IN THE SUPREME COURT OF FLORIDA

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

Defendants, Appellants,

v.

SOUTHEASTERN FIDELITY
INSURANCE CORPORATION

Plaintiff, Appellee

APPEAL NO. 78,293

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

USCA NO. 90-3359

ANSWER BRIEF OF APPELLEE SOUTHEASTERN FIDELITY INSURANCE COMPANY

Hal K. Litchford
Florida Bar No. 272485
Kristyn D. Elliott
One duPont Centre
Suite 2200
Post Office Box 1549
Orlando, Florida 32802
(407) 422-6600
Associate Counsel
for Appellee

Robert E. Austin, Jr.
Florida Bar No. 2701
Suite C
1321 W. Citizens Boulevard
Post Office Box 490200
Leesburg, Florida 34749-0200
(904) 728-0595
Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

In the brief, Appellants, Dimmitt Chevrolet, Inc. and Dimmitt Cadillac, Inc., will be collectively referred to as "Dimmitt". Appellee, Southeastern Fidelity Insurance Corporation, will be referred to as "Southeastern". Citations to the original record on appeal will be made by the letter "R" followed by the volume number, document number and page number or exhibit designation as appropriate. Thus, the citation "R1-2-3" shall refer to the first volume of the record, the second document at page 3.

STATEMENT OF THE CASE

This case arises from a final summary judgment entered by United States District Judge William Terrell Hodges finding on undisputed facts that extensive pollution that gradually built up over many years was not covered by a comprehensive general liability insurance policy by virtue of a clear and unambiguous exclusion. Industrial Indemnity Insurance Company v. Crown Auto Dealerships, Inc., 731 F.Supp. 1517 (M.D. Fla. 1990) (hereafter "Crown Auto"). On appeal, the United States Court of Appeals for the Eleventh Circuit certified to this Court what it perceived to be the controlling question of Florida substantive law:

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

Industrial Indemnity Insurance Company v. Crown Auto Dealerships, Inc., 935 F.2d 240, 243 (11th Cir. 1991).

Pursuant to Florida Rule of Appellate Procedure 9.210 (c), Southeastern adopts Dimmitt's Statement of the Case, with the following qualifications:

A. Question Presented.

Southeastern concurs in the Question Presented as certified by the United States Court of Appeals for the Eleventh Circuit. Southeastern disagrees, however, with Dimmitt's attempt to recharacterize the certified question.

B. Jurisdiction

This Court "[m]ay review a question of law certified ... by a United States Court of Appeals which is determinative of the cause

and for which there is no controlling precedent of the Supreme Court of Florida." Art. V, §3 (b)(6), Fla. Const. (emphasis added). This constitutional grant should not be extended to "an academic discussion" of a collateral issue. Greene v. Massey, 384 So.2d 24, 28 (Fla. 1980); see Padovano, Florida Appellate Practice §21.7 (1988).

C. Course of Proceedings and Disposition in the Courts Below.

Southeastern also concurs in Dimmitt's summary of the Course of Proceedings and Disposition in the Courts Below except for the following points:

1. Southeastern objects to Dimmitt's characterization of the pollution exclusion at page 2, note 1 of its initial brief as a gratuitous and wholly unsupported assertion.

2. Southeastern further objects to Dimmitt's argumentative footnote 2, particularly since Dimmitt itself acknowledges that this issue is beyond the scope of the question certified by the Eleventh Circuit. In any event, Dimmitt's argument is immaterial on this point. Judge Hodges' opinion found that the plain language of a clear and unambiguous exclusion precluded insurance coverage for damage caused by gradual pollution. Under the facts of this case, there can be no duty to defend when the duty to indemnify is nonexistent. See National Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So.2d 533 (Fla. 1977).

Further pursuant to Rule 9.210 (c) Southeastern supplements its Statement of the Case to ensure that all pertinent procedural aspects of this case are before this Court. The summary judgment standards that governed Judge Hodges' legal analysis are an

important facet of this case. In a series of recent decisions, the United States Supreme Court has emphasized the efficacy of the federal summary judgment rule, Fed.R.Civ.P. 56. In federal court, the moving party bears only the initial responsibility of informing or pointing out to the trial court the basis of its motion and identifying that portion of the record which it believes demonstrates the absence of a material issue of fact. E.g., Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). It is not necessarily incumbent on the moving party to carry its burden with supporting affidavits. Id. at 323, 324. Once the moving party makes its showing, the burden of production shifts to the nonmoving party to "designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324, quoting Fed.R.Civ.P. 56 (c), (e). Summary judgment is warranted if the nonmoving party fails to make a showing sufficient to establish an essential element of its case. Id. at 322. If the nonmoving party's rebuttal evidence is "merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986) (citations omitted). A U.S. District Court ruling on summary judgment "must view the evidence presented through the prism of the substantive evidentiary burden" each party will assume at trial. Id. at 254. In addition, to defeat summary judgment the nonmoving party must present facts that are admissible under the Rules of Evidence. E.g., General GMC Trucks, Inc. v. Mercury Freight Lines, 704 F.2d 1237 (11th Cir. 1983); Fed.R.Civ.P. 56 (e).

The cross motions for summary judgment decided by Judge Hodges in the order of March 1, 1990, were filed on April 28, 1989 and

January 5, 1990 (R1-21 and R3-62). The respective oppositions were filed on June 15, 1989 and January 25, 1990. (R2-34 and R4-74). The record on which Judge Hodges' analysis is based did not include purported statements of nonparty, out-of-court declarants in connection with the submission of the pollution exclusion language for regulatory approval to various states decades ago. Also absent from the summary judgment record was any admissible evidence concerning the drafting history of the pollution exclusion. Judge Hodges entered the order granting Southeastern's motion for summary judgment more than eight months after Dimmitt submitted its formal opposition.

The extrinsic materials underlying Dimmitt's argument at III. B. of its Initial Brief, pages 15-37 (hereafter "Br."), were injected into the trial court record post-judgment. These materials appeared for the first time in the case in accompaniment with Dimmitt's motion to alter or amend the final summary judgment, which was filed on March 16, 1990. (R4-100 & 101). In this motion, Dimmitt represented that it had become aware of much of its extrinsic information for the first time in 1990; it based its motion on "[n]ew interpretative evidence, not available to Dimmitts prior to the Court's ruling on the motions for summary judgment ...." R4-100-2. After considering this motion and the appended extrinsic materials, Judge Hodges rejected both. (R4-105). Southeastern finds itself in the anomalous position of appearing before the highest court of this State and confronting lengthy argument based on extrinsic materials. Yet, because of the manner by which these materials were submitted, Southeastern never had any genuine opportunity to probe, impeach, rebut, or supplement these materials.

It has never been disputed by the direct parties to this appeal that Southeastern's pollution exclusion would operate to preclude coverage but for the "sudden and accidental" exception. Dimmitt's position before both this Court and the Eleventh Circuit is that this exception to Southeastern's exclusion should be invoked to override the exclusion and thereby establish coverage. See, e.g., Br. at 7.

STATEMENT OF THE FACTS

Southeastern accepts the facts Dimmitt includes in its Statement of Facts. In order for the court to gain a full appreciation of the factual context of this case, however, Southeastern must supplement Dimmitt's partial and topical recitation. To enhance the clarity and continuity of Southeastern's presentation, there is some repetition in the supplemental statement of facts that follows.

Southeastern provided comprehensive general liability policies to Dimmitt from at least 1977 until August 1, 1980, the date its last policy expired. Crown Auto, 731 F.Supp. at 1519, n.2; R4-96.

The facts on which Judge Hodges based his decision that Southeastern's pollution exclusion removed the pollution damage from the scope of coverage are undisputed. The claims for which Dimmitt seeks insurance reimbursement result from its participation in contaminating a hazardous waste site maintained by a third party with whom Dimmitt transacted business for a five-year period. Between 1974 and 1979, Dimmitt sold used crankcase oil to the Peak Oil Company (hereafter "Peak" or "Peak Oil") which reprocessed it at its facility in Hillsborough County. Peak was engaged in the business of re-refining used oil from 1954 until 1979. On August

1, 1980, after Dimmitt's last policy with Southeastern expired, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§9601 et seq., was enacted into law. In 1983, the Environmental Protection Agency determined that Peak's business operations over the years had caused extensive soil and ground water contamination. "The pollution at Peak derived from the company's having placed waste oil sludge in unlined storage ponds. Chemicals from the waste then leached into the soil and ground water." 731 F.Supp. at 1518. Under CERCLA, Dimmitt became responsible for governmental investigative and clean-up costs of the Peak site because it generated hazardous waste (i.e., used crankcase oil) that contributed to the pollution. This statutory responsibility attached because of Dimmitt's ongoing sales of used oil to Peak for use in the latter company's oil recycling process. This previously unknown and unprecedented basis of restitutionary responsibility for environmental contamination was first created under the provisions of CERCLA. Pursuant to 42 U.S.C. §9607, any party that generates, transports, or disposes of hazardous substances is potentially responsible for the investigative and clean-up costs of a contaminated site.

The principal cause of the pollution and contamination at the Peak site was the leaching of chemicals from the waste sludge in the unlined retention ponds into the soil and aquifer. 731 F.Supp. 1520. Environmental damage was also caused by "accidental spills and leaks of used oil and other substances at the site" and "surface run-off or contaminants from the process area and sludge

retention ponds during precipitation events." Id. at 1521.[1] The affidavit of Mr. David A. Morris that Dimmitt timely submitted in opposition to Southeastern's motion for summary judgment contains the only first-hand account of the nature of these spills, leaks and overflows. R3-35-Ex. D. At paragraph 9, Mr. Morris states that "an occasional accident did occur." Id. At paragraph 10, he averred: "I recall one occasion in late 1982 or early 1983 when a major rainfall event caused contaminated run-off to overflow from the sludge storage pond." Id. The crux of Mr. Morris' first-hand description is set forth at paragraph 11, which reads in its entirety:

> I also remember an incident when a dike gave way on the sludge holding pond and there was a large spill of oily waste water. We tried to clean up as much of this as we could. I believe this was in September 1978. In addition, I recall that a number of accidental overflows occurred during the filling of the used oil holding tanks, some of which resulted in fairly large spills -- which we also tried to clean up as soon as they were discovered. There were also occasional spills due to leaky hose and pipe connections, though any such problem was corrected as soon as we detected it. Also, despite our efforts to impress on our employees the need for safety at all times, occasional carelessness by employees resulted in accidental spills during the transfer of used oil from trucks to the storage tanks. I recall a number of accidental spills that occurred when a by-product of the distillate process was pumped to a storage tank. Because the pump had to be shut off manually when the tank was full, there were a few accidental spills of by-product into an earthen drainage ditch when employees were not paying close attention to the tank level. Many of these accidental spills and leaks occurred when we were in the re-refining business, prior to 1980.

Id.

---

[1] The Environmental Protection Agency's 1983 Hazardous Waste Site Inspection report, refers to "spills everywhere" and characterizes them as common occurrences in later years. 731 F.Supp. at 1521.

Judge Hodges examined this evidentiary showing by Dimmitt and concluded that "[t]hese spills and leaks appear to be common place events which occurred in the course of daily business.... That is, these 'occasional accidental spills' are recurring events that took place in the usual course of recycling the oil." 731 F.Supp. at 1521.

SUMMARY OF ARGUMENT

The issue before this Court is a pure question of law involving a straightforward interpretation of an exclusion in a standard insurance policy and its application to undisputed facts. The pollution involved in this case accumulated over a twenty-five year period of operation of a used oil re-refining plant. In the course of this business, waste oil was continuously dumped and retained in unlined acid sludge pits. Over time, harmful chemicals from the waste leached into the soil and aquifer. As a further routine part of the oil recycling business, oil spills, leaks, and occasional run-offs of contaminated rain water regularly occurred. The undisputed evidence of environmental contamination "demonstrates that the pollution occurred gradually and as a normal result of Peak's business operations." Crown Auto, 731 F. Supp. at 1520.

On this factual record, it is undisputed by the direct parties to this appeal that the gradual contamination that occurred at the Peak Oil site is removed from coverage under Southeastern's policy by the first clause in the pollution exclusion. It is the insured's burden to establish facts that would invoke an exception to an exclusion, thereby establishing the existence of coverage under an insurance policy. E.g., Hudson Ins. Co. v. Double D Mgmt.

Co., 768 F.Supp. 1542, 1545 (M.D. Fla. 1991) (Florida law). The case turns on one question: whether Dimmitt carried its burden of establishing that the routine dumping into unlined ponds together with ongoing spills, leaks, seepage, leakage and other regularly occurring events that took place over a period of decades in the usual course of re-refining used oil can be reasonably characterized as a "discharge, dispersal, release or escape [that] is sudden and accidental."

No reasonable interpretation of the exclusion supports any finding of a genuine ambiguity in Southeastern's pollution exclusion. Applying the apposite rules of construction leads to the inescapable conclusion that the word "sudden" must be assigned a temporal meaning as well as a sense of the unexpected. In the context of the exception to the pollution exclusion, the term "sudden" applies to pollution or contamination which occurs abruptly, instantly, or within a very short period of time. Any other reading of the pollution exclusion would render it meaningless. The use of the word "accidental" in the exception already embodies the concept of unexpectedness. Accordingly, it makes no grammatical or legal sense to ascribe the same concept of unexpectedness to the term "sudden." The choice of interpretations therefore boils down to whether the term "sudden and accidental" means "abrupt and unexpected" or "unexpected and unexpected." The former interpretation is practical and sensible and gives meaning to the entire policy. The latter interpretation is manifestly unreasonable as it reads the word "sudden" out of the policy. In addition, Dimmitt's translation of the phrase "sudden and accidental" to mean "unexpected and unintended" unnecessarily replicates

that very language that triggers coverage in the first instance. Dimmitt's proposed construction of the phrase "sudden and accidental" would render key provisions of Southeastern's policy mere surplusage.

Southeastern's pollution exclusion is phrased conjunctively and operates with reference to the nature of the discharge of pollutants. The intent or relative culpability of the insured with respect to the resultant damage is irrelevant under the terms of this exclusion. It is impossible to characterize the discharge of contaminants here as "accidental" since the discharges were the necessary and probable consequence of Peak's regular business operations.

Nor did Dimmitt carry its burden of designating facts in opposition to Southeastern's motion for summary judgment sufficient to demonstrate that the twenty-five years of contaminating discharges occurred "suddenly." Dimmitt barely identified two incidents to support its claim of coverage -- "a major rainfall event" and "an incident when a dike gave way on the sludge holding pond." Dimmitt did not provide a sufficient factual basis to permit any determination of the suddenness of either event. Nor did Dimmitt sustain its burden of demonstrating that the environmental contamination which gave rise to liability resulted from either or both of these two events. Regardless, as a matter of law, it is impossible to parse discrete occurrences or events from a lengthy period of gradual accumulation of pollutants at a pollution-prone operation and then characterize them in isolation as "sudden and accidental" in order to establish insurance coverage.

E.g., Lumbermens Mut. Cas. Co. v. Belleville Ind., Inc., 938 F.2d 1423 (1st Cir. 1991).

The meaning and effect of Southeastern's pollution exclusion is readily ascertained from the four corners of the insurance policy. Hence, there is no need to depart from the ordinary rules of construction and factor extrinsic evidence into the interpretational analysis. Dimmitt's extensive argument is nothing less than a plea to employ extrinsic materials improperly to add meaning to policy language that is clear and to extend coverage beyond the boundaries set by Southeastern's pollution exclusion. The untested and self-serving extrinsic materials proffered by Dimmitt are also inadmissible in evidence against Southeastern and are inherently unreliable. Partisan extrinsic materials of this type are inadequate to assist this Court in making any principled decision with confidence.

The only public policy genuinely implicated in this case is the institutional constraint on the judiciary to give effect to insurance policies as written through the process of neutral application of legal principles. The analytical process must be divorced from the consequences of the result. The various public policies in support of various environmental goals advocated by Dimmitt and amici can only be balanced and resolved by legislative bodies. In defining coverage for environmental contamination in terms of the nature of the discharge, Southeastern's policies adopted a constant frame of reference that would be unaffected by future expansions or contractions of conceptual bases of liability. As this intent is manifest from the four corners of the policy, Southeastern's pollution exclusion must be enforced as written.

ARGUMENT

I. FLORIDA SUBSTANTIVE LAW GOVERNING THE CONSTRUCTION OF INSURANCE CONTRACTS REQUIRES THE COURT TO ENFORCE SOUTHEASTERN'S POLLUTION EXCLUSION AGAINST THE LONG-TERM GRADUAL ENVIRONMENTAL DAMAGE INVOLVED IN THIS CASE.

A. Analytical Framework

Southeastern's standard liability policies operate first through a broadly defined coverage provision, subject to specified terms and conditions. A loss that falls within the defined coverage is thus insured under Southeastern's policies, unless it is otherwise excluded by a specific provision that expressly removes it from coverage. Florida law provides that it is the insured's burden initially to establish coverage. E.g., Exhibitor, Inc. v. Nationwide Mut. Fire Ins. Co., 494 So.2d 288, 289 (Fla. 1st DCA 1986), rev. denied, 503 So.2d 327 (Fla. 1987). The operative language determining coverage under Southeastern's policies in the first instance is defined in terms of an "occurrence" and an "accident." Coverage is initially provided for

> all sums which the INSURED shall become legally obligated to pay as DAMAGES because of A. BODILY INJURY or B. PROPERTY DAMAGE to which this insurance applies, caused by an OCCURRENCE, ...

(emphasis added).

An "occurrence" is defined as

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

(emphasis added).

The initial determination of coverage under Southeastern's policies necessarily takes into account an unintentional and unexpected event from the standpoint of the insured. In contrast,

the pollution exclusion itself operates in plain terms to remove from coverage all losses attributable to pollution of every kind and source irrespective of anyone's intent:

> This coverage does not apply: ... to BODILY INJURY or PROPERTY DAMAGE arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials, or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; ....

The exception to this broad pollution exclusion operates to reinstate coverage only "if such discharge, dispersal, release or escape is sudden and accidental."

These clearly worded provisions combine to make the insured's intent relevant only in determining initial coverage. That intent is measured with respect to resultant bodily injury or property damage. The intent of the insured is conspicuously absent in the language comprising the pollution exclusion. The exception to the exclusion turns instead on the nature of the contaminating discharges. See Lumbermens Mut. Cas. Co. v. Belleville Ind., Inc., 407 Mass. 675, 679, 555 N.E.2d 568, 571 (1990). Southeastern's policies do not provide coverage for Dimmitt's responsibility for pollution damage unless the polluting discharge (by whomever made) on which liability is premised is both "sudden" and "accidental."

It is the insurer's burden to establish the application of an exclusion. E.g., State Farm Mut. Auto Ins. Co. v. Pridgen, 498 So.2d 1245, 1248 (Fla. 1986). In this case, there is no question that Southeastern has established the application of the pollution exclusion. The contamination that occurred at the Peak Oil site arose out of "the discharge, dispersal, release or escape of ... pollutants or contaminants into or upon land ... or any water

course or body of water." Dimmitt itself implicitly concedes this point in its formulation of the issue on appeal: "The issue before this Court is the meaning and effect of the phrase 'sudden and accidental' in the underscored language quoted above." Br. at 7.

One of the crucial flaws in Dimmitt's analysis is its assumption that Southeastern bears the substantive burden of negating the exception to the pollution exclusion. On the contrary, it is the insured that bears the burden of establishing an exception to an exclusion necessary to reinstate coverage. Analytically, this is tantamount to establishing coverage, and allocation of this burden to the insured is consistent with uniform Florida case law. Moreover, allocation of this burden to the insured is supported by the only published Florida decision Southeastern could locate that is directly on point. Hudson Ins. Co. v. Double D Mgmt. Co., 768 F.Supp. 1542, 1545 (M.D.Fla. 1991), citing Fireman's Fund Ins. Co. v. Ex-Cell-O-Corp., 702 F.Supp. 1317, 1328 (E.D.Mich. 1988) and Fischer & Porter Co. v. Liberty Mut. Ins. Co., 656 F.Supp. 132, 140 (E.D.Pa. 1986). The Double D case is all the more persuasive since it involved the identical pollution exclusion. "[T]his Court finds that as to the 'sudden and accidental exception' to the 'pollution exclusion' the burden of proof is upon [the insured] to prove that the 'sudden and accidental' exception applies." 768 F.Supp. at 1545; accord Northern Ins. Co. of New York v. Aardvark Assocs., Inc., 942 F.2d 189, 195 (3d Cir. 1991).

B. Florida Rules of Construction

Two fundamental rules of construction provide the benchmarks for resolving this case. First, by statutory and case law, in

construing an insurance contract it is mandatory to consider the policy as a whole, reading each provision together with all other terms and conditions found in the policy. §627.419 (1), Fla. Stat. (1989) ("Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy..."); accord, e.g., Gulf Tampa Drydock Co. v. Great Atlantic Ins. Co., 757 F.2d 1172, 1174 (11th Cir. 1985) (Florida law); St. Paul Guardian Ins. Co. v. Canterbury School of Fla., Inc., 548 So.2d 1159, 1160 (Fla. 2d DCA 1989). In order to give effect to the entirety of the policy, its language and provisions must not be construed so that they become mere surplusage. E.g., Supreme Int'l Corp. v. Home Ins. Co., 428 So.2d 295, 296 (Fla. 3d DCA 1983). Conversely, the Court must not focus on an isolated sentence when resolving a question of coverage. James v. Gulf Life Ins. Co., 66 So.2d 62 (Fla. 1953); Ellenwood v. Southern United Life Ins. Co., 373 So.2d 392, 395 (Fla. 1st DCA 1979).

The second important rule of construction limits the power of the judiciary to upset the contractual expectations of the parties to an insurance contract. Southeastern does not quarrel with the general proposition that exclusionary provisions of an insurance policy that are truly ambiguous or otherwise susceptible to more that one reasonable meaning are to be construed in favor of the insured. This familiar adage is of little moment here. Dispositive of this case is the crucial corollary to this general rule of contra proferentum:

> Only when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction is the rule apposite. It does not allow courts to rewrite contracts, add meaning that is

not present, or otherwise reach results contrary to the intention of the parties.

State Farm Mut. Auto. Ins. Co. v. Pridgen, 498 So.2d 1245, 1248 (Fla. 1986), quoting Excelsior Ins. Co. v. Pomona Park Bar & Pkg. Store, 369 So.2d 938, 942 (Fla. 1979) (emphasis added). Stated differently, this Court cannot, under the guise of construction, enlarge coverage beyond policy language that is clear and unambiguous nor otherwise make a new contract between the parties. E.g., Haenal v. United States Fid. & Guar. Co., 88 So.2d 888, 890 (Fla. 1956); 30 Fla.Jur.2d, Insurance §§400-01 (1981). Where the language of an insurance contract is clear and unambiguous, the intent of the parties must be derived from the four corners of the policy. E.g., Fireman's Fund Ins. Co. v. Cox, 742 F.Supp. 609 (M.D.Fla.), aff'd, 892 F.2d 87 (11th Cir. 1989).

Several other subsidiary principles of policy construction have a bearing on this case. In determining whether a genuine inconsistency or ambiguity is present in an insurance contract, the Court is constrained to afford the policy language a "reasonable, practical and sensible interpretation." Denman Rubber Mfg. Co. v. World Tire Corp., 396 So.2d 728, 729 (Fla. 5th DCA 1981); United States Fid. & Guar. Co. v. Hazen, 346 So.2d 632, 634 (Fla. 2d DCA 1977); see also Excelsior Ins., 369 So.2d at 941. A genuine ambiguity exists only when terms or provisions of a policy are hopelessly irreconcilable. Oliver v. United States Fid. & Guar. Co., 309 So.2d 237 (Fla. 2d DCA), cert. denied, 322 So.2d 913 (Fla. 1975); Government Employees Ins. Co. v. Sweet, 186 So.2d 95 (Fla. 4th DCA 1966). Construction of a provision that leads to an unreasonable and absurd result must be rejected. See, e.g., St.

Paul Guardian Ins. v. Canterbury School, 548 So.2d at 1161. If one interpretation of an insurance policy, considered in context with other provisions as well as the general scope and object of the policy, would lead to an absurd conclusion, then it must be abandoned in favor of one that comports with reason and probability. Travelers Indem. Co. v. Milgen Dev. Inc., 297 So.2d 845 (Fla. 3d DCA), cause dismissed, 303 So.2d 334 (Fla. 1974). The terms of an insurance policy cannot be labeled ambiguous simply because analysis may be necessary to interpret them. Travelers Ins. Co. v. C.J. Gayfer's & Co., 366 So.2d 1199 (Fla. 1st DCA 1979). Indeed, this Court has held "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." Pridgen, 498 So.2d at 1248.

Applying these complete rules of construction to Southeastern's policy leads to the inescapable conclusion that the phrase "sudden and accidental," in the context of the entire policy, is clear and unambiguous. This clause must be given its reasonable and sensible meaning so that the word "sudden" denotes a temporal aspect of immediacy and abruptness as well as a sense of the unexpected. To confine the interpretation of the word "sudden" to the sense of the unexpected is an unreasonable construction as it would duplicate the meaning of the next word "accidental." Without the temporal aspect of the word "sudden", any other reading of the phrase "sudden and accidental" is illogical as it would also render provisions of the policy superfluous.

C. "Sudden and Accidental" Means Sudden and Accidental.

The legal and linguistic analysis is not difficult. Common sense plays a significant role. To be sure, the word "sudden" in its ordinary usage can connote both a temporal sense of abruptness or immediacy as well as a sense of the unexpected. But the word does not stand alone in the exception to the pollution exclusion; it is an integral part of the conjunctive phrase "sudden and accidental." The term "accidental" is generally understood to mean unexpected or unintended. See, e.g., Crown Auto, 731 F.Supp. at 1520. ("An 'accident' may be defined as an event which is unexpected or unintended and does not take place within the usual course."). Focusing on the words "sudden" and "accidental" separately and without regard to their interrelationship, as Dimmitt urges, flies in the face of all principles governing insurance contract construction and leads to an artificial and even absurd result. Interpretation of this key phrase in pari materia requires that each word be given effect if it is at all reasonably possible.

Combining the two words in the phrase technically produces two hypothetical interpretations because the word "sudden" has two slightly different nuances. The question then becomes whether the interpretation advocated by Dimmitt, in the context of the entire policy, is reasonable and plausible. It is not. Employing the non-temporal meaning of the word "sudden," as Dimmitt presses, results in a redundant construction of the phrase "sudden and accidental." The phrase becomes translated as "unexpected and unexpected and unintended." The use of the conjunctive word "and" in the exception renders this interpretation all the more improba-

ble and unreasonable. This connector requires a construction of the phrase that something more was needed in addition to an "accidental" discharge in order to bring a polluting event back within coverage.

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

Northern Ins. Co. v. Aardvark Assocs., Inc., 942 F.2d 189, 192 (3d Cir. 1991) (citation ommitted) (emphasis in original). The word "sudden" thus becomes meaningless surplusage if it is translated to mean the same thing as accidental. Supreme Int'l Corp., 428 So. 2d at 296; see also A. Johnson & Co. v. Aetna Cas. & Sur. Co., 933 F.2d 66, 73 (1st Cir. 1991) (if sudden is synonymous with accidental, then "one of the words would be nothing more than redundant surplusage") (citation omitted).

In contrast to Dimmitt's redundant and strained reading, when "sudden" is accorded its normal and ordinary temporal sense the phrase is sensibly construed as "abrupt and unexpected." This latter interpretation is logical as it imparts significance to each of the words in the coverage-determinative phrase and gives substance to the clause itself. It is a "reasonable, practical and

sensible interpretation." Denman Rubber, 396 So.2d at 729.[2] Dimmitt's proposed construction is stilted and illogical. It imparts no independent significance to the word "sudden" and renders the phrase "sudden and accidental" a convoluted redundancy. This straightforward textual analysis of the three word phrase itself readily demonstrates that there is no genuine ambiguity in its wording. The so-called ambiguity that Dimmitt attempts to create only arises when the clause is read in an unnatural and unreasonable manner. The term "sudden and accidental" "is clear and plain, something only a lawyer's ingenuity could make ambiguous." United States Fid. & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31, 34 (6th Cir. 1988), quoting American Motorists Ins. Co. v. General Host Corp., 667 F.Supp. 1423, 1429 (D.Kan. 1988); see also Northern Ins. Co. v. Aardvark Assocs., Inc., 942 F.2d at 192 (ambiguity argument "blatantly unreasonable").

Further structural analysis of other terms and provisions of Southeastern's policy in accordance with the command to construe insurance policies in their entirety confirms the unreasonableness of Dimmitt's proffered construction of "sudden and accidental." Disregarding the temporal aspect of the word sudden disrupts the logical interrelationship between an "occurrence" and the pollution exclusion. Coverage under Southeastern's policy is triggered in the first instance by the happening of an occurrence that is

---

[2] Another strong indication that the natural construction of the word "sudden" has a temporal dimension when used in conjunction with the term "accidental" is found in this Court's own precedent prior to the hysteria induced by CERCLA. In workers' compensation cases involving the statutory definition of a sudden accident, the term "sudden" has always been construed in its temporal sense. Spivey v. Battaglia Fruit Co., 138 So.2d 308 (Fla. 1962); Meehan v. Crowder, 158 Fla. 361, 28 So.2d 435 (1946).

"neither expected nor intended from the standpoint of the insured." Coverage, however, is cut off by the clearly worded pollution exclusion. The initial coverage is restored only if the discharge, dispersal, release or escape of pollutants or contaminants is "sudden and accidental." The wording of the exception to the pollution exclusion, unlike the insuring provision, is deliberately phrased without reference to the insured's intent regarding the damage or injury. The Massachusetts Supreme Judicial Court described the effect of this precisely structured policy:

> The sudden event to which the exception in the pollution exclusion clause applies concerns neither the cause of the release of a pollutant nor the damage caused by the release. It is the release of pollutants itself that must have occurred suddenly, if the exception is to apply so as to provide coverage. The exception thus focuses on the circumstances of the release. In deciding whether there was an occurrence, on the other hand, the focus of the inquiry is on the property damage, asking whether it was expected or intended from the standpoint of the insured. Courts that have failed to appreciate this distinction have led themselves to identify an ambiguity in the policy language that does not exist.

Lumbermens Mut. Cas. Co. v. Belleville Ind., Inc., 407 Mass 675, 679, 555 N.E.2d. 568, 571 (1990).[3]

---

[3] It is difficult to understand Dimmitt's attempt to create an ambiguity from the use of the phrase "continuous or repeated exposure to conditions" in the occurrence definition. Br. 14-15. With all due respect to the Colorado Supreme Court, this argument cannot withstand intellectually honest scrutiny. It glosses over the different frames of reference that govern the occurrence definition and the pollution exclusion. In addition, the definition of an occurrence is part of an insuring clause. An exclusion describes, and excludes from coverage, a subset of events that would otherwise be covered under the occurrence definition. An exclusion and an occurrence are therefore inherently inconsistent. Following the logic of Dimmitt's argument on this point, no exclusion could ever be given effect in any insurance policy because it would always be in conflict with the definition of an occurrence. Dimmitt's attempt to force the occurrence definition of accident to serve for all other purposes of the policy is badly misplaced. See also Travelers Ins. Co. v. C. J. Gayfers & Co., 366 So.2d 1199, 1202 (Fla. 1st DCA 1979).

An "occurrence" is defined in different wording than the exception to Southeastern's pollution exclusion. Each clause serves a different purpose in the policy and, presumably, each was intended to have a different meaning. Yet, interpretation of "sudden and accidental" to mean "unexpected and unintended," as Dimmitt argues, duplicates the words that define coverage in the first place. Since the effect of the exception to the pollution exclusion is to establish coverage, Dimmitt's interpretation renders the scope of coverage established by operation of the exception coterminous with the first definition of coverage. Thus, Dimmitt's interpretation results in circularity between a covered "occurrence" and covered pollution damage. This provides yet another reason to abandon the contrived interpretation of the phrase "sudden and accidental." Considered in context with other provisions as well as the scope and object of the policy, this reading leads to an absurd conclusion -- namely that any damage caused by an occurrence is covered, notwithstanding the pollution or any other exclusion. The only construction of the phrase that comports with reason and probability and gives effect to all language in the policy is that "sudden and accidental" means sudden and accidental and that coverage for pollution related damage is barred unless the contaminating discharge is both abrupt and unexpected.

The analytical process that results in the proper construction of the phrase "sudden and accidental" to mean "abrupt and unexpected" is also consistent with analogous cases from Florida courts of appeal. For example, in Travelers Insurance Co. v. C.J. Gayfers & Co., 366 So.2d 1199 (Fla. 1st DCA 1979), the court dealt

with another attempt by an insured to manufacture coverage from purported ambiguities in a contractor's public liability insurance policy. There, the insured attempted to cast a "completed operations" clause as ambiguous in order to obtain coverage for property damage that occurred after expiration of the policy. The court first rejected the insured's argument that ambiguity was inherent in the completed operations definition because the clause itself was silent as to coverage. 366 So.2d at 1201. The court concluded that such an interpretation was unavailable in the context of the entire policy. Id. The court then addressed the insured's second contention that the definition of "property damage" could fairly be construed as ambiguous. Like Dimmitt, the insured in Gayfers tried to infer an ambiguity from complementary policy provisions that were not identically worded. Coverage was provided for destruction of property "which occurs during the policy period." Coverage also extended to loss of use of property provided that "such loss of use is caused by an occurrence during the policy period." The insured reasoned that the loss of use coverage was ambiguous as it could envision damage that arose after the policy period expired. This is no different from Dimmitt's effort to contrive an ambiguity by comparing the phrase "sudden and accidental" in Southeastern's pollution exclusion with the prior definition of an occurrence. The First District rejected the insured's reading of this definition as a "strained" interpretation that could not fairly be given. Id. at 1201, 1202.

More recently, the Fifth District gave short shrift to an insured's effort to circumvent an exclusion because an isolated word that was otherwise undefined in a policy supposedly was

capable of conveying a multitude of meanings. Jefferson Ins. Co. v. Sea World of Florida, 586 So.2d 95 (Fla. 5th DCA 1991). The case involved the death of a performer at a water skiing show at Sea World. An exclusion in Sea World's insurance policy read in pertinent part:

> It is agreed...the insurance does not apply to bodily injury to any person while performing in any exhibition or diving event sponsored by the named insured.

Id. at 97. Similar to Dimmitt's argument that the undefined term "sudden" renders Southeastern's pollution exclusion fatally defective, the insured fixated on the single word "exhibition" and maintained that it was hopelessly vague. The trial court agreed that the term "exhibition" could have "as many definitions as those who choose to define it." The Fifth District unanimously reversed the result-oriented construction of the exclusion:

> While uncertainties and ambiguities are to be construed against the insurer, this does not mean that courts are authorized to put a strained and unnatural construction on the terms of a policy in order to create an uncertainty or ambiguity...The mere failure to provide a definition for a term involving coverage does not necessarily render the term ambiguous.

Id. (citations omitted). The court had no difficulty in holding that "the plain meaning of the exhibition exclusion in the policy applies" and that "[s]uch an interpretation would be consistent with the common, everyday usage of the word 'exhibition.'" Id. at 98. Dimmitt's attempt to pervert the plain meaning of the phrase "sudden and accidental" is based on precisely the type of disingenuous argument advanced in Sea World.

The case of Zimmer v. Aetna Insurance Co., 383 So.2d 992 (Fla. 5th DCA 1980), cited at Br. 41, is fully consistent with finding a temporal component to the word "sudden" in this case. Unlike the

instant case, the Fifth District in Zimmer interpreted the phrase "sudden settlement or collapse" in a sinkhole insurance endorsement mandated by Florida law. The court was not called on to construe the word "sudden" as part of a conjunctive clause also including the word "accidental." The fact that the word "sudden" has two subtly different connotations was necessary to the resolution of the case. The Fifth District acknowledged the insurer's argument that the word had a temporal sense of immediacy. Resorting to Black's Law Dictionary, the court noted that the word also conveys a sense of the unexpected. Of course, this is an uncontroversial grammatical fact that Southeastern accepts in the case sub judice. In the context of sinkhole insurance, the Fifth District held that the two slightly different meanings of the word could fairly be given. In order to give meaning to the disjunctive term "settlement," it was necessary to construe the phrase non-redundantly to mean something more gradual than a "sudden collapse." According the sense of unexpectedness to the word "sudden" was sensible and reasonable because of the context of its use.

The context of the case before this Court is quite different. Examination of the policy language and structure as well as the purpose of Southeastern's pollution exclusion is necessary to discern the logically intended meaning of the word "sudden." In Zimmer, the Fifth District performed this contextual analysis and chose the sense of the unexpected as the more logical construction that gave meaning to the entire policy. Here, in contrast, the word must be used in its temporal sense to make sense of and give meaning to the entire policy. "If the word 'sudden' is to have any meaning or value in the exception to the pollution exclusion

clause, only an abrupt discharge or release of pollutants falls within the exception." Belleville, 407 Mass. at 681, 555 N.E.2d at 572.

D. The Governing Weight of Authority from other Jurisdictions Supports Application of Southeastern's Pollution Exclusion to Gradual Long Term Release of Pollutants

The qualitative weight and emerging consensus of authority from other jurisdictions is in full support of Judge Hodges' judicial construction of Southeastern's pollution exclusion. The growing majority of cases from other state supreme courts and United States Courts of Appeals construes the plain language of the phrase "sudden and accidental" to mean "abrupt and unexpected." [4] E.g., Northern Ins. Co. v. Aardvark Assocs., Inc., 942 F.2d 189, 192 (3d Cir. 1991) (Pennsylvania law) ("sudden" refers to "abruptness or brevity"); New York v. AMRO Realty Corp., 936 F.2d 1420, 1428 (2d Cir. 1991) (New York law) (sudden discharge must "occur over a short period of time"); Lumbermens Mut. Cas. Co. v. Belleville Ind., Inc., 938 F.2d 1423 (1st Cir. 1991) (Massachusetts law following certification from Massachusetts Supreme Judicial Court); A. Johnson & Co. v. Aetna Cas. & Sur. Co., 933 F.2d 66, 72 (1st Cir. 1991) (Maine law) ("sudden" should be accorded the "unambiguous, plain and commonly accepted meaning of temporally abrupt"); Ogden Corp. v. Travelers Indem. Corp., 924 F.2d 39 (2d Cir. 1991) (New York law); FL Aerospace v. Aetna Cas. & Sur. Co., 897 F.2d 214 (6th Cir.) (Michigan law) cert. denied 111 S.Ct. 284 (1990); United States Fid. & Guar. Co. v. Murray

---

[4] A complete listing of all cases that have reached this conclusion is contained in Appendix A attached to Southeastern's brief.

Ohio Mfg. Co., 875 F.2d 868 (6th Cir. 1989) (per curiam) (Tennessee law), aff'g 693 F.Supp. 617 (M.D. Tenn. 1988); United States Fid. & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31, 34 (6th Cir. 1988) (Kentucky law) (sudden "joins together conceptually the immediate and the unexpected"); Lumbermens Mut. Cas. Co. v. Belleville Ind., Inc., 407 Mass. 675, 555 N.E.2d 568 (1990); Upjohn Co. v. New Hampshire Ins. Co., 438 Mich. 197, ___ N.W.2d ___ (Nos. 86906-86908, August 26, 1991); Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374, 381 (N.C. 1986). Dimmitt can only make its argument that the "majority rule" supports its position, Br. at 10, by inflating its count through such artifices as including cases from inferior courts (some from jurisdictions that now have contrary supreme court decisions) as well as twelve additional cases from Georgia on top of that state's supreme court decision. Presumably, Dimmitt also counts decisions from Florida trial courts. See Br. at 11.

Despite Dimmitt's obfuscation, it can cite but four authoritative cases from a state court of last resort or U.S. Court of Appeals.[5] The authority in support of Dimmitt's position is poorly reasoned and obviously result-oriented. By all appearances, the judges who authored these decisions permitted their reasoning to be swayed by the consequences that resulted from their rulings. This line of cases also has the effect of stretching the boundaries of coverage to the point of transforming insurers from risk-

[5] New Castle County v. Hartford Acc. & Indem. Co., 933 F.2d 1162, 1192-99 (3d Cir. 1991) (Delaware law); Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1092 (Colo. 1991) (4-3 decision); Claussen v. Aetna Cas. & Sur. Co., 380 S.E.2d 686, 688 (Ga. 1989) (4-3 decision); Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wisc. 1990).

spreaders to risk-preventers. Dimmitt's authority and the analytical process it embodies have been roundly criticized by neutral commentators in scholarly journals. See, e.g., Note, The Pollution Exclusion Clause through the Looking Glass, 74 Geo.L.J. 1237, 1242 (1986); Developments in the Law-Toxic Waste Litigation, 99 Harv.L.Rev. 1458 (1986). In a word, Dimmitt's authority is unpersuasive.

E. The Decades-Long Pollution that Gradually Built Up at the Peak Oil Site Cannot Be Characterized as Sudden and Accidental.

The factual record supports but one conclusion: the contamination at the Peak Oil site occurred gradually and as a normal result of Peak's business operations. Categorization of the extensive polluting discharges as "abrupt and unexpected" is impossible. Judge Hodges found on undisputed facts that the gradual accretion of contaminants from the mid 1950s until 1979 resulted principally from the seepage and leaching of chemicals from waste sludge that was dumped in unlined retention ponds. Crown Auto, 731 F.Supp. at 1520. Judge Hodges held that the long term "leaching and occasional spills of chemicals and runoff from sludge ponds during major rainfalls cannot be classified as abrupt or sudden events." Id. at 1521. Dimmitt does not challenge this general finding. Instead, Dimmitt argues that a microanalysis of the manner by which pollution occurred over the decades at the Peak Oil site shows a handful of "abrupt and immediate accidents" that trigger coverage for the entire loss. Br. at 45-49. The record does not bear out Dimmitt's fallback argument.

Event-by-event scrutiny of the process by which pollutants were dumped at the Peak Oil site to divine whether any were

"sudden" is neither required nor permitted. Application of Southeastern's pollution exclusion turns on the character of "the discharge, dispersal, release or escape" of pollutants. For purposes of the exclusion, the intent of the insured or the ultimate polluter is irrelevant. Nor is the relative culpability of the insured as a polluter a requirement impliedly to be engrafted on Southeastern's pollution exclusion. Therefore, the fact that Dimmitt sold waste oil to Peak rather than discharging it itself is irrelevant. See, e.g., Northern Ins. Co. v. Aardvark Assocs, Inc., 942 F.2d at 194; New York v. AMRO Realty Corp., 936 F.2d at 1428; A. Johnson & Co. v. Aetna Cas. & Sur. Co., 933 F.2d at 72 n.9; Powers Chemco, Inc. v. Federal Ins. Co., 74 N.Y. 2d 910, 911, 548 N.E.2d 1301, 1302, 549 N.Y.S.2d 650,651 (1989).

The pollution at the Peak Oil site resulted from dumping waste sludge in unlined lagoons between 1954-1979; regular spills and overflows occurred incidental to the maintenance of these acid sludge pits. These discharges were intentional or un-accidental in the traditional sense that they were the natural and probable consequence of the business operation. See Restatement (Second) Torts §8A. In the words of Dimmitt's own geologist:

> An inspection of the site by [the Hillsborough County Environmental Protection Commission] in October 1977 resulted in an "Official Notice" to Peak which noted that the lack of proper functioning of the facilities and equipment at the site could be reasonably expected to cause water pollution.

R2-35-Ex.E. ¶9 (emphasis added). As the discharges were the "normal result of Peak's business operations," 731 F.Supp. at 1520, they cannot be characterized as "accidental" for purposes of this

exception to the exclusion. Hence, the exception cannot be invoked because the "accidental" prong cannot be satisfied.

With respect to "suddenness," federal procedural standards and Florida substantive law imposed on Dimmitt the burden of pointing out specific facts necessary to defeat Southeastern's motion for summary judgment. Dimmitt failed to meet its burden of establishing coverage under the exception to Southeastern's pollution exclusion. The only evidence Dimmitt adduced that even arguably bears on the sudden nature of any polluting discharge was the affidavit of David A. Morris. At best, this evidence was vague and conclusory. While chronicling the numerous and continual polluting discharges at the Peak Oil site, Mr. Morris simply labels them "accidental overflows," "accidental" or "occasional spills" and "accidental leaks." R3-35-Ex. D ¶11. Mr. Morris only specifically identifies two incidents; both are purposefully vague as to their suddenness or abruptness. One is described only as a "major rainfall event." Id. ¶10. The other was identified vaguely as "an incident when a dike gave way on the sludge holding pond." Id. ¶11. Notably absent from these averments were any facts that would permit an assessment of the rapidity with which either event occurred. Also missing is any admissible evidence that would create a factual issue that these events caused the pollution that gave rise to Dimmitt's liability. At best, they were two in an infinite series of discharges that occurred over a period of twenty-five years.

Dimmitt thus failed to designate "specific facts" showing that there was a genuine issue on this point. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1987); Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 249-52 (1986). What scant evidence it offered was not sufficiently probative to avert summary judgment on the application of Southeastern's pollution exclusion to the environmental damage involved in this case. Judge Hodges carefully examined Dimmitt's evidentiary showing, including the Morris affidavit, and concluded that "[t]hese spills and leaks appear to be common place events which occurred in the course of daily business... That is these 'occasional accidental spills' are recurring events that took place in the usual course of recycling the oil." 731 F.Supp. at 1521. There is no basis on the undisputed factual record for finding that Dimmitt carried its burden of demonstrating that any pollution-causing discharge could be properly classified as abrupt or sudden.[6]

The fact that occasional spills, leaks and overflows periodically occurred during the operation of an oil reprocessing plant is

---

[6] The dearth of evidence of causation of the contamination at the Peak Oil site also disposes of Dimmitt's argument that it established coverage by proving a concurrent cause of loss. Br. at 45-49. This argument first fails to the extent it assumes that the record supports a finding of discrete polluting events that occurred both abruptly and accidentally. Dimmitt's argument is based on the additional premise that "there is no way to distinguish the property damage that was caused by gradual releases of contaminants from that caused by abrupt releases." Id. at 45. Of course, the reason for this factual deficiency is that Dimmitt offered no evidence on this issue on which it bore the procedural and substantive burden of proof. This factual flaw in the underlying premise of its argument eliminates the jurisdictionally questionable need to address possible inconsistencies between the appellate districts with respect to the degree of causation necessary to trigger insurance coverage. Compare Wallach v. Rosenberg, 527 So.2d 1386 (Fla. 3d DCA), rev. denied, 536 So.2d 246 (1988) (coverage established if record supports finding of concurrent causes of loss, one of which is covered under insurance policy) with Hartford Acc. & Indem. Co. v. Phelps, 294 So.2d 362 (Fla. 1st DCA 1974) (coverage exists where there is a concurrence of different causes only if efficient cause is established).

immaterial as a matter of law. The commonplace spills of hazardous waste at the Peak Oil site were regular variants of the same process that gradually caused considerable accumulated pollution damage. Assuming, arguendo, that Dimmitt could establish that over the course of decades one or two of these otherwise routine events occurred abruptly, the inherently toxic and contaminating nature of Peak's business precludes coverage.

The recent opinion of the United States Court of Appeals for the First Circuit in Lumberman's Mut. Cas. Co. v. Belleville Ind., Inc., 938 F.2d 1423 (1st Cir. 1991), is highly persuasive. In that case, toxic waste had been discharged into a river for over twenty-five years as a routine part of the manufacturing process for electrical capacitors. The insured attempted to establish coverage for this extensive, long term contamination by claiming that two isolated events -- a storm and a fire -- were sudden and accidental and thereby triggered coverage. Writing for a unanimous panel, Judge Coffin systematically dismantled the notion that a "micro-analysis" could be employed to circumvent application of the pollution exclusion to contamination that inevitably occurs in a pollution-prone business. The crux of the court's reasoning is as follows:

> Our reading of the two pollution provisions in the policy suggests that in the "ordinary" case, i.e., a case involving a "clean" operation, such as an office building housing company headquarters, insurers were willing to commit to covering a possible but unlikely event resulting in the release of pollutants. A coverable occurrence would be clearly identifiable as "sudden and accidental" because it would be a marked departure from normal operations. But in the case of a pollution-prone operation, where the emission of pollutants is part and parcel of the daily conduct of business, there is the possibility of infinite variations on the usual theme; i.e., polluting incidents are likely to occur that are on

> the fringe of normal operations but that the company seeks to characterize as sudden and accidental. As this case illustrates, determining where along the spectrum of polluting events coverage should begin is a perplexing and, ultimately, unsatisfying endeavor....

Id. at 1427-28. Citing, inter alia, Judge Hodges' opinion in this case, the First Circuit rejected any conceivable application of the exception to the pollution exclusion that would provide "insurance coverage where a company has for a lengthy period of time purposefully and regularly been carrying on operations involving continual pollution." Id. at 1429; see also A. Johnson & Co. v. Aetna Cas. & Sur. Co., 933 F.2d at 74; EAD Metallurgical, Inc. v. Aetna Cas. & Sur. Co., 905 F.2d 8, 11 (2d Cir. 1990).

Thus, Dimmitt's attempt to parse two discrete events from a twenty-five year period of recurring spills at the Peak Oil site must fail as a matter of law. Two de minimis events cannot be characterized in isolation as "sudden and accidental" in order to establish omnibus insurance coverage for environmental damage. This contamination was the inexorable result of decades of dumping waste sludge in unlined ponds in the course of reprocessing used oil.

F. Summary

In the context of Southeastern's entire policy, with meaning imparted to each of its provisions, the phrase "sudden and accidental" is unambiguous as a matter of law. For the word "sudden" to have any significant purpose, it must connote the ordinary temporal aspect to its meaning and not merely a sense of the unexpected. Correspondingly, the word "accidental" separately means unintended and unexpected in this phrase. There is no genuine inconsistency, uncertainty or ambiguity in the meaning of

the phrase "sudden and accidental." Pollution damage that is unintended and unexpected from the standpoint of the insured is a covered occurrence under Southeastern's policy only if it results from an abrupt discharge or release of contaminants. This Court should align itself with the overwhelming qualitative weight of authority by answering the certified question of the Eleventh Circuit Court of Appeals in the affirmative. Southeastern's pollution exclusion precludes coverage to Dimmitt for the environmental damage that occurred in this case.

II. THE CLEAR AND UNAMBIGUOUS NATURE OF THE EXCEPTION TO SOUTHEASTERN'S POLLUTION EXCLUSION PRECLUDES CONSIDERATION OF THE EXTRINSIC MATERIALS DIMMITT SUBMITTED POST-JUDGMENT.

The same rules of construction that limit Florida courts to the four corners of an unambiguous insurance policy preclude consideration of Dimmitt's one-sided mass of extrinsic materials. "Florida law is quite clear that the parties' intent is to be measured solely by the language of the policies unless the language is ambiguous." Towne Realty, Inc. v. Safeco Ins. Co., 854 F.2d 1264, 1267 (11th Cir. 1988) (emphasis in original) (citation ommitted); Hurley v. Werly, 203 So.2d 530, 537-38 (Fla. 2d DCA 1967). This rule must apply with particular vigor to this case. Dimmitt proffers its post-judgment materials in a brazen effort to vary the plain meaning and operation of the written policies and conjure up coverage where none reasonably exists.

Further, these extrinsic materials are alien to both Southeastern and Dimmitt as well as their contractual relationship. What few actual statements that are contained in the proffered materials, hearsay though they may be, are not those of Southeast-

ern. Without the slightest effort to establish an evidentiary foundation, Dimmitt would have this Court attribute all statements in these unauthenticated materials to Southeastern vicariously. These materials become even more problematic because Dimmitt concededly did not utilize or rely on the drafting history of the exclusion and the supposed intent of the industry when the policies were executed and reviewed. By its own admission, Dimmitt was not even aware of the background of the pollution exclusion until 1990. Under identical circumstances, the Supreme Judicial Court of Massachusetts declined to consider the same extrinsic materials Dimmitt urges on this Court:

> Because the word "sudden" in the pollution exclusion clause is not ambiguous, we have no need to consider the drafting history of that clause or any statements made by insurance company representatives concerning the intention of its drafters. There is no evidence in the record that [the insured] relied on or was even aware of any of this background information when it purchased coverage from [the insurer]. The use of such information to resolve an ambiguity in [the insured's] insurance policies would have nothing to do with contract negotiations, and thus its use would be different from the use of parol evidence to aid in resolving an ambiguity in a contract. Attempts to use the drafting history and official comments about the purpose of a provision in an insurance policy seems somewhat analogous to attempts to use legislative history in construing an ambiguous statute.

Lumbermen's Mut. Cas. Co. v. Belleville Ind., Inc., 407 Mass. 675, 682, 555 N.E.2d 568, 573 (1990); accord Upjohn Co. v. New Hampshire Ins. Co., 438 Mich. 197, _____ N.W.2d ____, slip op. at 9 n.6

(August 26, 1991).[7] These same extrinsic items are immaterial for purposes of interpreting Southeastern's pollution exclusion.

Dimmitt's attempt to contrive a "latent" ambiguity in the policy is equally unpersuasive. The archaic distinction between latent and patent ambiguities in relation to parol evidence is one that is rapidly vanishing. The modern trend is simply to limit the admission of parol evidence to explain any genuine ambiguity, whether latent or patent. See, e.g., Bajrangi v. Magnethel Enterprises, Inc., 16 F.L.W. D2867, D2868 n.3 (Fla. 5th DCA November 14, 1991). If the rights and obligations of the parties are clearly stated in an agreement, and there is no ambiguity, the latent ambiguity doctrine will not apply to justify the introduction of parol evidence. Hashwani v. Barbar, 822 F.2d 1038, 1040 (11th Cir. 1987) (Florida law).[8] The purpose of the vestiges of the latent ambiguity rule is to resolve an actual ambiguity rather than create one; if a proffered interpretation is unreasonable in light of the plain language of the instrument, it is improper to

---

[7] After the analysis quoted above, the Massachusetts Supreme Judicial Court proceeded indirectly to comment on the probity and reliability of the extraneous materials before it. The court suggested that a "formally published, explanatory report of an industry-wide committee that drafted particular policy language" and "language changes from one standard policy form to the next" would be reliable or instructive one as evidence. The court questioned the reliability of "statements made after the adoption of standard language" and "the views of insurance executive ... to guide the interpretation of a standard form of policy used by many companies." Finally, the Massachusetts Supreme Court endorsed the procedure where any evidence of drafting history should be "presented in a manner that would permit countervailing or explanatory material to be submitted in response." 407 Mass. at 682-83, 555 N.E.2d at 573.

[8] Dimmitt cites an incomplete quotation of Hashwani v. Barbar for the erroneous proposition that "objective extrinsic evidence is always admissible to show that a 'latent' ambiguity exists in a contract." Br. at 33-34.

consider explanatory parol evidence under the guise of a claimed latent ambiguity. Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1362 (11th Cir. 1988), cert. denied, 488 U.S. 1041 (1989).

The limited parameters of the latent ambiguity rule are evident even in the authority on which Dimmitt relies. For example, in Carey Canada, Inc. v. Columbia Casualty Co., 940 F.2d 1548 (D.C. Cir. 1991), the court stressed the extremely narrow circumstances that warrant a finding of a latent ambiguity in an instrument. The D.C. Circuit emphasized no less than three times that the existence of a genuine ambiguity is a necessary prerequisite to the invocation of the latent ambiguity doctrine to justify resort to "objective extrinsic evidence." 940 F.2d at 1554 - 1557. The court then adopted an objective rather than subjective standard for ascertaining the presence of a latent ambiguity. It is far from clear that this is a correct pronouncement of Florida law. Nevertheless, the high burden of proof inherent in this objective standard promotes the integrity of written instruments. It ensures that a latent ambiguity will be found only in extremely reliable circumstances where it is demonstrable that both parties to the contract expected words in a contract to have a disguised meaning. Application of this rule necessarily presumes some level of knowledge of the usage, custom or "objective extrinsic evidence" by both parties at the time of contracting. See 2 S. Gard, Florida Evidence §14:20 (2d Ed. 1980). Dimmitt, which advanced its latent ambiguity argument for the first time in its reply brief in the Eleventh Circuit, admitted in its motion for reconsideration that it had no prior knowledge of the extrinsic materials it filed. It is nonsensical, then, for Dimmitt to contend that these items

reveal a technical or unnatural meaning of the terminology "sudden and accidental" that both parties understood at the time of contracting.

Dimmitt's cases from Florida further underscore the very points that preclude the use of a purported latent ambiguity to vary the clear language of Southeastern's policies. In Bunnell Medical Clinic, P.A. v. Barrera, 419 So.2d 681 (Fla. 5th DCA 1982), for example, the course of dealings of the actual parties to the contract clearly revealed a considerable anomaly in the agreement as written. Course of dealings, of course is "objective extrinsic evidence" that reflects knowledge by both parties to the agreement. Moreover, enforcement of the contract strictly as written would not have made sense: one party lacked the ability to comply with its contractual undertaking. It is perfectly logical to apply the concept of latent ambiguity when the dealings of the parties and the operation of the agreement established the problem with such clarity.[9]

Here, Dimmitt is attempting to bootstrap the latent ambiguity doctrine to create, rather than resolve an ambiguity. Dimmitt desires to vary the plain and easily understandable language of Southeastern's pollution exclusion to expand coverage. The latent ambiguity it tries to create is an unreasonable interpretation of the policy and admittedly is not based on the actual dealings of the parties. There is no actual or latent ambiguity in South-

---

[9] Hunt v. First National Bank of Tampa, 381 So.2d 1194 (Fla.2d DCA 1980), and Drisdom v. Guarantee Trust Life Ins. Co., 371 So.2d 690 (Fla. 3d DCA 1979), are to the same effect.

eastern's pollution exclusion that would open the door to the consideration of Dimmitt's ream of extrinsic materials.

Dimmitt's attempt to distort the plain meaning of Southeastern's pollution exclusion by importing decisions from other jurisdictions involving boiler and machinery policies is also unavailing. One obvious flaw in Dimmitt's argument is that it ascribes universal meaning to the phrase "sudden and accidental" regardless of the context of its use. This fallacy is heightened in this case since boiler and machinery policies provide coverage for damage that is sudden and accidental; Southeastern's pollution exclusion applies the phrase to the causative agent -- the discharge. Dimmitt also overstates again the effect of the authority on which it relies. A full reading of this line of cases reveals nothing close to a uniform interpretation of "sudden and accidental" to mean merely unintended and unexpected. See Br. at 28-29. On the contrary, a temporal component to the word "sudden" is inherent throughout most of these cases decided prior to the adoption of the pollution exclusion. See, e.g., Julius Hyman & Co. v. American Motorists Ins. Co, 136 F.Supp 830 (D. Colo. 1955) (coverage because damage did not occur "gradually"); Good Canning Co. v. London Guar. & Acc. Co., 128 F.Supp. 778 (W.D. Ark. 1955) (coverage because damage occurred within thirty minutes); Cornell Wood Prods. Co. v. Hartford Steam Boiler Inspection & Ins. Co., 62 F.Supp. 303 (N.D. Ill. 1945) (no coverage when damage occurred as a result of a sixty hour submersion).

The recent opinion of the Massachusetts Supreme Judicial Court in the Belleville case is highly persuasive on this point, too. Dimmitt relies heavily on New England Gas & Electric Association v.

Ocean Accident & Guaranty Co., 330 Mass. 640, 116 N.E.2d 671 (1953), for its boiler and machinery argument. Br. at 33-34 n.32. Dimmitt inexplicably omits from its analysis, however, the recent Massachusetts decision in Belleville. The Massachusetts Supreme Court rejected its own prior decision in New England Gas as authority compelling interpretation of an identically worded exception to a pollution exclusion to mean "unexpected and unintended." Instead, the Massachusetts Supreme Court held

> [f]or the word "sudden" to have any significant purpose, and not to be surplusage when used generally with the word "accident" it must have a temporal aspect to its meaning, and not just the sense of something unexpected. We hold, therefore, that when used in describing a release of pollutants, "sudden" in conjunction with "accidental" has a temporal element. The issue is whether the release is sudden. The alternative is that it was gradual. If the release was abrupt and also accidental, there is coverage for an occurrence arising out of the discharge of pollutants.

407 Mass. at 680, 555 N.E.2d at 572. Moreover, in reaching this conclusion the Massachusetts Supreme Court overruled a decision of an intermediate Massachusetts appellate court that found ambiguity in the pollution exclusion on the basis of the New England Gas case.[10]

---

[10] Dimmitt resorts to even more disengenuity with respect to the Massachusetts Supreme Court's opinion in Belleville. Even though it did not cite Belleville in its argument drawn from the New England Gas case, Dimmitt did cite the decision later. Br. pp. 41-42 n.45. There Dimmitt represents to this Court that "[i]t should be emphasized that in Belleville, the Massachusetts Supreme Court did find that "sudden" had more than one reasonable interpretation, including the concept of unexpected and unintended ..." (emphasis in original). This representation cannot be reconciled with the opinion: "We have analyzed the policy language and conclude that there is no construction of the word "sudden" that is a reasonable alternative to that which we have given it in the context of the pollution exclusion clause." 407 Mass. at 682, 555 N.E.2d at 573.

Dimmitt's argument on this point has no credibility. With charity, its cases are inapposite. The state supreme court from which one of Dimmitt's major cases on this point originates rejected the interpretation of its own previous case that Dimmitt nevertheless presses here. There is even less reason for this Court to accept the boiler and machinery precedent to support a strained reading of the term "sudden and accidental."

The extrinsic materials that Dimmitt belatedly dumped on the trial court are not of the character on which a judicial decision should turn in any event. Dimmitt's extraneous materials, untested by the safeguards of the adversarial system, are inherently unreliable. The bulk of these materials consists of rank hearsay at multiple levels by non-parties, none of which is even arguably admissible against Southeastern in this case. In fact, Judge Hodges never ruled on the admissibility of these specific items against Southeastern. Most of Dimmitt's and its amici's materials consists of selective documentation, partisan briefs, and subjective articles written by advocates. Perhaps the most outlandish example of this supposed evidence that Dimmitt compiled on a unilateral record is the extraneous matters from West Virginia. Br. at 23-24. This prominent feature of Dimmitt's brief is built on triple and even quadruple hearsay as to Southeastern. Dimmitt offers in this Court (1) an unauthenticated hearing transcript; (2) containing a statement by a West Virginia Commissioner; (3) who further attributes statements to other unidentified, out-of-court declarants; (4) to prove the truth of the matter asserted; (5) all of which is imputed to Southeastern without any further evidentiary

foundation.[11] Since none of these materials has undergone, much less survived, the crucible of the truth-seeking process, they are simply too one-sided and untrustworthy to enter into any decision at this high level.

Internal inconsistencies within Dimmitt's extrinsic materials also suggest that they are not as they appear. These internal indications of unreliability are all the more probative as Dimmitt and its amici could not even camouflage them in a selective compilation. There are several known factual discrepancies interspersed in these materials. Further, much of the alleged drafting history merely demonstrates the overriding purpose of the proposed pollution exclusion -- the elimination of the issue of intent as set forth in the definition of an occurrence, while simultaneously preserving coverage for classic environmental accidents or mishaps. Factoring in the full historical context that ultimately led to the adoption of the pollution exclusion more than twenty years ago further exposes Dimmitt's and its amici's slanted version of the drafting history as sheer demagoguery. For a full explanation of each of these points, Southeastern adopts point II.B. of the brief of amici curiae Insurance and Environmental Litigation Association, et al., pages 34 to 41. All of these defects combine to render the extrinsic materials thrust on this Court extremely questionable. These partisan and adversarially

---

[11] The 1970 letter to the Florida Insurance Commissioner from a representative of the St. Paul Insurance Companies fares slightly better as evidence; it is only double or triple hearsay offered to prove the truth of the matter asserted and imputed to Southeastern without foundation.

pristine extrinsic materials are useless to the principled judicial decision called for in this landmark case.

Accordingly, both from a legal and factual standpoint, there is no place in this Court's decision-making process for the clutter of unreliable extrinsic materials Dimmitt filed with the trial court post-judgment and its amici have assembled in this Court.

III. ENTREATIES TO THIS COURT TO BASE ITS DECISION ON NOTIONS OF PUBLIC POLICY ARE MISPLACED.

Dimmitt and amici for both sides advance cogent policy considerations supporting each side of the legal question this Court must resolve. Persuasive or unpersuasive, the policy ramifications that may result from a particular legal conclusion are not pertinent to the inquiry conducted in this forum. The policy debate that is being waged here by Dimmitt and between and among amici raises classic legislative questions. The abstract question whether the costs of environmental disasters are better allocated to the insurance industry or to the public fisc cannot and should not be settled by the judiciary. The plain language of the insurance contract has determined the outcome of that debate. Likewise, whether deterrence or restoration of contaminated sites is a preferable social goal is another value choice that is not the prerogative of the courts. This Court, of course, is powerless to act in a legislative manner. E.g., Greater Loretta Improvement Ass'n v. State ex rel. Boone, 234 So.2d 665, 672 (Fla. 1970); Santa Rosa County v. Raymond Blanton Constr. Co., 138 So.2d 518, 520 (Fla. 1st DCA 1962); see also Chiles v. Children A, B, C, D, E, & F, 16 FLW S708 (Fla. October 29, 1991). In the words of Chief

Justice Burger in response to similar lobbying efforts before the U. S. Supreme Court:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elective representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.

Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980) (footnote omitted).

The only public policy genuinely implicated in this case is the duty of the Court to give effect to the private contracts of insurance as written by the process of neutral application of legal principles. "We, of course, reject any temptation to let our own ideas of public policy concerning the desirability of insurance coverage for environmental damage guide our legal conclusions." Belleville, 407 Mass. at 679-80, 555 N.E.2d at 571; see also A. Johnson & Co. v. Aetna Cas. & Sur. Co., 933 F.2d at 73 n.10 (the courts' role "is simply to determine the meaning of a private contract between these parties, not to foster or retard environmental goals.") Unfortunately, the enormous stakes of this case are not easily ignored. It is fair to say that during the effective dates of the policies neither Dimmitt nor Southeastern foresaw the sweeping changes in pollution liability that was ultimately enacted in CERCLA. This does not automatically mean, however, that a broadened basis of liability for gradual, long-term pollution was unanticipated by the insurance contracts. In fact, the language of the policies in this case leads to the opposite conclusion.

Southeastern's pollution exclusion is written in terms of the nature of the release of pollutants that occurs. Gradual contamination over a period of time is excluded from coverage; an abrupt, Valdez-type accident invokes the exception to the exclusion and triggers coverage. The language is silent with respect to the conceptual basis of liability. According to the policy language, then, the intent of the parties at the time they contracted was to exclude coverage for a particular category of pollution damage that is defined by how it occurred. If the pollution occurred gradually, it matters not whether the insured became liable or responsible under theories of trespass, negligence, strict liability, CERCLA, or any other newly emergent basis of liability. See Britamco Underwriters, Inc. v. Zuma Corp, 576 So.2d 965 (Fla. 5th DCA 1991) (Griffin, J.). In other words, in the 1970's when the parties contracted, Southeastern's policies anticipated that the basis of liability for pollution damage may well change or evolve over time. To neutralize uncertainty, the benchmark for coverage for pollution damage was written in terms of a physical constant -- the nature of the discharge. The basis of liability is immaterial to the operation of the pollution exclusion just as the intent of the insured is.

Viewed in this light, it is apparent from the four corners of Southeastern's unambiguously worded policy that coverage was never intended for the environmental damage that gradually permeated the Peak Oil site. As Judge Hodges concluded "the severe and long-term pollution damage appears to be just the kind of pollution which the pollution exclusion clause was meant to exclude from coverage." 731 F.Supp. at 1521. The subsequent enactment of CERCLA and the

expanded basis for imposing liability on polluters and other generators of toxic waste are certainly of blockbuster proportions. If anything, however, this intervening event makes it all the more imperative for the Court to confine its analysis to the four corners of Southeastern's policies as the best and most reliable expression of the intentions of the parties in the 1970s. It is this Court's duty to give effect to the clearly expressed intention of the parties by enforcing Southeastern's policy as written.

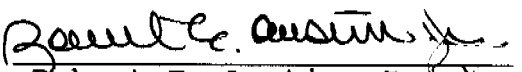
IV. CONCLUSION

As a matter of Florida substantive law, the pollution exclusion contained in Southeastern's comprehensive general liability insurance policy precludes coverage to Dimmitt for the environmental contamination that occurred in this case. The certified question of the Unites States Court of Appeals for the Eleventh Circuit should be answered in the affirmative so that the plain meaning and intent of Southeastern's policies will be implemented in accordance with Judge Hodges' original opinion.

Respectfully submitted,

Hal K. Litchford
Florida Bar No. 272485
Kristyn D. Elliott
Suite 2200
390 North Orange Avenue
Post Office Box 1549
Orlando, Florida 32802
(407) 422-6600
Associate Counsel for
Appellee

Robert E. Austin, Jr.
Florida Bar No. 2701
Suite C
1321 W. Citizens Boulevard
Post Office Box 490200
Leesburg, Florida 34749-0200
(904) 728-0595
Counsel for Appellee

By: 
Robert E. Austin, Jr.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Answer Brief of Appellee Southeastern Fidelity Insurance Company has been provided by U. S. Mail, this 9th day of December, 1991 to:

Thomas K. Bick
Joseph Dorn
J. Vance Hughes
KILPATRICK & CODY
Suite 800
700 Thirteenth Street N.W.
Washington, D.C. 20005

Luther T. Munford
PHELPS DUNBAR
Suite 1400
2829 Lakeland Drive
P. O. Box 55507
Jackson,
Mississippi 39296-5507

Richard N. Dicharry
Pamela G. Michiels
PHELPS DUNBAR
Thirtieth Floor, Texaco Center
400 Poydras Street
New Orleans,
Louisiana 70130-3245

Steven R. Berger, Bradley H. Trushin and Jeffrey S. Kurtz
WOLPE, LEIBOWITZ
Suite M-110
19 W. Flagler Street
Miami, Florida 33130

George K. Rahdert
RAHDERT & ANDERSON
535 Central Avenue
St. Petersburg, Florida 33701

William H. Allen
Saul B. Goodman
William F. Greaney
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.,
P. O. Box 7566
Washington, D.C. 20044

Jeffrey A. Tew
Daniel A. Casey
KIRKPATRICK & LOCKHART
Miami Center, Suite 2000
201 South Biscayne Blvd.
Miami, Florida 33131-2305

Jeff Peters
Assistant Attorney General 111-36 S. Magnolia Drive
Tallahassee, FL 32301

Thomas W. Brunner
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006

Robert E. Austin, Jr.

APPENDIX 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 at 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, at 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), (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. April 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 Insurance Co. of America, No. 109913, slip op. at 3 (Mich. Ct. App. February 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, 544 N.Y.S.2d 531, 542 N.E.2d 1048 (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 September 30, 1991) (pollution exclusion barred coverage for sloppy or negligent operation of a business or for which 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 September 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 August 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 September 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. April 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).

8. St. Paul Fire & Marine Insurance Co. v. McCormick & Baxter Creosoting Co., No. A6711-07096 (Or. Cir. Ct., Multnomah County December 21, 1990) ("while the term 'sudden' in certain contexts may mean 'unforseen,' 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 April 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 September 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. New York v. AMRO Realty Corp., 936 F.2d 1420 (2d Cir. 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 & Surety Co., No. CV 90-4260 RG(Gx) (C.D. Cal. October 18, 1991).

2. Anaconda Minerals Co. v. Stoller Chemical Co., No. 87-C-118W (D. Utah September 13, 1991) ("routine discharges of pollutants or contaminants, over a lengthy period, are not sudden discharges").

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 Industries, 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"), appeal pending, No. 90-3359 (11th Cir.).

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 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, 875 F.2d 868 (6th Cir. 1989) (per curiam) (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. March 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 & Surpluss 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, over a short period of time).

28. Olin Corp. v. Insurance Co. of North America, No. 1991 WL 63420 (S.D.N.Y. April 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.).