedent on the meaning of "sudden" in the pollution exclusion. See Lumbermens, 555 N.E.2d at 573 ("abruptness of the commencement of the release" determines "suddenness" in the exception to the pollution exclusion).

[44] See also Rueckert Meat Co. v. Hartford Steam Boiler Inspection & Insurance Co., 368 S.W.2d 914, 917 (Mo. App. 1963) (hole in a refrigeration coil was caused by gradual burning from an electric short, and not by "a sudden outward movement of pressure from within"); Sutton Drilling Co. v. Universal Ins. Co., 335 F.2d 820, 824 (5th Cir. 1964) (court equated "sudden" with "rapid"); City of Detroit Lakes v. Travelers Indem. Co., 275 N.W. 371, 392 (Minn. 1937) ("[a]lthough the factors of causation may have been gradual

(continued...)

Finally, as these cases show, "sudden and accidental" in boiler and machinery policies relates to the resulting damage to the covered object, while "sudden and accidental" in the exception to the pollution exclusion relates to the polluting discharge. Therefore, boiler and machinery cases are ultimately irrelevant to the pollution exclusion.[45]

III. THE INTERPRETATION OF "SUDDEN AND ACCIDENTAL" URGED BY THE INSUREDS AND THE ATTORNEY GENERAL WOULD SUBVERT IMPORTANT PUBLIC POLICY GOALS.

This case involves far more than an airy debate about abstract canons of contract interpretation.[46] Viewed in the context of the literally hundreds of similar cases in Florida and across the country, the public policy implications of the issues presently before the Court are difficult to overstate.

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[44](...continued)
and even slow in operation, the rupturing itself was doubtless sudden, at least in its beginning").

[45] Similarly, the Dimmitts' reliance on the purported analysis of "sudden" in Zimmer v. Aetna Ins. Co., 383 So. 2d 992 (Fla. 5th DCA 1980), is misplaced. Br. at 41. There, the court construed an endorsement that was mandated by statute. Id. at 993. The court refused to give effect to the word "sudden" in the policy because of what it viewed as an overriding statutory purpose to insure the specific loss, caused by a sinkhole; the statute specifically referred to coverage for damage caused by "settlement," which was defined as gradual. Id. at 994. There is no similar statute here mandating coverage for generators of polluting waste.

[46] Contrary to the State's contention, this case is also not about clean-up of environmental contamination. This case is about whether insurance companies, who excluded this risk, should be forced to pay the price for cleaning up pollution caused by routine business operations.

Any failure to enforce the plain terms of insurance contracts necessarily affects the integrity of the insurance underwriting process in general -- a particularly important principle as insurers around the country face major threats to their financial capacity.[47] Insurance involves an agreement by the insurer to protect the insured against categories of risk for a fee. Insurance can cover risks, even very large ones, that can be actuarially predicted over a large number of insureds. This vital risk-spreading function is undercut, however, by excessive uncertainty as to the nature of the risk assumed. No insurer can (or would) agree to cover a carefully defined risk if courts felt free to impose liability as they saw fit, notwithstanding the plain language of the policy.

In short, settled assumptions concerning judicial enforcement of contractual terms underlie insurers' actuarial projections of their expected loss experience and the resulting calculation of premiums, particularly for large commercial risks. Confounding these actuarial

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[47] As "[m]easured against the total surplus of the entire property-casualty insurance business . . . [environmental] claims hold out the prospect of widespread insolvencies among the major carriers." Cheek, A Need to Address the Environmental Liability Insurance Crisis, Mealey's Litigation Rep.: Ins. 210, 212 (1985). A recent Congressional Research Service report observed that judicial decisions that expand coverage for pollution-related liability beyond policy language could seriously impair the insurance industry's capital base. Rappaport, CRS Report for Congress: Insurance Company Solvency at 18 (July 13, 1989).

considerations, polluters, generators, and those courts that have accepted their position ignore or distort policy language to reward insureds with free insurance against environmental cleanup costs.[48] This approach transforms the insurance contract from a pool of actuarially predictable risks into a gambling transaction with the odds stacked so that the insurer always pays. Applied to environmental claims, such a profound alteration of the insurance risk could expose insurers to liabilities many times greater than the capacity of the industry.[49]

Moreover, when courts "create" insurance coverage by disregarding express and unambiguous provisions defining the risks that the insurer agreed to cover, they create uncertainty. The underwriter must pass on the cost of this uncertainty to all consumers of insurance. Failure to enforce the insurance contract as written therefore affects

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[48] Appellants' and amici's assertions that policyholders paid for coverage for this liability is wholly unsupported and belied by the plain language of the policy.

[49] A congressional agency estimated in 1989 that the cost of cleaning up the thousands of Superfund sites could reach $500 billion. U.S. Office of Technology Assessment, Coming Clean 27 (1989). As an insurance executive has predicted, "if the insurance industry gets stuck with even a quarter of the estimated cleanup [it will cause] major insolvencies." Naj, Can $100 Billion Have "No Material Effect" on Balance Sheets?, Wall St. J., May 11, 1988, at 11; see also Cheek, Site Owners or Liability Insurers: Who Should Pay For Cleaning Up Hazardous Waste?, 8 Va. J. Nat. Resources L. 75, 89 (1988) (forcing insurers to fund such environmental expenses "would have a devastating impact on the industry").

the price and availability of insurance coverage for those who do not have the resources to self-insure, e.g., individuals and small businesses.[50] The excessive uncertainty may, in turn, discourage the writing of all coverages potentially subject to environmental claims.[51]

Moreover, imposing coverage obligations on insurers as purported "deep pockets," irrespective of clear coverage limitations, also retards the attainment of environmental goals. In passing CERCLA, Congress determined to force the waste generators, not their insurers, to bear the costs of hazardous waste disposal.[52] "Congress never intended

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[50] As the California Supreme Court observed in Garvey v. State Farm Fire & Casualty Co., 48 Cal. 3d 395, 408, 257 Cal. Rptr. 292, 299, 770 P.2d 704, 711 (1989), judicially-created insurance coverage leaves "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities."

[51] EPA itself has explained that the limited availability of insurance for CERCLA contractors is based in part on the fact that "[c]ourts in key jurisdictions have imposed retroactive liabilities on insurers for pollution damages and cleanup costs that were never intended to be covered . . . . The reinsurance market for gradual pollution insurance has virtually disappeared because of adverse loss experience and concerns over legal trends in the U.S." "Superfund Response Action Contractor Indemnification," 54 Fed. Reg. 46012, 46013 (Oct. 31, 1989). See also Note, Encouraging Safety Through Insurance-Based Incentives: Financial Responsibility for Hazardous Wastes, 96 Yale L.J. 403, 423 (1986) (contraction of pollution coverage market attributed in part to insurers' "fears that further changes in legal rules will undermine the basis upon which policies are currently written").

[52] As Professor Brett has emphasized, "it is contrary to public policy to allow a responsible party to pass on the (continued...)

insurers to bear the brunt of CERCLA liability . . . . in its creation of CERCLA, Congress intended that waste generators pay for the cleanup of toxic wastes according to the amount of their hazardous waste contribution."[53] Cleanup Costs, 56 Fordham L. Rev. 1169, 1187 n. 123 (1988).[54]

Undoubtedly, CERCLA's retroactively-imposed obligation creates problems for the waste generators. Obviously, cleaning up the results of this pollution creates problems for states and municipalities, like Florida and Delray Beach.

Florida and Delray Beach expressly endorse the "deep pocket" approach. Initially, it is not at all clear that a ruling for appellants will ensure coverage for Delray Beach. The polluter of Delray's aquifer appears to have deliberately

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[52](...continued)
costs of cleanup, as well as other costs recoverable under Superfund, to its insurance carriers, and thereby retain the benefit of having another perform its public duty without ever having paid for it." Brett, Insuring Against the Innovative Liabilities and Remedies Created by Superfund, 6 UCLA J. Envtl. L. & Pol'y 1, 52 (1986).

[53] The court held in United States v. Northeastern Pharmaceutical and Chemical Co. that Congress "impose[d] liability for the cost . . . upon those parties who created and profited from the sites and upon the chemical industry as a whole." 810 F.2d 726, 734 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

[54] Likewise, environmentalists recognize the salutary effect of forcing waste generators to bear their own cleanup costs. Various national environmental groups, such as the Clean Water Action Group, the Natural Resources Defense Council, and the National Audubon Society, support the "polluter pays" approach and oppose alternative funding schemes that undermine that approach. Inside EPA's Superfund Report at 9-10 (Inside Washington Publication, Washington D.C., May 10, 1989).

discharged toxic chemicals into the environment and likely will be held to have intended the consequences of its actions; accordingly, there has been no "occurrence" under the policy. Delray's grasping at straws should not influence the Court's decision. Although all may agree that it is unfortunate if Delray cannot collect on its judgment, ignoring or distorting the plainly worded pollution exclusion in this case is not a legitimate response.

Florida, likewise, seeks any source of funding. It and Delray point to the public policy favoring clean-up of environmental waste as a sufficient reason to shift responsibility for payment to the insurers. They provide no clear rationale to make insurers rather than polluters pay, because there is none. We all share in the goal of cleaning our environment; we all should also recognize the necessity of maintaining a sound and viable system of insurance. It is both contrary to law and unsound public policy to put the price of environmental clean up on the insurers, who expressly excluded this risk from their policies and whose ability to carry out their socially beneficial insurance function would be seriously threatened if they were forced to do so. "The rule that ambiguities in insurance contracts are to be construed in favor of the insured is not license for our raiding the deep pocket." State Farm Fire & Casualty Co. v. Oliveras, 441 So. 2d 175, 178 (Fla. 4th DCA 1983), review denied, 451 So. 2d 849 (Fla. 1984) (citation omitted); see

also Finci v. American Casualty Co., 323 Md. 358, 593 A.2d 1069 (1991) ("[t]here is no principled basis on which" a state agency's goal of collecting funds can invalidate a policy provision "without imperiling all contractual defenses").

In the long run, public environmental policy is best served by adhering to time-tested principles of insurance contract interpretation. These fundamental public policy considerations reinforce what Florida law requires: an insurance policy, like any other contract, must be construed according to its terms and not distorted to provide free insurance where none was intended.

CONCLUSION

For the foregoing reasons, the Court should hold that the pollution exclusion precludes coverage for the long-term and gradual pollution at issue in this case.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amici Curiae for the Insurance Environmental Litigation Association ("IELA"), Service Insurance Company, Florida Farm Bureau Insurance Company, and American Surety & Casualty Company was served on December 9, 1991 by first-class mail postage prepaid, upon counsel below.

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ADDENDUM A

Cases Holding That The Term "Sudden"
In The Pollution Exclusion Has A Temporal Meaning

State Supreme Court Cases

1. Upjohn Co. v. New Hampshire Insurance Co., 438 Mich. 197, to be published 476 N.W.2d 382 (1991) ("'sudden' includes a temporal element as well as a sense of the unexpected").

2. Protective National Insurance Co. v. City of Woodhaven, 438 Mich. 154, to be published 476 N.W.2d 374 (1991) ("'sudden' is defined with a 'temporal element that joins together conceptually the immediate and the unexpected").

3. Hazen Paper Co. v. United States Fidelity & Guaranty Co., 407 Mass. 689, 555 N.E.2d 576, 579 (1990) (pollution exclusion provides coverage "only if the discharge or release was not only accidental but also 'sudden,' in the sense of an unexpected, abrupt discharge or release").

4. Lumbermens Mutual Casualty Co. v. Belleville Industries, Inc., 407 Mass. 675, 555 N.E.2d 568, 572 (1990) ("For the word 'sudden' to have any significant purpose, and not to be surplusage when used generally in conjunction with the word 'accidental,' it must have a temporal aspect to its meaning, and not just the sense of something unexpected").

5. Waste Management of Carolinas, Inc. v. Peerless Insurance Co., 315 N.C. 688, 340 S.E.2d 374, 382-83 (1986) (pollution exclusion bars coverage for "'contribution' over a number of years of contaminating materials to a landfill").

State Intermediate Appellate Court Cases

1. Harleysville Mutual Insurance Co. v. R.W. Harp & Sons, Inc., 409 S.E.2d 418 (S.C. App. 1991), reh. denied, Oct. 4, 1991 (gasoline leak of up to sixty days' duration was not sudden)

2. Outboard Marine Corp. v. Liberty Mutual Insurance Co., 212 Ill. App. 3d 231, 570 N.E.2d 1154 (1991) ("The word 'sudden' has a temporal meaning and is synonymous with 'abrupt'"), appeal pending, Nos. 71753, 71761 (Ill.).

3. Mays v. Transamerica Insurance Co., 103 Or. App. 578, 799 P.2d 653 (1990) (pollution exclusion bars coverage for releases of wastes over a ten-year period).

4. Weber v. IMT Insurance Co., No. 9-437, Slip op at 7 (Iowa Ct. App. Apr. 24, 1990) ("'sudden' in its common usage, means 'happening without previous notice or with very brief notice'"; no coverage where pollutants were discharged on ongoing basis over ten-year period), aff'd on other grounds, 462 N.W.2d 283 (Iowa 1990).

5. Chemetco, Inc. v. Citizens Ins. Co. of America, No. 109913, slip op. at 3 (Mich. Ct. App. Feb. 13, 1990) (pollution occurring over "a long period of time" was not sudden).

6. Lower Paxton Township v. United States Fidelity & Guaranty Co., 383 Pa. Super. 558, 557 A.2d 393, 398 (1989) ("sudden" means "abrupt and lasting only a short time"), review denied, 93 M.D. Allocatur Dkt. 1989 (Pa. Sept. 22, 1989).

7. Technicon Electronics Corp. v. American Home Assurance Co., 141 A.D.2d 124, 533 N.Y.S.2d 91, 99 (1988) ("[a] 'sudden and accidental' event is one which is unexpected, unintended and occurs over a short period of time"), aff'd on other grounds, 74 N.Y.2d 66, 542 N.E.2d 1048, 544 N.Y.S.2d 531 (1989).

8. International Mineral & Chemical Corp. v. Liberty Mutual Insurance Co., 168 Ill. App. 3d 361, 522 N.E.2d 758, 769 (1st Dist.) (referring to the word "sudden," court "decline[d] to ignore . . . temporal-focused definitions or hold that because the word might also have other contextual uses, it is ambiguous and thus must be interpreted to provide coverage where the policy language read as a whole clearly intends to exclude such coverage"), review denied, 122 Ill. 2d 576, 530 N.E.2d 246 (1988).

9. Barmet of Indiana, Inc. v. Security Insurance Group, 425 N.E.2d 201, 203 (Ind. Ct. App. 1981) (discharge of emissions due to regular and frequent malfunctioning of pollution control equipment is not sudden and accidental).

10. Techalloy Co. v. Reliance Insurance Co., 338 Pa. Super. 1, 487 A.2d 820, 827 (1984) (no coverage for "a regular or sporadic discharge over a period of 25 years"), review denied, 338 E.D. Allocatur Dkt. 1985 (Pa. Oct. 31, 1985).

11. Transamerica Insurance Co. v. Sunnes, 77 Or. App. 136, 711 P.2d 212, 214 (1985) (pollution exclusion bars coverage for discharges "regularly over a period of many years"), review denied, 301 Or. 76, 717 P.2d 631 (1986).

State Trial Court Cases

1. North Pacific Insurance Co. v. United Chrome Products, Inc., No. CV89-0777 (Or. Cir. Ct., Benton County Sept. 30, 1991) (pollution exclusion barred coverage sloppy or negligent operation of a business or occurred slowly over an extended period of time").

2. Rochester Smelting & Refining Co., Inc. v. Merchants Mutual Insurance Co., No. 91/02683 (N.Y. Sup. Ct., Monroe County Sept. 9, 1991) (where wastes were deliberately dumped in a landfill over a seven-year period, "it would be difficult to conclude that such discharges were either sudden or accidental").

3. Aerojet-General Corp. v. Transport Indemnity Insurance Co., No. 262425 (Cal. Super. Ct. San Mateo County Aug. 20, 1991) ("the plain, ordinary and popular meaning of sudden is abrupt, quick, swift, not gradual").

4. Goodman v. Aetna Casualty & Surety Co., No. 88-0052 (Mass. Super. Ct., Berkshire County Sept. 28, 1990) (lengthy discharge of gasoline into the nearby soil and ground water could not be considered "sudden"), appeal pending, No. 91-P-565 (Mass. Ct. App.).

5. Gilbert Spruance Co. v. Pennsylvania Manufacturers' Association Insurance Co., No. L-8840-88, slip op. at 6 (N.J. Super. Ct., Law Div. June 26, 1989) ("it escapes me as to how the deposit of waste materials or toxic materials over the course of 15 or 20 years can be considered as sudden under any stretch of a reasonable imagination"), appeal pending, No. A-1975-90-TS (N.J. Super. Ct. App. Div.).

6. Diamond Shamrock Chemicals Co. v. Aetna Casualty & Surety Co., No. C-3939-84, slip op. at 21, 24 (N.J. Super. Ct., Ch. Div. Apr. 12, 1989) ("the clear language of the pollution exclusion bars coverage where . . . the damage happens gradually over a period of time"; "there is always a temporal element to the word 'sudden'"), appeal pending, No. A-694-89T1 (N.J. Super. Ct. App. Div.).

7. Continental Casualty Co. v. Rapid-American Corp., No. 24112/90 (N.Y. Sup. Ct., New York County, June 5, 1991) (gradual discharge of asbestos dust and fibers over a period spanning several decades did not fall within "sudden and accidental" exception to pollution exclusion). 936 F.2d 1420.

8. St. Paul Fire & Marine Insurance Co. v. McCormick & Baxter Creosoting Co., No. A6711-07096 (Or. Cir. Ct., Multnomah County Dec. 21, 1990) ("while the term 'sudden' in certain contexts may mean 'unforeseen,' when used in conjunction with 'accidental,' it necessarily assumes its temporal definition of short in time"; no coverage for 25 to 30 spills of chemicals over 40-year period).

9. New Hampshire Insurance Co. v. H. Brown Co., No. 87-56315-CK (Mich. Cir. Ct., Kent County Sept. 27, 1989) ("only fair reading" of the pollution exclusion is that the policy does not cover damage which arises from normal, continuous business operations), aff'd, No. 121961 (Mich. Ct. App. July 29, 1991).

10. Sylvester Brothers Development Co. v. Great Central Insurance Co., No. C2-88-2491 (Minn. Dist. Ct., Anoka County Apr. 30, 1991) (pollution exclusion bars coverage for routine dumping of hazardous substances at landfill over several years; to come within the exception, the discharge or release "must . . . have been 'sudden,' in other words, 'abrupt' or 'quick' as opposed to continuous"), appeal pending, No. CO-91-1080 (Minn. Ct. App.).

11. ACL Technologies, Inc. v. Northbrook Property & Casualty Insurance Co., No. X-61 95 76 (Cal. Super. Ct., Orange County Sept. 23, 1991) ("sudden" refers to "something which occurs abruptly"; coverage excluded for "a leaking situation over several years" resulting from extended corrosion).

Federal Appellate Court Cases

1. Grant-Southern Iron & Metal Co. v. CNA Insurance Co., 905 F.2d 954, 955 (6th Cir. 1990) ("the phrase 'sudden and accidental' has a temporal component and does not describe continuous or ongoing polluting events").

2. FL Aerospace v. Aetna Casualty & Surety Co., 897 F.2d 214, 219 (6th Cir. 1990) ("word 'sudden' has a plain, everyday temporal component . . . a sudden and accidental event is one that happens quickly, without warning, and fortuitously or unintentionally"), cert. denied, 111 S. Ct. 284 (1990).

3. Ogden Corp. v. Travelers Indemnity Co., 924 F.2d 39, 42 (2d Cir. 1991) ("For a release or discharge to be sudden, it must 'occur[] over a short period of time.'").

4. United States Fidelity & Guaranty Co. v. Star Fire Coals, Inc., 856 F.2d 31, 34 (6th Cir. 1988) ("[w]e do not believe that it is possible to define 'sudden' without reference to a temporal element that joins together conceptually the immediate and the unexpected").

5. Great Lakes Container Corp. v. National Union Fire Insurance Co., 727 F.2d 30, 33 (1st Cir. 1984) (no coverage for contamination as a result of "regular business activity").

6. A. Johnson & Co. v. Aetna Casualty & Surety Co., 933 F.2d 66, 72 (1st Cir. 1991) (predicting that Maine will "join the jurisdictions which accord 'sudden' its unambiguous, plain and commonly accepted meaning of temporally abrupt").

7. State of New York v. AMRO Realty Corp., No. 90-7940 (2d Cir. June 15, 1991) ("The underlying complaint here, alleging that an industrial operation disposed of its manufacturing waste by certain improper methods for close to thirty years, cannot be understood to allege a 'sudden' release").

8. Lumbermens Mutual Casualty Co. v. Belleville Industries, Inc., 938 F.2d 1423 (1st Cir. 1991) (pollution exclusion bars coverage for discharge of pollutants as ordinary part of long term business operations, notwithstanding that scattered instances of release may have been unforeseen or occurred suddenly).

9. Northern Insurance Co. v. Aardvark Associates, Inc., 942 F.2d 189 (3d Cir. 1991) ("exception for 'sudden and accidental' discharges applies only to discharges that are abrupt and last a short time": no coverage for pollution "occurring over a period of years").

Federal District Court Cases

1. Aeroquip Corp. v. Aetna Casualty & Sur. Co., No. CV 90-4260 RG(Gx) (C.D. Cal. Oct. 18, 1991) (exclusion "clear and unambiguous. The term 'sudden' as used in the 'sudden and accidental' pollution exclusion includes a temporal element. Thus, the release must be brief, abrupt and of short duration to fall within this exception to the pollution exclusion.") (also holding that burden is on insured to prove a "sudden and accidental discharge).

2. Anaconda Minerals Co. v. Stoller Chemical Co., Civ. No. 87-C-118W (D. Utah Sept. 13, 1991), to be published 773 F. Supp. 1498 (D. Utah 1991) ("routine discharges of pollutants or contaminants, over a lengthy period, are not sudden

discharges"), appeal pending sub nom. ARCO v. Stoller Chemical Co., No. 9-4187 (10th Cir.).

3. Ludlow's Sand & Gravel Co. v. General Accident Insurance Co., No. 87-CV-1239 (N.D.N.Y. May 13, 1991) (discharges taking place over twenty-year period cannot be considered "sudden").

4. Detrex Chemical Indus., Inc. v. Employers Insurance of Wausau, 681 F. Supp. 438, 457 (N.D. Ohio 1987) ("sudden and accidental" does not include events over a period of time).

5. Peerless Insurance Co. v. Strother, 765 F. Supp. 866, 871 (E.D.N.C. 1990) ("a pattern of repetitive activity" is not "sudden and accidental").

6. United States Fidelity & Guaranty Co. v. Morrison Grain Co., 734 F. Supp. 437, 446 (D. Kan. 1990) ("As commonly used, the meaning of 'sudden' combines both the elements of without notice or warning and quick or brief in time").

7. Inland Waters Pollution Control, Inc. v. National Union Fire Insurance Co., No. 89-CV-70584-DT (E.D. Mich. May 17, 1990) (pollution exclusion unambiguous), aff'd in part, rev'd in part, 943 F.2d 52 (6th Cir. 1991).

8. Industrial Indemnity Insurance Co. v. Crown Auto Dealerships, Inc., 731 F. Supp. 1517, 1520 (M.D. Fla. 1990) ("sudden" unambiguously refers to "pollution which occurs abruptly, instantly, or within a very short period of time"), on certification to Florida Supreme Court in case at bar.

9. Ray Industries Inc. v. Liberty Mutual Insurance Co., 728 F. Supp. 1310, 1319 (E.D. Mich. 1989) (releases that "occurred regularly and continuously for approximately thirteen years . . . were not sudden and accidental").

10. Becker Electronics Manufacturing Corp. v. Granite State Insurance Co., No. 86-CV-1294, slip op. at 6 (N.D.N.Y. June 12, 1989) (1989 WL 63671) ("[n]or can this court conclude that allegations of continuous disposal of waste solvents for a period of approximately twenty years . . . constitutes a 'sudden and accidental' exception to the pollution exclusion").

11. C.L. Hauthaway & Sons Corp. v. American Motorists Insurance Co., 712 F. Supp. 265, 268 (D. Mass. 1989) ("sudden" connotes "a temporal aspect of immediacy, abruptness, swiftness, quickness, instantaneousness, and brevity").

12. Federal Insurance Co. v. Susquehanna Broadcasting Co., 727 F. Supp. 169, 177 (M.D. Pa. 1989) ("pollution exclusion broadly, but nevertheless plainly, excludes coverage for gradual pollution"), aff'd, 928 F.2d 1131 (3d Cir. 1991).

13. United States Fidelity & Guaranty Co. v. Murray Ohio Manufacturing Co., 693 F. Supp. 617 (M.D. Tenn. 1988), aff'd per curiam, 875 F.2d 868 (6th Cir. 1989) (release of pollutant over seven year period "cannot, under any reasonable interpretation, be deemed a 'sudden' discharge or release").

14. United States Fidelity & Guaranty Co. v. Korman Corp., 693 F. Supp. 253, 260 (E.D. Pa. 1988) (pollution exclusion applies where alleged leaching of contaminants was not sudden but rather "occurred continually over a long period of time").

15. Fireman's Fund Insurance Cos. v. Ex-Cell-O Corp., 702 F. Supp. 1317, 1325-26 (E.D. Mich. 1988) ("'sudden' in the pollution exclusion includes the temporal component of briefness, and means 'brief, momentary, or lasting only a short time'").

16. EAD Metallurgical, Inc. v. Aetna Casualty & Surety Co., 701 F. Supp. 399 (W.D.N.Y. 1988) (no coverage for releases occurring from 1977 to 1983), aff'd on other grounds, 905 F.2d 8 (2d Cir. 1990).

17. Hayes v. Maryland Casualty Co., 688 F. Supp. 1513, 1515 (N.D. Fla. 1988) ("[u]nder the evidence here it is clear beyond cavil that the damage was not sudden -- the pollution had to be carried on over a considerable period of time").

18. Centennial Insurance Co. v. Lumbermens Mutual Casualty Co., 677 F. Supp. 342, 347, 348 (E.D. Pa. 1987) ("pollution exclusion clause . . . . [is] unambiguous and . . . the language should be given its plain and ordinary meaning"; waste released on numerous occasions over thirteen-month period cannot be characterized as "sudden").

19. American Mutual Liability Insurance Co. v. Neville Chemical Co., 650 F. Supp. 929, 933 (W.D. Pa. 1987) ("annual careless spillage onto the ground surface cannot be sudden").

20. Borden, Inc. v. Affiliated FM Insurance Co., 682 F. Supp. 927, 930 (S.D. Ohio 1987) (regular depositing of radioactive wastes "is precisely the type of activity which the pollution

exclusion was drafted to preclude"), aff'd mem., 865 F.2d 1267 (6th Cir.), cert. denied, 110 S. Ct. 68 (1989).

21. American Motorists Insurance Co. v. General Host Corp., 667 F. Supp. 1423, 1428 (D. Kan. 1987) ("[n]o use of the word 'sudden' or 'suddenly' could be consistent with an event which happened gradually or over an extended time"), aff'd on other grounds, 1991 U.S. App. LEXIS 4428 (10th Cir. 1991), vacated in part on reh'g No. 88-1503 (Aug. 29, 1991).

22. Fischer & Porter Co. v. Liberty Mutual Insurance Co., 656 F. Supp. 132, 140 (E.D. Pa. 1986) (continuous dumping of toxic chemicals is not "sudden").

23. Grant-Southern Iron & Metal Co. v. CNA Insurance Co., 669 F. Supp. 798, 801 (E.D. Mich. 1986) (pollution exclusion bars coverage for pollution discharged "at least sporadically and may be continuously"), appeal dismissed mem., 838 F.2d 470 (6th Cir. 1988).

24. American States Insurance Co. v. Maryland Casualty Co., 587 F. Supp. 1549, 1553 (E.D. Mich. 1984) (no coverage for continuous dumping).

25. National Standard Insurance Co. v. Continental Insurance Co., No. CA-3-81-1015-D, slip op. at 17 (N.D. Tex. Oct. 4, 1983) (chemical discharges "over a period of years" are not sudden).

26. Terminix International Co. v. Maryland Casualty Co., No. 88-2186-4B (W.D. Tenn. Mar. 7, 1991) (pollution exclusion bars coverage where contaminants were released over long period of time), appeal pending, No. 91-5519 (6th Cir.).

27. CPC International, Inc. v. Northbrook Excess & Surplus Insurance Co., 159 F. Supp. 966 (D.R.I. 1991) (pollution exclusion allows coverage only for events that are "accidental," i.e., unexpected and unintended, and "sudden," i.e., occurring abruptly, precipitantly, or over a short period of time).

28. Olin Corp. v. Insurance Co. of North America, No. 1991 WL 63420 (S.D.N.Y. Apr. 23, 1991) (pollution exclusion bars coverage for claims resulting from discharge of DDT- bearing effluent where discharge was neither "sudden," since it occurred over a sixteen-year period, nor "accidental," since insured was aware of DDT in effluent).

29. Hudson Insurance Co. v. Double D Management Co., 768 F. Supp. 1542 (M.D. Fla. 1991) (pollution exclusion precludes coverage where discharge occurred over long period of time as normal part of business operations).

ADDENDUM B

Extrinsic Evidence

State Supreme Court Cases

1. Upjohn Co. v. New Hampshire Insurance Co., 438 Mich. 197, to be published 476 N.W.2d 382 (1991) (pollution exclusion being unambiguous, extrinsic evidence may not be considered; moreover, alleged drafting history does not support conclusion that pollution exclusion restates "occurrence" definition).

2. Lumbermens Mutual Casualty Co. v. Belleville Industries, Inc., 407 Mass. 675, 555 N.E.2d 568, 572-73 (1990) (finding pollution exclusion unambiguous and therefore refusing to consider extrinsic evidence).

3. AIU Insurance Co. v. Superior Court, 51 Cal. 3d 807, 823 n.9, 274 Cal. Rptr. 3d 820, 832 n.9 (1990) (rejecting "drafting history" documents as not probative of mutual intent of parties at time contract was formed)

State Intermediate Appellate Court Cases

1. Lower Paxton Township v. United States Fidelity & Guaranty Co., 383 Pa. Super. 558, 557 A.2d 393, 402 n.5 (1989) (since pollution exclusion unambiguous, court may not refer to extrinsic evidence of drafters' intent), review denied, 93 M.D. Allocatur Dkt. 1989 (Pa. Sept. 22, 1989).

State Trial Court Cases

1. North Pacific Insurance Co. v. United Chrome Products, Inc., No. CV89-0777 (Or. Cir. Ct., Benton County Sept. 30, 1991) (ISO documents submitted by insured indicate intention to exclude coverage for gradual, longterm pollution).

2. Aerojet-General Corp. v. Transport Indemnity Insurance Co., No. 262425 (Cal. Super. Ct. San Mateo County Aug. 7, 1991) (rejecting extrinsic documents as not probative of parties' intent at time contract was formed).

3. Central Illinois Public Service Co. v. Allianz Underwriters Insurance Co., No. 87-L-39 (Ill. Cir. Ct., 7th Jud. Cir. Apr. 27, 1989) (striking portions of complaint containing references to drafting history and drafters' alleged intent).

4. Great Lakes Chemical Corp. v. Northwestern National Insurance Co., No. 23 Col-8711-CP-263 (Ind. Cir. Ct., Fountain County May 4, 1989) (refusing to require insurers to respond to discovery requests relating to drafting history).

5. Purex Industries, Inc. v. Proctor, No. C-446-935 (Cal. Super. Ct., Los Angeles County July 19, 1988) (interpreting policies on their face without regard to parties' intent and finding that response costs are not "damages").

6. Troy Mills, Inc. v. Aetna Casualty & Surety Co., No. 86-E-054 (N.H. Super. Ct. June 20, 1989) (rejecting extrinsic evidence, since policy language regarding "damages" was unambiguous), aff'd, No. 89-311 (N.H. Feb. 13, 1990).

7. Schering Corp. v. Evanston Insurance Co., No. L-97311-88 (N.J. Super. Ct., Law Div. Aug. 4, 1989) (denying discovery into drafting history as immaterial to interpretation of contract).

8. Township of Lacy v. Selective Risks Insurance Co., No. L-068049-88 (N.J. Super. Ct., Ocean County Mar. 6, 1990) (refusing to require discovery of history of policy terms).

9. Central Illinois Public Service Co. v. Allianz Underwriters Insurance Co., No. 90 L 11094 (Ill. Cir. Ct., Cook County Apr. 26, 1991) ("the industry's general understanding of the terms of the contract cannot transform clarity into ambiguity").

10. Sylvester Brothers Development Co. v. Great Central Insurance Co., No. C2-88-2491 (Minn. Dist. Ct., Anoka County Apr. 30, 1991) (rejecting extrinsic evidence on pollution exclusion because "sudden and accidental" unambiguous), appeal pending No. CO-91-1080 (Minn. Ct. App.).

11. Air Products and Chemicals, Inc. v. Hartford Accident and Indemnity Co., No. L-17134-89 (N.J. Super. Ct., Middlesex County Oct. 5, 1990) (finding drafting history to be irrelevant to interpretation of contract terms).

12. Syndergeneral Corp. v. Continental Insurance Co., No. CA3-90-2396-T (N.D. Tex. May 1, 1991) (refusing to allow

discovery into drafting history of pollution exclusion where it had not been held to be ambiguous).

Federal District Court Cases

1. Alcolac, Inc. v. California Union Insurance Co., 716 F. Supp. 1546 (D. Md. 1989) (denying discovery into extrinsic evidence on "absolute" pollution exclusion).

2. American Motorists Insurance Co. v. General Host Corp., 120 F.R.D. 129 (D. Kan. 1988) (rejecting extrinsic evidence, which nonetheless supports holding that pollution exclusion has independent, objective meaning).

3. Grant-Southern Iron & Metal Co. v. CNA Insurance Co., No. 85-1866 (E.D. Mich. Nov. 30, 1988) (pollution exclusion's alleged drafting history supports insurer's position).

4. Fireman's Fund Insurance Cos. v. Ex-Cell-O Corp., 720 F. Supp. 597 (E.D. Mich. 1989) (finding pollution exclusion unambiguous and rejecting extrinsic evidence regarding its interpretation).

5. Fireman's Fund Insurance Cos. v. Ex-Cell-O Corp., 702 F. Supp. 1317 (E.D. Mich. 1988) (as pollution exclusion not ambiguous, no extrinsic evidence should be considered).

6. Independent Petrochemical Corp. v. Aetna Casualty & Surety Co., 1987 WL 11417 (D.D.C. May 26, 1987) (drafting history supports insurer's position on pollution exclusion).

7. Inland Waters Pollution Control, Inc. v. National Union Fire Insurance Co., No. 89-CV-70584-DT (E.D. Mich. May 17, 1990) (denying discovery into drafting history, as "sudden" and "accidental" are unambiguous), aff'd in part, rev'd in part, 943 F.2d 52 (6th Cir. 1991).

8. Northern Insurance Co. v. Aardvark Associates., Inc., 743 F. Supp. 379 (W.D. Pa. 1990) (refusing to consider drafting history, since pollution exclusion was not ambiguous), aff'd, 942 F.2d 189 (3d Cir. 1991).

9. Ogden Corp. v. Travelers Indemnity Co., 740 F. Supp. 963, 967 (S.D.N.Y. 1990) (refusing to resort to extrinsic evidence where terms of contract were unambiguous), aff'd, 924 F.2d 39 (2d Cir. 1991).

10. Rhone-Poulenc Rover, Inc. v. Home Indemnity Co., No. 88-9752, 1991 WL 11040 (E.D. Pa. June 17, 1991) (refusing to allow discovery of drafting history unless and until policy language is found to be ambiguous).

11. United States Fidelity & Guaranty Co. v. Citizens Electric Corp., No. 90-0350-C-7 (E.D. Mo. Nov. 26, 1990) (denying discovery of drafting history regarding the meaning of "damages" because the term is not ambiguous), on appeal, No. 91-2834 (8th Cir.).