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

APPELLANTS' INTITIAL BRIEF ON THE MERITS

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I. STATEMENT OF THE CASE

A. QUESTION PRESENTED

The following question has been certified to this Court by the United States Court of Appeals for the Eleventh Circuit:

> 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 Indem. Ins. Co. v. Crown Auto Dealerships, Inc., 935 F.2d 240, 243 (11th Cir. 1991) (hereinafter "Crown Auto II").

The above statement of the certified question can be divided into two distinct but related issues:

(1) Did the district court err in holding that the word "sudden" in the pollution exclusion can only refer to pollution events that are abrupt and immediate in a temporal sense, unambiguously relieving an insurer of its duty to defend and indemnify against claims for property damage that is neither expected nor intended by the policyholders?

(2) In the alternative, assuming that the word "sudden" in the pollution exclusion refers only to events that are abrupt and immediate in time, did the district court err in holding that where both gradual and abrupt discharges of contaminants cause indivisible property damage, coverage for such damage is barred by the exclusion?

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW

In October 1988, Plaintiff/Appellee Southeastern Fidelity Insurance Company ("Southeastern") filed a declaratory judgment

action against Defendants/Appellants Dimmitt Chevrolet, Inc. and Dimmitt Cadillac Inc. ("the Dimmitts") in the United States District Court for the Middle District of Florida. The complaint sought a declaration that Southeastern owed no duty to defend or indemnify the Dimmitts under the Comprehensive General Liability ("CGL") insurance policies Southeastern sold to the Dimmitts from 1974 through 1981.

On March 1, 1990, the district court (Hodges, J.) entered an order granting Southeastern's motion for summary judgment and denying the Dimmitts' cross-motion for partial summary judgment. Industrial Indem. Ins. Co. v. Crown Auto Dealerships, Inc., et al., 731 F. Supp. 1517 (M.D. Fla. 1990) (hereinafter "Crown Auto I"). The sole basis of the Order was the court's conclusion that the qualified pollution exclusion clause[1] in the standard-form CGL policies barred the Dimmitts' coverage claims. The court reasoned that because the property damage was caused by pollution that could not be characterized as "sudden and accidental" within the meaning of that phrase in the pollution exclusion, Southeastern had no duty to defend or indemnify the Dimmitts.[2]

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[1] The qualified pollution exclusion clause is also referred to as the "polluter's exclusion." The clause has no title or heading in most standard-form CGL policies, including the policies at issue here. The clause is referred to in this brief as the "pollution exclusion."

[2] The district court failed to address a critical distinction: while the insurer's duty to indemnify is to be based on the factual record as a whole, its duty to defend is based solely on a comparison between the policy language and the allegations in the underlying complaint. Tropical Park, Inc. v. United States Fidelity & Guar. Co., 357 So. 2d 253, 256 (Fla. 3d

(continued...)

The district court's analysis did not address a category of evidence that other courts have found highly persuasive in interpreting identical policy language: evidence of the insurance industry's intent when incorporating the "pollution exclusion" into standard-form CGL policies in the early 1970's. Most of this interpretative evidence was not before the district court at the time it rendered its initial decision.[3] Accordingly, the Dimmitts moved the district court to alter or amend its decision in light of this evidence. The court denied that motion without opinion on April 4, 1990.

The Dimmitts appealed the decision of the district court to the Eleventh Circuit, which certified the question on appeal to this Court on July 10, 1991. Among other things, the Eleventh Circuit concluded in its certification opinion that "the record

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[2](...continued)
DCA 1978). "If the allegations of the complaint leave any doubts regarding the duty to defend, the question must be resolved in favor of the insured requiring the insurer to defend." Florida Ins. Guar. Assoc. v. Giordano, 485 So. 2d 453, 456 (Fla. 3d DCA 1986); see also, Keller Indus. Inc. v. Employers Mutual Liab. Ins. Co., 429 So. 2d 779 (Fla. 3d DCA 1983) (duty arises if "some allegations in the complaint arguably [fall] within coverage of policy"). The district court made no such distinction between the duty to defend and the duty to indemnify. The Dimmitts also raised other coverage arguments regarding Southeastern's duty to indemnify besides those addressed in their motion for partial summary judgment. Accordingly, even should this Court confirm the district court's holding on the certified question, the Eleventh Circuit should remand the case to the district court to address the duty to defend issue and the Dimmitts' other arguments on the duty to indemnify.

[3] The reason this interpretive evidence was not addressed in the district court's initial decision is explained in the Eleventh Circuit's certification decision. See Crown Auto II, 935 F.2d at 243 n.3.

properly includes the extrinsic evidence submitted by Dimmitt regarding the drafting history of the pollution exclusion clause and the intent of the insurance companies." Crown Auto II, 935 F.2d at 243 n.3.

C. STATEMENT OF THE FACTS

1. The Dimmitts' Relationship To The Peak Oil Company

The key facts relevant to the issue on appeal, many of which have been summarized in the opinion of the federal appellate and district courts, have not been disputed by Southeastern. The Dimmitts operate two automobile dealerships in the Tampa, Florida area. 731 F. Supp. at 1518. From 1974 to 1979, they sold used crankcase oil, a by-product of their automobile servicing operations, to the Peak Oil Company ("Peak"). Peak collected the used oil from the Dimmitts' automobile service facilities and trucked it to the site of its used oil reprocessing plant in Hillsborough County, Florida ("the Site"). There, Peak filtered and reprocessed the oil into valuable products for resale. Id.

Four years after the Dimmitts stopped selling used oil to Peak, the Environmental Protection Agency ("EPA") determined that Peak's oil recycling process had resulted in extensive soil and groundwater pollution at the site. 731 F. Supp. at 1518. This pollution was "derived from the [Peak Oil] company's having placed waste oil sludge in unlined storage ponds" and "from oil spills and leaks at the site as well as from occasional runoff of contaminated water." Id.

As both the federal appellate and district courts observed, much of the contamination that occurred at the Site was the result of accidents. The district court quoted the following undisputed passage from the affidavit of David Morris:

> [A] number of accidental overflows occurred during the filling of the used oil holding tanks, some of which resulted in fairly large spills. . . . There were also occasional spills due to leak [sic] hose and pipe connections . . . 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 storage tanks. I recall a number of accidental spills that occurred when a byproduct of the distillate process was pumped to a storage tank . . . .

731 F. Supp. at 1521. In addition, as the Eleventh Circuit pointed out, some of the pollution resulted from "a 1978 incident in which a dike collapsed and allowed oily wastewater to be released from a holding pond . . . ." 935 F.2d at 242.

Southeastern does not dispute the Dimmitts' assertion that they were not even aware of the contamination that occurred at the Site. Southeastern has offered no evidence in response to the Dimmitts' affidavit testimony that (1) the Dimmitts never intended or expected any of the releases of used oil or other materials that occurred at the Site, much less the resulting property damage; and (2) they never considered the used oil sold to Peak to be a waste in need of disposal; rather, they understood all of the used oil was to be reprocessed and sold as a usable product.[4] Indeed, because Peak's trucks collected the

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[4] Affidavit of Maureen Mack, ¶ 5, R3-63-Exh. C at 4; Affidavit of David Morris, ¶ 14, R2-35-Exh. D at 7. (The "R___-(continued...)

used oil directly from the Dimmitts' service facilities, there was no need for any employee of the Dimmitts to ever visit the Site.[5] The Dimmitts' alleged Superfund liability is based solely on the allegation that they sold used crankcase oil to the Peak Oil Company for recycling. The EPA has never suggested that the Dimmitts themselves ever released, discharged, or dispersed used oil or any other contaminant at the Site.

2. The Dimmitts' Insurance Coverage

The CGL policies[6] that Southeastern sold to the Dimmitts provided coverage 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, and the Company shall have the right and duty to defend any suit against the INSURED seeking DAMAGES on account of such BODILY INJURY or PROPERTY DAMAGE, even if any of the allegations of the suit are groundless . . . .

731 F. Supp. at 1519. 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 . . . .

Id.

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[4](...continued)
___" notation used herein identifies documents in the record as certified to the Eleventh Circuit by the district court. The notation format is the same as required by the Circuit Court's rules.)

[5] Affidavit of David Morris, R2-35-Exh. D at 7.

[6] See Exhibit 1 to Complaint, Record Excerpts, Tab 2. ("Record Excerpts" as used herein identifies district court pleadings and opinions that were separately compiled and submitted to the Circuit Court pursuant to the rules of that court.)

The policy excluded coverage for

> **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 . . . into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Id. (emphasis added). The issue before this Court is the meaning and effect of the phrase "sudden and accidental" in the underscored language quoted above. The parties agree that Florida law governs the resolution of this issue.

3. The Dimmitts' Coverage Claim

In February 1989, the EPA issued two administrative orders to the Dimmitts and other parties alleged to be liable for contamination at the Site under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq. (also known as the Superfund law).[7] Pursuant to these orders, allegedly liable parties, including the Dimmitts, agreed to undertake remedial measures at the Site. 731 F. Supp. at 1519. Prior to the issuance of these orders, the Dimmitts timely notified Southeastern of the EPA's claims and requested Southeastern to defend and indemnify them against those claims. Crown Auto I, 731 F. Supp. at 1519. Southeastern initially provided a defense under reservation of rights, but refused to

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[7] It is the EPA's position that the Dimmitts, and numerous other generators of used oil sent to the Peak Oil Site for recycling, are strictly, jointly, and severally liable for the cost of cleaning up the Site pursuant to Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3). See the EPA's Conclusions of Law at 6-7 and at 3-4. The Dimmitts do not admit such liability.

indemnify; it later refused to defend as well. In denying coverage, Southeastern asserted, among other things, that coverage was precluded by operation of the pollution exclusion. Southeastern Complaint ¶ 10(c), at 4.

II. SUMMARY OF THE ARGUMENT

As the district court notes, the Dimmitts contend they are entitled to insurance coverage because "it is undisputed that [the Dimmitts] never intended to cause contamination at Peak and, from their perspective, the resulting pollution caused by leaks, spills, and releases was accidental." Crown Auto I, 731 F. Supp. at 1520. In denying coverage, the district court concluded that the phrase "sudden and accidental" in the pollution exclusion could only be interpreted to mean "pollution which occurs abruptly, instantly, or within a very short period of time." Id. at 1520. Finding that some of the pollution at Peak occurred "gradually and as a normal result of Peak's business operations," the court reasoned that none of the pollution could be considered "sudden and accidental." Id.

The district court's decision is flawed in several respects. The majority of the courts that have addressed this issue--including the highest courts of Colorado, Wisconsin and Georgia and also two lower Florida state courts in the past year--have concluded that the exclusion does not bar coverage for gradual pollution if that pollution was not expected or intended by the policyholder. Moreover, the district court's reading of the exclusion conflicts with settled Florida law governing the

construction of insurance contracts, including the fundamental principle that courts must adopt the policyholder's reasonable interpretation of an undefined term that appears in a policy exclusion.

As noted above, the district court's decision also fails to address irrefutable evidence that the insurance industry itself intended the pollution exclusion to mean precisely what the Dimmitts say it means here. In contemporaneous statements by insurance industry drafters of the exclusion, in explanations by industry trade associations to state regulators at the time the exclusion was first added to CGL policies, and in other "drafting history" of the exclusion, industry representatives consistently stated that the exclusion was meant to preclude coverage only for deliberate polluters regardless of whether the pollution occurred gradually or abruptly.

Considering (1) that in common, everyday usage the phrase "sudden and accidental" in the exclusion lends itself to at least two reasonable meanings, (2) that courts and commentators nationwide have adopted sharply differing interpretations of the phrase, and (3) that even today the insurance industry itself reads the phrase in different ways, there can be no question that "sudden and accidental" is, at the very least, an ambiguous policy term. In Florida, this alone requires a finding of coverage.

Finally, even accepting for the sake of argument that "sudden and accidental" can only refer to pollution events that

are abrupt and instantaneous, there is still coverage. The district court acknowledged that much of the pollution at the Site did result from abrupt, accidental releases of contaminants. Under CERCLA's strict, joint, and several liability scheme, the EPA considers the Dimmitts liable for all of the Site contamination, including that caused by both abrupt and gradual pollution events. Accordingly, the Dimmitts have insurance coverage for all indivisible damage that occurred at the Site, even under the district court's erroneous reading of "sudden and accidental."

III. ARGUMENT

A. UNDER FLORIDA RULES OF CONTRACT CONSTRUCTION, THE "POLLUTION EXCLUSION" MUST BE READ TO BAR COVERAGE ONLY FOR POLICYHOLDERS WHO DELIBERATELY POLLUTE THE ENVIRONMENT.

Although acknowledging that the Dimmitts were unaware of the pollution at the Peak Oil Site, the district court concluded that such pollution could not be characterized as "sudden and accidental" within the meaning of the pollution exclusion clause in the Dimmitts' CGL policies. This conclusion is contrary to the majority of the cases that have interpreted the scope of the exclusion, including recent decisions of the highest courts of Georgia, Wisconsin, and Colorado. Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686 (Ga. 1989) (hereinafter "Claussen");[8]

[8] This opinion resolved a certified question to the Georgia Supreme Court from the Eleventh Circuit. The full citation is Claussen v. Aetna Casualty & Sur. Co., 676 F. Supp. 1571, 1573 (S.D. Ga. 1987) question certified, 865 F.2d 1217 (11th Cir. (continued...)

Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990) (hereinafter "Just"); and Hecla Mining Co. v. New Hampshire Ins. Co, 811 P.2d 1083 (Colo. 1991) (hereinafter "Hecla"). The decision is also in conflict with the only two Florida state courts that have interpreted the exclusion. Safe Harbor Enters. Inc. v. United States Fidelity & Guar. Co., No. 90-1099-CA-03, slip. op. (Fla. 16th Cir. Ct. May 28, 1991) (hereinafter "Safe Harbor")[9] and State of Fla. Dep't. of Envt'l Reg. v. Delicio, No. CL-90-389, slip op. (15th Cir. Ct. Sept. 22, 1990).[10]

The district court's decision disregards well-established Florida rules for the construction of insurance contracts. Under Florida law, an insurance contract is presumed to be a contract of adhesion, drafted by experts for the insurer and presented to the policyholder on a "take or leave it" basis. Financial Fire & Casualty Co. v. Callaham, 199 So. 2d 529, 531 (Fla. 2d DCA 1967); Firemans Fund Ins. Co. of San Francisco v. Boyd, 45 So. 2d 499 (Fla. 1950). As such, the burden rests on the insurer-draftsmen to use "clear and unmistakenable" language. United States Aviation Underwriters v. Van Houtin, 453 So. 2d 475, 477 (Fla. 2d

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[8](...continued)
1989, certified question answered, 380 S.E.2d 686 (Ga. 1989); and later op., 888 F.2d 747 (11th Cir. 1989).

[9] This decision is reported in 5 Mealey's Litig. Reps. #29, B-1 (June 4, 1991). A copy of this decision is provided in Appendix A.

[10] A copy of Judge Oftedal's order is appended to the Reply Brief For Appellants to the United States Court of Appeal for the Eleventh Circuit (hereinafter "Appellants' Reply Brief to Court of Appeals") as Appendix B.

DCA 1984). The policy must be construed "liberally in favor of coverage" unless the contrary intent clearly appears in the contract. Id. See also New Amsterdam Casualty Co. v. Addison, 169 So. 2d 877, 881 (Fla. 2d DCA 1964).

A corollary of this principle is that where a term is not defined in an insurance contract, but may be reasonably interpreted as to find coverage, such an interpretation must be adopted. Stuyvesant Ins. Co. v. Butler, 314 So. 2d 567, 570 (Fla. 1975); Triano v. State Farm Mut. Auto Ins. Co., 565 So. 2d 748, 749 (Fla. 3d DCA 1990); Trizec Properties, Inc. v. Biltmore Constr. Co., 767 F.2d 810, 812 (11th Cir. 1985); Security Ins. Co. of Hartford v. Investors Diversified Ltd., Inc., 407 So. 2d 314 (Fla. 4th DCA 1981); Ellenwood v. Southern United Life Ins. Co., 373 So. 2d 392, 395 (Fla. 1st DCA 1979).

The principle of resolving uncertainties in favor of coverage applies with particular force, where, as here, an insurer seeks to rely upon a clause of exclusion designed to limit coverage otherwise afforded. State Farm Mut. Auto Ins. Co. v. Pridgen, 498 So. 2d 1245, 1248 (Fla. 1986); Lane v. Allstate Ins. Co., 472 So. 2d 823, 824 (Fla. 4th DCA 1985). Under such circumstances, the exclusion must be construed strictly against the insurer and liberally in favor of the insured. Id.; Demshar v. AAA Con. Auto Transp. Co. v. Johns, 337 So. 2d 963, 965 (Fla. 1976); Michigan Mut. Liab. Co. v. Mattox, 173 So. 2d 754, 756 (Fla. 1st DCA 1965). Consistent with this rule, the insurer has the burden of proving that coverage does

not exist because of a policy exclusion. Hudson v. Prudential Property & Casualty Ins. Co., 450 So. 2d 565, 568 (Fla. 2d DCA 1984); Van Houtin, 453 So. 2d at 477.

Numerous courts[11] have cited these principles of construction in holding that the pollution exclusion clause cannot be read to deny coverage for policyholders who, like the Dimmitts, did not expect or intend the pollution that occurred. A recent notable example is the Georgia Supreme Court's decision in Claussen. There, the court addressed a claim for coverage under CGL insurance policies virtually identical to those at issue here. Noting that the insurance company might have drafted the pollution exclusion differently had it known the extent of its potential liability, the court stated that "the fact that it did not, cannot be construed to the detriment of the insured who purchased a 'comprehensive general liability' policy." Claussen, 380 S.E.2d at 689. Under Georgia law, the court observed, the risk of any lack of clarity in an insurance contract "must be borne by the insurer." Id. Applying this same principle under Florida law, the Florida Circuit Court in Safe Harbor recently agreed that the pollution exclusion only bars coverage for policyholders who deliberately cause pollution. The court emphasized that the settled rule in Florida--that policy language which lends itself to more than one reasonable interpretation must be read so as to provide coverage--is "all the more

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[11] A partial listing of cases not cited in the text which support the Dimmitts' reading of the pollution exclusion is provided in Appendix B hereto.

appropriate in this case because the phrase 'sudden and accidental' is not defined in the standard form insurance policies." Id. at 9.

As in Claussen and Safe Harbor, the Dimmitts' CGL policies are comprehensive general liability policies. By their own terms, these policies afford full protection against all risks except those specifically and unequivocally excluded.[12] If Southeastern had wanted to exclude coverage for unintended and unexpected pollution damage, it could have accomplished that result by phrasing the exception in "clear and unmistakenable language." Ward v. National Fire Ins. Co., 364 So. 2d 73, 77 (Fla. 2d DCA 1978). Having failed to do so, the insurer, not the insured, must bear the consequences.

The district court's interpretation of the word "sudden" cannot be reconciled with another key policy term. The word "accident" in the definition of "occurrence" specifically includes "continuous or repeated exposure to conditions" (see complete definition at page 6 above). As the Florida Circuit Court observed in Safe Harbor, when one reads this definition of "accident" together with an interpretation of "sudden" as meaning only abrupt or immediate, "one ends up with a nonsensical pollution exclusion clause that excludes discharges unless they

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[12] See Note, The Applicability of General Liability Insurance to Hazardous Waste Disposal, 57 Cal. L. Rev. 745, 757 (1984) ("[t]he very title 'Comprehensive General Liability Insurance' suggests the expectation of maximum coverage").

are both 'abrupt' and 'continuous.'" Id. at 9. The Colorado Supreme Court reached the same conclusion in Hecla:

> If "sudden" were to be given a temporal connotation of abrupt or immediate, then the phrase "sudden and accidental discharge" would mean: an abrupt or immediate, and continuous or repeated discharge. The phrase "sudden and accidental" thus becomes inherently contradictory and meaningless.

811 P.2d at 1092.

It is axiomatic under Florida law that contract provisions must be read so as to avoid such contradictory results. L'Engle v. Scottish Union and Nat'l Fire Ins. Co., 48 Fla. 82 (1904); Paddock v. Bay Concrete Indust., Inc., 154 So. 2d 313 (1963); St. Paul Guardian Ins. v. Canterbury Sch., 548 So. 2d. 1159 (Fla. 2d DCA 1989). The courts in Hecla and Safe Harbor concluded that the only logical way to avoid such an internal contradiction is to read "sudden and accidental" as it was meant to be read: as describing pollution events, either abrupt or gradual, which were not expected or intended by the policyholder. Other courts have reached the same conclusion. See, for example, City of Northglenn v. Chevron, U.S.A., Inc., 634 F. Supp. 217, 222 (D. Colo. 1986); United States v. Conservation Chem. Co., 653 F. Supp. 152, 203-04 (W.D. Mo. 1986); United Pac Ins. Co. v. Van's Westlake Union, Inc., 664 P.2d 1262, 1265-66 (Wash. App. 1983), review denied, 100 Wash. 2d 1018 (1983).

B. WHEN THE INSURANCE INDUSTRY DRAFTED THE POLLUTION EXCLUSION AND SUBMITTED IT FOR REGULATORY APPROVAL, THE INDUSTRY REPRESENTED THAT THE CLAUSE WAS ONLY MEANT TO CLARIFY THAT DELIBERATE POLLUTERS WOULD NOT BE COVERED.

". . . A page of history is worth a volume of logic."[13]

Southeastern's interpretation of the pollution exclusion contradicts the insurance industry's own interpretation of the meaning and effect of the exclusion at the time the clause was first added to CGL policies in the early 1970's.

When the insurance industry introduced the pollution exclusion in 1970, it explained that the clause was meant as a clarification of the insurance coverage then provided under the so-called "occurrence" policies--policies that expressly covered damage from gradual pollution. Evidence of the industry's original intent includes contemporaneous statements of the drafters of the exclusion, explanations by industry representatives to state insurance regulators, and statements by insurers to consumers as part of the industry's effort to market the new policies. In every case, insurers represented that the new policies did not change the coverage then provided by occurrence-based policies, which provided coverage for property damage resulting from gradual pollution, as long as such damage was not deliberately caused by the policyholder.

While it is also true that a minority of courts has agreed with the district court that "sudden and accidental" can only

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[13] Justice Oliver Wendell Holmes, New York Trust Co. v. Eisner, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed.2d 963, 983 (1921).

refer to abrupt and immediate events, every court that has examined the extensive public record underlying the development, marketing, and regulatory approval of the exclusion has rejected such a temporal construction. As will now be shown, this public record demonstrates that the addition of the pollution exclusion to the occurrence-based CGL policies was meant only to clarify the coverage already provided by those policies.

1. Before Adoption Of The Pollution Exclusion, "Occurrence" Policies Provided Coverage For Gradual Pollution Damage

In the late 1930's, the insurance industry developed the standard-form CGL policy, which was an "all-risk" policy. This standard-form policy was revised in 1947, 1955, 1966, and 1973.[14] The so-called "pollution exclusion," offered to insurance regulators for approval in 1970, first appeared in the 1973 policies.

Prior to 1966, most CGL policies provided coverage for property damage or personal injury "caused by accident."[15] The industry's failure to define the phrase "caused by accident" resulted in considerable confusion. To clarify the matter, and to respond to policyholder demands for expanded coverage, the

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[14] Saylor & Zolensky, Pollution Coverage and the Intent of the CGL Drafters, The Effect of Living Backwards, 12 Mealey's Lit. Reps. 4,425, 4,227 (1987). A copy of this article is appended to the Opening Brief For Appellants to the United States Court of Appeals for the Eleventh Circuit (hereinafter "Appellants' Opening Brief to Court of Appeals") as Appendix B.

[15] See Broadwell Realty Servs. Inc. v. Fidelity & Casualty Co., 528 A.2d 76, 84 (N.J. App. Div. 1987), (citing Hourihan, Insurance Coverage For Environmental Damage Claims, 15 Forum 551, 552 (1980)).

insurance industry revised the CGL language in 1966.[16] The resulting policies, for which policyholders were charged increased premiums,[17] provided coverage for property damage "caused by an occurrence." Courts interpreting this new occurrence-based policy uniformly recognized that it was meant to provide broadened coverage for property damage arising from long-term exposures, including gradual pollution exposures, as long as the policyholder did not deliberately cause the pollution.[18]

These decisions were consistent with the insurers' contemporaneous explanations of the scope of the coverage provided by the new "occurrence" policies. As recently noted by the Wisconsin Supreme Court, "[n]umerous representatives of

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[16] See Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990) (citing Tyler & Wilcox, Pollution Exclusion Clauses: Problems in Interpretation and Application under the Comprehensive General Liability Policy, 17 Idaho L. Rev. 497, 499 (1981)). A copy of this article is appended to Appellants' Opening Brief to Court of Appeals, supra, as Appendix D.

[17] Pfenningstorf, Environment, Damages, and Compensation, 1979 Am. B. Found. Res. J. 349, 438 (insurance industry's shift to occurrence language "was perceived and intended to be a broadening of the coverage--compensated by a premium surcharge. . . ."). A copy of this article is appended to Appellants' Opening Brief to Court of Appeals, supra, as Appendix C.

[18] See, for example, Steyer v. Westvaco Corp., 450 F. Supp. 384 (D. Md. 1978) (damage to trees caused by discharges of pollutants over four-year period); Aetna Casualty & Sur. Co. v. Martin Bros. Container & Timber Prod. Corp., 256 F. Supp. 145 (D. Or. 1966) (emission of fly ash from insured's plant over a period of several months); Grand River Lime Co. v. Ohio Casualty Ins. Co., 289 N.E.2d 360 (Ohio 1972) (property damage caused by particulate emissions from insured operation over seven-year period); United States Fidelity & Guar. Co. v. Specialty Coatings & Co., 535 N.E.2d 1071, 1077 (Ill. App. 1989), appeal denied, 545 N.E.2d 133 (Ill. 1989) ("'occurrence-based' coverages embraced not only the usual accident, but also exposure to conditions which continued for an unmeasured period of time").

insurance industry trade associations and the insurance companies that drafted the revised standard form [occurrence-based] CGL policy actively promoted this policy as providing new, broadened coverage for liabilities arising from gradual pollution." Just, 456 N.W.2d at 574.[19] In sum,

> [t]he standard, occurrence-based policy thus covered property damage resulting from gradual pollution. So long as the ultimate loss was neither expected nor intended, courts generally extended coverage to all pollution related damage, even if it arose from the intentional discharge of pollutants.

New Castle County v. Hartford Accident and Indem. Co., 933 F.2d 1162, 1197 (3d Cir. 1991) (citation omitted) (hereinafter "New Castle County").

2. The Pollution Exclusion Was Intended To Clarify The Definition Of "Occurrence"

In 1970, the insurance industry decided to add the so-called "pollution exclusion" to the standard-form CGL "occurrence" policies. When the exclusion was first submitted for regulatory approval, the industry represented that the clause was intended merely to clarify the scope of coverage provided under the "occurrence" policies. As recently noted by the Third Circuit in New Castle County, this clarification was made "amid growing public awareness of the deleterious environmental effects of pollution . . . ." Id. at 1197. The insurance industry's

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[19] The court quoted from Pendygraft, Plews, Clark & Wright, Who Pays For Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation, 21 Ind. L. Rev. 117, 141 (1988). The industry official quoted was G.L. Bean, Assistant Secretary of Liberty Mutual Insurance Company. A copy of the article is at R4-101-Exh. 14.

decision to add this clarification was largely motivated by public relations concerns; its primary motive was to distance itself from the growing perception that it was providing insurance to those who deliberately polluted the environment.[20]

Today, the insurance industry, including Southeastern in the present case, desperately seeks to rewrite this history by arguing that the use of the term "sudden and accidental" in the pollution exclusion was meant to impose a major new coverage restriction. This simply is not true. Nowhere in the extensive record of the industry's initial explanations of the meaning and intent of the pollution exclusion is there any suggestion that the term "sudden and accidental" was meant to limit pollution coverage available under the "occurrence" policies. To the contrary, this historical record dramatically demonstrates that no such limitation was intended.

The standard-form pollution exclusion introduced in 1970 is identical to the exclusion at issue in this case. An insurance industry association known as the Industrial Ratings Board ("IRB") was the entity largely responsible for drafting this exclusion.[21] The minutes of the March 17, 1970 meeting of the

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[20] See Bradbury, Original Intent, Revision, and the Meaning of the CGL Policies, 1 Envt'l Claims J. 279, 286-287 (1989). A copy of this article is included in the record at R4-101-Exh. 10.

[21] The IRB was a drafting and rating organization comprised of stock insurance companies. See Chesler, Rodburg & Smith, Patterns of Judicial Interpretation of Insurance Coverage or Hazardous Waste Site Liability, 18 Rutgers L.J. 17, 34-35 (1986); Tyler & Wilcox, supra, at 506. A parallel exclusion was developed by the Mutual Insurance Rating Bureau ("MIRB"), a

(continued...)

General Liability Governing Committee of the IRB indicate that it asked its drafting committee

> to consider the question and determine the propriety of an exclusion, having in mind that pollutant-caused injuries were envisioned to some extent in the adaptation of the current "occurrence" basis of coverage, and some protection is afforded by way of the definition of the term.[22]

Because coverage for "expected or intended" pollution was already excluded under the "occurrence" clause, the IRB drafting committee viewed the proposed pollution exclusion as a mere clarification of the coverage then provided: "[T]he adoption of the exclusion could be said to be a clarification, but a necessary one in order to avoid any question of intent." Id.[23]

Equally revealing are the explanations of the pollution exclusion offered by industry representatives when they submitted the new clause to state insurance regulators for approval. In May and June of 1970, the two industry trade associations--IRB and the Mutual Insurance Rating Board ("MIRB")--submitted the

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[21](...continued)
similar organization for mutual insurance companies. See Bradbury, supra, at 281. In 1970, most major insurance companies, including Southeastern's parent corporation, the Great American Insurance Company, participated in the development of the pollution exclusion through representative drafting and rating associations such as the IRB and MIRB. In commenting on the pollution exclusion, the IRB purported to represent all of its members, and Southeastern has not suggested otherwise.

[22] Agenda and Minutes--Meetings of the General Liability Governing Committee, IRB, 1 Mar. 17 1970, (R4-101-Exh. 11 at 1), quoted in Bradbury, supra, at 283.

[23] See also Niagara County v. Utica Mut. Ins. Co., 80 A.D.2d 415, 439 N.Y.S.2d 538 (App. Div. 1981); United Pac. Ins. Co. v. Van's Westlake Union Co., 664 P.2d 1262, 1265-1266 (Wash. App. 1982), review denied, 100 Wash. 2d 1018 (1983).

exclusion for approval to state regulators throughout the country. United States Fidelity & Guaranty v. Specialty Coatings Co., 535 N.E.2d 1071, 1077 (Ill. App. 1989) (hereinafter "Specialty Coatings"). In an explanatory memorandum accompanying its submissions, the IRB explained that

> [c]overage for pollution or contamination is not provided in most cases under present policies because damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident.

Just, 456 N.W.2d at 575, quoting Price, Evidence Supporting Policyholders in Insurance Coverage Disputes, 3 Nat. Resources & Env't. 17, 48 (Spring 1988) (emphasis added).

The IRB gave the same explanation of the exclusion to other state regulatory officials, including the Florida Insurance Commissioner.[24] In these statements the industry represented to insurance regulators nationwide that the proposed exclusion merely clarified, but did not restrict, the coverage provided by the then-existing "occurrence" policies. The fact that the new

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[24] See "IRB Files Pollution Liability Exclusions," Bus. Ins., June 8, 1970 (R4-101-Exh. 6). See also Letter from St. Paul Fire and Marine Insurance Co. to Florida Insurance Commissioner (May 28, 1970) (R4-101-Exh. 7). The letter from St. Paul indicates that the IRB's standard explanation of the pollution exclusion had been filed with the Florida Insurance Commissioner earlier that year and was similar to that being offered by St. Paul, namely, that "Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident . . . ." Id. at 1.

policies were not accompanied by a change in premium rates reinforces these statements.[25]

At least one skeptical state regulator questioned whether the true impact of the pollution exclusion would simply be to clarify the scope of coverage already provided. The West Virginia Insurance Commissioner refused to approve the exclusion until he received further explanation of its real effect on policyholders. The IRB responded that the clause was meant to clarify "that the definition of occurrence excludes damages that can be said to be expected or intended." Specialty Coatings, 535 N.E.2d at 1079. On the basis of this and similar representations, the Commissioner approved the exclusion for use in West Virginia, stating:

> The [insurance] companies and rating organizations have represented to the Insurance Commissioner, orally and in writing, that the proposed exclusions . . . are merely clarifications of existing coverage as defined and limited in the definitions of the term "occurrence," contained in the respective policies to which said exclusions would be attached.[26]

The West Virginia Insurance Commissioner recently reviewed this historical record and confirmed that the approval of the pollution exclusion for CGL policies sold in West Virginia was

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[25] See Anderson & Passannante, Insurance Industry Doublethink: The Real and Revisionist Meanings of "'Sudden and Accidental'", 12 Insur. Litig. Rep. 186, 193 (1990) (copy appended to Appellants' Opening Brief to Court of Appeals, supra, as Appendix H).

[26] Order of West Virginia Commissioner of Insurance, Samuel H. Weese, In Re "Pollution and Contamination Exclusion Findings," Administrative Hearing No. 70-4, at 3, Aug. 19, 1970 (R4-101-Exh. 5 at 3).

conditioned on the industry's claim that the exclusion would have no impact on existing coverage:

> The Commissioner at that time, the Honorable Samuel H. Weese, Jr., approved the exclusion, but only after first conducting an extensive hearing and assuring himself and the agency--based upon the explicit representations of the insurers--that the exclusion did not cut back coverage, that it was a mere "clarification" of the "occurrence" definition already contained in the policies, and that unintended and unexpected pollution damage remained covered under the comprehensive general liability ("CGL") insurance policy.[27]

Many courts have found these statements to state insurance regulators highly persuasive. For example, the Georgia Supreme Court in Claussen concluded that "[d]ocuments presented by the Insurance Rating Board . . . to the [Georgia] Insurance Commissioner when the "pollution exclusion" was first adopted suggest that the clause was intended to exclude only intentional polluters." Claussen, 380 S.E.2d at 689.

The United States Court of Appeals for the Third Circuit recently came to the same conclusion:

> This history is reinforced by the representations made by insurance industry officials to state authorities in an effort to gain regulatory approval of the pollution exclusion clause. Insurance company executives stated that the language of the clause was a mere clarification of the "occurrence" definition.
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> * * * *
>
> That insurers publicly marketed the exclusion as a clarification, rather than a restriction of coverage, further indicates that "sudden and accidental" may

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[27] Amicus Curiae Brief of the Insurance Commissioner of West Virginia at 3, Liberty Mut. Ins. Co. v. Triangle Indust., Inc., No. CC999, slip op. (W. Va. Sup. Ct. App. Jan. 17, 1990) (R4-101-Exh. 4).

mean, as the County suggests, unexpected and unintended.

New Castle County, 913 F.2d at 1197-98.

Similarly, the Wisconsin Supreme Court observed that interpreting the pollution exclusion to preclude coverage only for damages from intentional pollution "comports with substantial evidence indicating that the insurance industry itself originally intended the phrase 'sudden and accidental' to mean 'unexpected and unintended.'" Just, 456 N.W.2d at 579. An Illinois appellate court noted that "interpreting 'sudden' to mean 'abrupt' and 'instantaneous' contravenes the insurance industry's announced intent in adding the pollution exclusion to the general liability policy." Specialty Coatings, 535 N.E.2d at 1079. Accord, Centennial Ins. Co. v. R.R. Donnelley & Sons Co., No. H89-410, slip op. (N.D. Ind. April 11, 1991) (applying Illinois law).[28] See also Broadwell Realty Services, Inc. v. Fidelity & Casualty Co., 528 A.2d 76, 85 (N.J. App. Div. 1987) (based on industry statements at the time the exclusion was introduced, the pollution exclusion merely clarifies existing coverage); Aetna Casualty & Sur. Co. v. General Dynamics, No. 88-2220C, slip. op. (E.D. Mo. Jan. 23, 1991) ("[T]he drafting history of the Pollution Exclusion clause evidences that the Insurance Rating

[28] This decision is reported in 5 Mealey's Litig. Reps. #23, A-7 (April 4, 1991). A copy is provided in Appendix C hereto.

Board and plaintiff drafted the clause intending to exclude coverage only from accidental pollution occurrences").[29]

In marketing the "pollution exclusion" policies to their prospective customers, insurers made representations similar to those they gave to state regulators. Industry bulletins, which insurance agents and brokers relied on to interpret standard policy provisions to policyholders, explained that the new pollution exclusion clause would have little effect on existing coverage. One such bulletin stated:

> In one important respect, the exclusion simply reinforces the definition of occurrence. That is, the policy states that it will not cover claims where the "damage was expected or intended" by the insured and the exclusion states, in effect, that the policy will cover incidents which are "sudden and accidental--unexpected and not intended."

Just, 456 N.W.2d at 575 (quoting from The Fire, Casualty & Surety Bulletin). See also New Castle County, 933 F.2d at 1198: "That insurers publicly marketed the exclusion as a clarification, rather than a restriction of coverage, further indicates that 'sudden and accidental' may mean . . . unexpected and unintended." Even more telling, a member of the IRB committee that actually drafted the pollution exclusion stated publicly in 1971 that the exclusion continued coverage for the "unexpected"

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[29] This decision is reported in 5 Mealey's Litig. Reps. #13, E-1 (Feb. 5, 1991). A copy is provided in Appendix D hereto.

event but "does not allow an insured to seek protection from his liability insurer if he knowingly pollutes."[30]

Once the pollution exclusion had been drafted and approved by the IRB and MIRB, it was circulated to member companies with an explanation of its intent.[31] The MIRB advised its subscribers in a circular dated June 22, 1970, that "[w]ith these exclusions, coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident." Id. at 284. The IRB made a similar statement in a circular to its members dated May 15, 1970:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident . . . . (emphasis added).[32]

These circulars, like other portions of the drafting history of the exclusion, are finding their way into insurance coverage litigation. For example, after reviewing the 1970 IRB circular, an Ohio appellate court stated:

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[30] Bruton, Historical, Liability and Insurance Aspects of Pollution Claims, 1971 A.B.A. Sec. Proc. Ins. Negl. & Compensation L. 303, 311, quoted in Soderstrom, The Role of Insurance in Environmental Litigation, 11 Forum 762, 768 (1976). A copy of this article is appended to Appellants' Opening Brief to Court of Appeals, supra, as Appendix F.

[31] See Bradbury, supra, at 283-84.

[32] Copies of these MIRB and IRB circulars are included in the record at R4-101-Exh. 12 and R4-101-Exh. 13, respectively.

> We find in the record before us a 1970 circular to the members of the Insurance Rating Board that in discussing [the pollution exclusion], states that the clause is intended to clarify the definition of "occurrence" so as to exclude coverage for expected or intended results. [The pollution exclusion] does not bar coverage in this case.

Kipin Indus., Inc. v. American Universal Ins. Co., 535 N.E.2d 334 (Ohio Ct. App. 1988), review denied, No. 87-1720, slip op. (Ohio, Jan. 13, 1988).[33]

3. By 1970, The Term "Sudden And Accidental" Had Already Come To Mean "Unintended And Unexpected" In The Insurance Industry

The phrase "sudden and accidental" was not new when first added to CGL policies in the early 1970's. It had for many years been in use in another type of standard-form policy, the so-called "boiler and machinery" policy. Boiler and machinery policies provided coverage for "accidents," which were defined to mean a "sudden and accidental breakdown" or a "sudden and accidental tearing asunder."[34]

In resolving the scope of coverage provided by the "sudden and accidental" language in these policies prior to 1970, courts

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[33] This case is discussed in Pendygraft et al, supra, at 155.

[34] See Anderson & Luppi, Environmental Risk Management 42, 189 (1987), citing Hoey, The Meaning of 'Accident' in Boiler and Machinery Insurance and New Developments in Underwriting, 19 Forum 467 (1984).

uniformly interpreted "sudden and accidental" to mean unintended and unexpected.[35] According to a recent treatise:

> In order for the insured to recover under a boiler and machinery policy, it must demonstrate that the occurrence was 'sudden and accidental.' Although the terms 'sudden' and 'accidental' seem to imply that an immediate or instantaneous event must occur, courts have construed these terms more broadly. Utilizing the 'common meaning' doctrine, the courts have uniformly held that the dictionary definition of the terms as 'unforeseen, unexpected and unintentional' is controlling . . . .

Cozen, Insuring Real Property, § 5.03(2)(b) (1989). Similarly, Professor Couch states in his 1982 treatise:

> When coverage is limited to sudden "breaking" of machinery the word "sudden" should be given its primary meaning as happening without prior notice, or as something coming or occurring unexpectedly, as unforeseen or unprepared for. That is, "sudden" is not to be construed as synonymous with instantaneous.

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[35] See, for example, New England Gas & Elec. Ass'n. v. Ocean Accident & Guar. Co., 116 N.E.2d 671 (Mass. 1953) (giving the word "sudden" in a boiler and machinery policy "its primary meaning according to lexicographers as a happening without previous notice or with very brief notice, or as something coming or occurring unexpectedly, unforeseen, or unprepared for . . . ."); Anderson & Middleton Lumber Co. v. Lumbermen's Mut. Casualty Co., 333 P.2d 938 (Wash. 1959) (concluding that it was more reasonable to assume that the word "sudden" was placed in a boiler and machinery policy "to exclude coverage of a break which was unforeseen and therefore unavoidable"). See also Sutton Drilling Co. v. Universal Ins. Co., 335 F.2d 820, 824 (5th Cir. 1964) (construing "sudden", as used in an oil well insurance policy, as "happening without previous notice or with very brief notice, unforeseen; rapid. It does not mean instantaneously"). After 1970, courts continued to construe the phrase "sudden and accidental" in boiler and machinery policies in similar fashion. See, e.g., Cyclops Corp. v. Home Ins. Co., 352 F. Supp. 931, 935 (W.D. Pa. 1973) (relying on dictionary definition, "sudden" means "happening or coming unexpectedly"); Community Fed. Sav. & Loan Ass'n v. Hartford Steam Boiler Inspection & Ins. Co., 580 F. Supp. 1170, 1173 (E.D. Mo. 1985) (three separate motor failures over a seven-month period were "sudden and accidental").

G. Couch, 10A Cyclopedia of Insurance Law 2d, §§ 42:395-96 (1982). Professor Couch had made the same observation in the 1963 version of his treatise. G. Couch, Cyclopedia of Insurance Law, § 42:383 (1963).

In sum, as the Third Circuit pointed out in New Castle County,

> [t]he phrase "sudden and accidental" was not new to the insurance industry. For many years, it had been used in the standard boiler and machinery policy . . . and the courts uniformly had construed the phrase to mean unexpected and unintended.

933 F.2d at 1197 [footnote omitted].

Seen in this context, incorporation of the phrase "sudden and accidental" into CGL policies in 1973 was merely a clarification of the coverage then afforded by occurrence-based policies. By that year "sudden and accidental" as used in boiler and machinery policies had long been defined by judicial precedent to mean unintended and unexpected. It is well-settled that prior judicial interpretations of insurance policy language are presumed to reflect the intent of the insurance industry when adding the same language to a new policy:

> The judicial construction placed on particular words or phrases made prior to the issuance of a policy employing them will be presumed to have been the construction intended to be adopted by the parties, otherwise the language of the policy should have been modified to make the contrary intent clear.

G. Couch, 2 Couch on Insurance 2d § 15:20, at 196 (1984).[36]

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[36] See also J. Appleman, Insurance Law and Practice § 7404 (1969): "[I]f an insurance company continues to employ clauses which have been construed unfavorably to its contention by the (continued...)

Accordingly, it must be presumed that by 1970 the insurance industry meant the phrase "sudden and accidental" to have a particular meaning--the meaning adopted by the courts when interpreting boiler and machinery policies. See New Castle County, 933 F.2d at 1197: "We think that it is reasonable to assume that the insurance industry was aware of this construction when it chose to use the phrase 'sudden and accidental' in the pollution exclusion clause."[37]

To summarize, Southeastern cannot avoid its duty to defend and indemnify the Dimmitts on the basis of its after-the-fact interpretation of the pollution exclusion. That coverage-defeating interpretation directly contradicts (1) the express intent of the insurance industry in drafting the proposed exclusion; (2) the industry's contemporaneous explanations when submitting the exclusion to state regulators for approval; (3) the industry's representations when marketing the exclusion

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[36](...continued)
courts, it may well be considered to have issued the policy with the construction placed upon it."

[37] The conclusion that the insurance industry drafters of the pollution exclusion relied on judicial interpretations of "sudden and accidental" in boiler and machinery policies is more than a mere legal presumption. One industry official who was "very much involved" in developing the pollution exclusion testified under oath that the drafters of the exclusion wanted "language that at least some people in the insurance business had seen before" and consequently turned to the "analogous concept" in the boiler and machinery policy. Memorandum in Support of Motion for Partial Summary Judgment as to "Pollution Exclusion", at 12-13 n.7, in Boeing Co. v. Aetna Casualty & Sec. Co., No. C86-352 WD, slip op. (W.D. Wa. 1991), quoting from the deposition testimony of Richard Schmalz, filed Feb. 8, 1990. This testimony is referenced in Anderson & Passannante, supra, at 190.

to consumers; and (4) judicial interpretations of the "sudden and accidental" language as used in boiler and machinery insurance policies before its adoption by the drafters of the exclusion.

Try as it might, the insurance industry has not been able to explain away the overwhelming evidence of its own interpretive statements in the early 1970's. Nor can it explain why, if the pollution exclusion really was meant to effect a major restriction on the coverage provided by occurrence-based policies, there was no change in the premium rates when the exclusion was added to those policies. Instead, the industry's favored strategy has been to strive desperately to keep this extrinsic evidence out of the public domain[38] and, that failing, to argue that such evidence is not admissible in individual coverage disputes.

Adopting the latter tactic in the district court, Southeastern argued that the phrase "sudden and accidental" is clear and unambiguous on its face and, consequently, that extrinsic evidence of the industry's own interpretation of that phrase may not be considered.[39] According to Southeastern,

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[38] See Bradbury, supra, at 292 n.1, which summarizes the many ways insurers have resisted disclosure of the pollution exclusion drafting history, including requiring litigating policyholders to consent to protective orders as a condition of discovery. As Bradbury concludes: "The victories won by insurance companies regarding the interpretation of the polluter's exclusion . . . could simply become a measure of their lawyers' past success in keeping out of court the mass of documentation that contains the insurers' interpretations of their own standard-form policies." Id.

[39] See Plaintiff's Brief in Support of Motion for Summary Judgment (R-104 at 5-6).

because "sudden and accidental" can only refer to unintentional and instantaneous events, extraneous evidence showing otherwise, no matter how persuasive, is not admissible.

This argument fails for two important reasons. First, it ignores the conclusion, reached by the majority of the courts that have addressed this issue, that in common, everyday usage the phrase "sudden and accidental" lends itself to more than one reasonable interpretation. As discussed below (pp. 37-45), in Florida such ambiguous policy language must be resolved in favor of coverage. Second, as will now be shown, Southeastern's argument mischaracterizes the applicable rule of evidence under Florida law.

4. In Florida, Objective Extrinsic Evidence Is Always Admissible To Show That A Disputed Policy Term Has More Than One Reasonable Interpretation

Even assuming, for the sake of discussion, that a court on first reading finds the phrase "sudden and accidental" to be clear and unambiguous, in Florida and many other states the court may properly consider objective extrinsic evidence to determine whether these words might, in fact, be given another reasonable interpretation.

This principle is based on the more general rule that, under Florida law, objective extrinsic evidence is always admissible to show that a "latent" ambiguity exists in a contract. The Eleventh Circuit articulated this principle as follows:

> [A] latent ambiguity exists where a document is rendered ambiguous by some collateral matter. Under such circumstances the trial court is obligated to consider parol evidence to determine whether the

> contract is ambiguous. See Cathbake Invest. Co. v. Fisk Elec. Co., 700 F.2d 654 (11th Cir. 1983); Landis v. Mears, 329 So. 2d 323 (Fla. 1976).

Hashwanit v. Barbar, 822 F.2d 1038, 1040 (11th Cir. 1987) (interpreting Florida law). This principle has frequently been applied by Florida courts. In Bunnell Medical Clinic, P.A. v. Barrera, 419 So. 2d 681, 683 (Fla. 5th DCA 1982), for example, the appellate court stated:

> A latent ambiguity has been defined as one where the language in a contract is clear and intelligible and suggests a single meaning, but some extrinsic fact or extraneous evidence creates a need for interpretation or a choice between two meanings. Hunt v. First Nat'l. Bank of Tampa, 381 So. 2d 1194 (Fla. 2d DCA 1980); Drisdom v. Guarantee Trust Life Ins. Co., 371 So. 2d 690 (Fla. 3d DCA 1979).

In Drisdom, the court stated this rule as follows: "A latent ambiguity has been defined as an ambiguity where the language employed in the policy is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings." 371 So. 2d at 693 n.2.

Some Florida courts have held that "parol evidence" may only be introduced after the court has found an ambiguity in a contract. For example, in Landis v. Mears, 329 So. 2d 322 (Fla. 2d DCA 1976), the court stated: "Since there is an ambiguity here, apparent on the face of the instrument, the trial court correctly admitted parol evidence." Id. at 323. However, it is clear that by "parol evidence," these courts are referring to evidence which reflects the actual intent of the contracting parties. In contrast, objective extrinsic evidence--such as

evidence showing customary industry usage or practice, evidence of the industry's contemporaneous explanations to customers and regulators, dictionary definitions, and settled judicial interpretations--may always be considered by courts in the first instance to show that a latent ambiguity exists.

This distinction was recently addressed at some length by the United States Court of Appeals for the District of Columbia in Carey Canada, Inc. v. Columbia Casualty Co., Nos. 89-7266, 89-7267, 1991 U.S. App. LEXIS 17891 (D.C. Cir. Aug. 9, 1991) (hereinafter "Carey Canada").[40] The court examined the state evidentiary rules of Florida and Illinois, which it concluded were essentially the same, to determine the propriety of considering extrinsic evidence to determine if "asbestosis," as used in a liability policy exclusion, could have more than one reasonable meaning. The court concluded that under the laws of both states "subjective" evidence of the contracting parties' intent was not admissible, but that "objective evidence of an ambiguity is necessary to find a contract term ambiguous." Id. at *29. The court explained that by "objective" extrinsic evidence it meant "extrinsic evidence of an agreement's 'commercial context,' i.e., the industry or trade practices milieu within which the parties executed a particular agreement." Id.

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[40] A copy of this decision is provided in Appendix E hereto.

Evidence of the drafting and marketing history of the pollution exclusion, documents reflecting the insurance industry's explanations of the exclusion to state regulators, cases showing that "sudden and accidental" had already become a term-of-art at the time of inclusion in CGL policies, and recent statements as to the meaning of the exclusion by insurance company officials (see pp. 42-44 below), constitute precisely the type of objective evidence of the "industry or trade practices milieu" that Florida courts should properly consider in evaluating whether "sudden and accidental" is ambiguous.

Courts in states with parol evidence rules similar to Florida's have not hesitated to consider drafting history evidence to explain the term "sudden and accidental." See Just, 456 N.W.2d 570; Claussen, 380 S.E.2d 686; United States Fidelity & Guaranty v. Specialty Coatings Co., 535 N.E.2d 1071 (Ill. App. Ct. 1989), appeal denied, 545 N.E.2d 133 (Ill. 1989); Kipin Indus., Inc. v. American Universal Ins. Co., 535 N.E.2d 334 (Ohio Ct. App. 1987), review denied, No. 87-1720, slip op. (Ohio, Jan. 13, 1988).[41] It should also be noted that the district

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[41] See also Sunstream Jet Exp. Inc. v. International Air Serv. Co., 734 F.2d 1258, 1266 (7th Cir. 1984); Southern Stone Co. v. Singer, 665 F.2d 698, 701 (5th Cir. 1982); Minnesota Mining & Mfg. Co. v. Blume, 533 F. Supp. 493, 501 (S.D. Ohio 1978), aff'd, 684 F.2d 1166 (6th Cir. 1982), cert. denied, 460 U.S. 1047, 103 S.Ct. 1449, 75 L.Ed.2d 803 (1983). A Florida court has noted that the drafting history "arguably shed[s] light upon [the insurer's] intentions" in providing coverage and could constitute admissions against interest. Lone Star Indus. v. Liberty Mut. Ins. Co., No. 87-05683-CA-15, slip op. at 4 (Fla. 11th Cir. Ct. Jan. 3, 1989) (copy appended to Appellant's Reply Brief to Court of Appeals as Appendix B).

court recognized in the instant case that drafting history was relevant to this dispute when it ruled that such extrinsic material was discoverable.[42]

The principle that extrinsic evidence may be considered in interpreting insurance policies has long been endorsed by the United States Supreme Court: "This Court, moreover, has long emphasized that in interpreting insurance contracts reference should be made to considerations of business and insurance practices." Standard Oil Co. v. United States, 340 U.S. 54, 60, 71 S.Ct. 125, 152, 95 L. Ed. 68, 74 (1950).

In sum, even if on first reading a court were to consider the phrase "sudden and accidental" clear on its face, objective extrinsic evidence of how the industry itself traditionally interprets this phrase is admissible to determine whether, at the very least, it admits of more than one reasonable interpretation.

C. THE DIMMITTS' READING OF THE PHRASE "SUDDEN AND ACCIDENTAL" IS A REASONABLE INTERPRETATION OF WHAT IS AT MOST AN AMBIGUOUS POLICY TERM

As noted above, Southeastern argues that because the phrase "sudden and accidental" is clear and unambiguous on its face, it may only be read in isolation, without reference to extrinsic interpretive evidence--no matter how revealing that evidence might be. Even without reference to that extrinsic evidence, however, the phrase can readily be shown to have at least two

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[42] See Appellants Br. at 32, n. 30, referencing the district court's order at R3-55; see also Crown Auto II, 935 F.2d at 243 n.3.

distinct and equally reasonable meanings. When extrinsic evidence is also considered--as it should be here--this ambiguity becomes even more apparent.

Ambiguities in contracts of insurance must be resolved in favor of the insured. Demshar v. AAACon Auto Transp. Inc., 337 So. 2d 963, 965 (Fla. 1976); Hodges v. National Indem. Co., 249 So. 2d 679 (Fla. 1971); Gulf Life Ins. Co. v. Nash, 97 So. 2d 4 (Fla. 1957); Valdes v. Smalley, 303 So. 2d 342, 345 (Fla. 3d DCA 1974), cert. dismissed sub nom. National Ben Franklin Ins. Co. v. Valdes, 341 So. 2d 975 (Fla. 1976). An interpretation favoring coverage must be adopted "[i]f there is any doubt, uncertainty or ambiguity in the phraseology of a policy, or if the phraseology is susceptible to two meanings." Lane v. Allstate Ins. Co., 472 So. 2d 823, 824 (Fla. 4th DCA 1985) (emphasis added); Ellenwood v. Southern United Life Ins. Co., 373 So. 2d 392, 395 (Fla. 1st DCA 1979).[43]

The district court's conclusion that the word "sudden" unambiguously conveys a temporal meaning cannot be reconciled with everyday usage of that word. As the Georgia Supreme Court observed in Claussen,

> Perhaps, the secondary meaning is so common in the vernacular that it is, indeed, difficult to think of "sudden" without a temporal connotation: a sudden

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[43] See also J. Appleman, Insurance Law & Practice § 7403 (1976): "[T]o sustain its construction of the contract, the insurer has the burden of establishing not only that the words used in the policy are susceptible of its construction, but also that such construction is the only construction that can fairly be placed on the language in question." Id. at 312-13 (footnotes omitted; emphasis added).

> flash, a sudden burst of speed, a sudden bang. But, on reflection one realizes that, even in its popular usage, "sudden" does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death. Even when used to describe the onset of an event, the word has an elastic temporal connotation that varies with expectations: Suddenly, it's spring. See also Oxford English Dictionary, at 96 (1933) (giving usage examples dating back to 1340, e.g., "She heard a sudden step behind her"; and, "A sudden little river crossed my path As unexpected as a serpent comes.").

380 S.E.2d at 688.

Standard English dictionary definitions of "sudden" emphasize the element of unforeseeability rather than, or in addition to, the idea of brevity or immediacy. Numerous courts have relied upon these dictionary definitions in holding that the word "sudden" in the pollution exclusion clause can reasonably be construed to mean either "unintended" or "instantaneous." For instance, in Just the Wisconsin Supreme Court pointed out that the first definition of "sudden" in Webster's Third New International Dictionary (1986) is "happening without previous notice . . . occurring unexpectedly . . . not foreseen." 456 N.W.2d at 573. Similarly, in Claussen the Georgia Supreme Court observed:

> The primary dictionary definition of the word is "happening without previous notice or with very brief notice; coming or occurring unexpectedly; not foreseen or prepared for." Webster's Third New International Dictionary, at 2284 (1986). See also, Funk and Wagnalls Standard Dictionary, at 808 (1980); Black's Law Dictionary, at 1284 (1979).

Claussen, 380 S.E.2d at 688.

Certainly, as acknowledged in both Claussen and Just, the word "sudden" is alternatively defined as abrupt or instantaneous

in most dictionaries. But the distinct concept of unintended or unexpected appears equally as often. See Just, 456 N.W.2d at 572: "We agree that one meaning of the phrase 'sudden and accidental' is abrupt and immediate; we disagree that such definition is the only meaning that can reasonably attach to the phrase." See also New Castle County, 933 F.2d at 1198: "Our dictionaries, like the district court's, define 'sudden' both with and without a temporal element, thus lending considerable weight to the County's assertion that either interpretation is reasonable."

Numerous other courts have relied on common vernacular and dictionary definitions to conclude that "sudden" as used in the pollution exclusion can reasonably be interpreted to refer to an "unexpected or unintended" event, regardless of its duration.[44] As recently concluded by the Colorado Supreme Court, "[t]he majority of the courts addressing the meaning of the phrase 'sudden and accidental' as used in CGL insurance policies have determined that the phrase is ambiguous and therefore must be construed against the insurer to mean unexpected and unintended." Hecla, 811 P.2d at 1091.

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[44] See, for example, Aetna Casualty & Sur. Co. v. Gen. Dynamics Corp., No. 88-2220C, slip op. (E.D. Mo. Jan. 23, 1991); The Upjohn Co. v. New Hampshire Ins. Co., 444 N.W.2d 813 (Mich. App. 1989), appeal denied, 435 Mich. 863 (1990); United States Fidelity & Guar. Co. v Thomas Solvent, 683 F. Supp. 1139 (W.D. Mich 1988); Allstate Ins. Co. v. Klock Oil Co., 73 A.D.2d 486, 426 N.Y.S.2d 603 (App. Div. 1980); Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co., 528 A.2d 76 (N.J. App. Div. 1987).

The only decision by a Florida appellate court that has interpreted the word "sudden" in an insurance context provides strong support for the Dimmitts' contention that their reading of that word is a reasonable and commonly accepted one. The court was called upon to interpret the word as it appeared in the phrases "sudden settlement" and "sudden collapse" in a policy insuring against sinkhole collapses sold by the Aetna Insurance Company. The court first noted that "Aetna urges a construction which would limit coverage only to those situations where the collapse would occur instantaneously." Zimmer v. Aetna Ins. Co., 383 So. 2d 992, 994 (Fla. 5th DCA 1980). Rejecting that argument, the court looked to the statutory purpose of legislation requiring the sale of such policies in Florida and concluded that "sudden" in that context was only meant to "limit claims to those losses which occur unexpectedly, without previous notice and which are unforeseen and unprepared for." Id.

In the instant case, the district court correctly notes that some courts have accepted the insurers' argument that the term "sudden and accidental" bars coverage for all but unintended, instantaneous pollution.[45] This conflict among the courts over

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[45] See, for example, Hayes v. Maryland Cas. Co., 688 F. Supp. 1513, 1515 (N.D. Fla. 1988) ("sudden" has a temporal meaning and therefore did not apply "where the pollution had to be carried on over a considerable period of time"); International Minerals and Chem. Corp. v. Liberty Mut. Ins. Co., 522 N.E.2d 758 (Ill. App. Ct. 1987), appeal denied, 530 N.E.2d 246 (Ill. 1988) ("sudden" means "abrupt"). See also Lumbermen's Mut. Cas. Co. v. Belleville Indus. Inc., 555 N.E.2d 568 (Mass. 1990); Powers Chemco, Inc. v. Federal Ins. Co., 548 N.E.2d 1301 (N.Y. 1989). It should be emphasized that in Belleville, the Massachusetts

(continued...)

the correct meaning of "sudden and accidental," however, only tends to underscore the fact that the phrase lends itself to at least two different but reasonable interpretations. "The fact that courts of the several jurisdictions have arrived at different constructions as to the meaning of the words in the provision or exclusion of a policy, and even in some instances have taken opposite views, is some indication that the terms are ambiguous." 2 Couch on Insurance 2d, supra, § 15:84, at 419. See also New Castle County, 933 F.2d at 1198: "That so many learned jurists throughout the nation differ on the construction of this phrase is in our view, additional proof that the phrase admits of two reasonable constructions."[46]

Even today, high-level insurance industry officials read the phrase "sudden and accidental" to refer only to deliberate pollution. For example, in deposition testimony in February of 1990, two corporate officers of plaintiff Federated Mutual

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[45](...continued)
Supreme Court did find that "sudden" had more than one reasonable interpretation, including the concept of unexpected and unintended, but the court was not constrained to adopt the pro-policyholder interpretation. Under Florida law, as noted herein, courts do not have such discretion. Both Hayes and Power's Chemco are distinguishable on their facts: both involved deliberate pollution; that is, pollution that could not be characterized as "accidental."

[46] See also Jones v. Ins. Co. of N. Am. 504 P.2d 130 (Or. 1972) (differing results and disagreement between courts as to a particular policy exclusion are strong indication that the clause contains a real ambiguity).

Insurance Company[47] took a very different position than that advocated by Southeastern in this case. Both of these high-level industry officials equated "sudden and accidental" with unintended and unexpected pollution.[48]

One of these officials, Robert L. Braswell, is the senior underwriter in Federated's regional office in Atlanta, Georgia. Braswell Transcript at 5-6. When questioned about a letter from Federated's home office to all of its underwriters transmitting the company's official position on the scope of the pollution exclusion, he explained:

> A [by Mr. Braswell]: It was a question concerning the meaning of sudden and accidental, and we had received some press that was stating that our wording excluded any sudden and -- anything except sudden and accidental tank leakage, and this was put out for the benefit of our petroleum products' dealers to tell them that our definition of sudden and accidental included any unintentional and unexpected leak.
>
> Q: So that sudden and accidental, as you understand Federated's policy, means unintended and unexpected?
>
> A: Yes.

Braswell Transcript at 134.

The other Federated official is Berkeley E. Boone, who, as claims manager in Federated's Atlanta office, has primary

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[47] Federated Mutual was a plaintiff in two of the four consolidated cases before the district court. Both of those cases settled before the district court's ruling.

[48] Excerpts of transcripts of the two depositions referred to herein are in the record before this Court. These include transcript excerpts of the deposition of Federated's Robert L. Braswell on February 14, 1990 ("Braswell Transcript"), R4-101-Exh. 2, and transcript excerpts from the deposition of Federated's Berkeley E. Boone on February 13, 1990 ("Boone Transcript"), R4-101-Exh. 3.

authority to interpret CGL policy provisions on behalf of the company. Id. at 55-56. When questioned about the meaning of the "sudden and accidental" language in the pollution exclusion, Boone replied: "[s]udden means unexpected, without warning, and accidental means without intention, by accident." Boone Transcript at 74-75.

Boone then responded to follow-up questions posed by his own counsel:

> Q: ...When we had discussed the pollution exclusion, which is also contained in the CGL exclusion F, and you had been asked what was meant by the terms sudden and accidental and I think you used the words unexpected and unintended. Are those words that you formulated today sitting analyzing that thing as being the explanation for what is meant by sudden accidental?
>
> A: No.
>
> Q: Do you have an idea where you got those words?
>
> A: Seventeen years worth of experience and different cases coming out redefining or refining what that means.

Boone Transcript at 141-142.

The sworn testimony of these upper level insurance industry officials demonstrates the fallacy of Southeastern's argument that the term "sudden" unambiguously carries with it the single concept of abrupt or immediate. To both the claims manager and chief regional underwriter in a major national insurance company--a company that was Southeastern's co-plaintiff in the consolidated cases before the district court--this commonly-used policy term means exactly what the policyholders in this litigation say it means.

To summarize, where a court is presented with ambiguous policy language in a dispute over coverage, the Florida cannons of construction are clear. If the controlling language of a policy will support two interpretations of an undefined policy term, the construction promoting coverage must be adopted. This principle has particular force, where, as in this case, the ambiguity appears in a standardized exclusionary clause. State Farm Mut. Auto Ins. Co. v. Pridgen, 498 So. 2d 1245, 1248 (Fla. 1986); George v. Stone, 260 So. 2d 259, 262 (Fla. 4th DCA 1972); Michigan Mut. Liab. Co. v. Mattox, 173 So. 2d 754, 756 (Fla. 1st DCA 1965).

D. EVEN ACCEPTING THE DISTRICT COURT'S INTERPRETATION OF THE POLLUTION EXCLUSION, THE UNDISPUTED FACTS DEMONSTRATE THAT THE DIMMITTS ARE ENTITLED TO COVERAGE.

Even accepting the district court's erroneous conclusion that only abrupt, nondeliberate pollution events fall within the meaning of "sudden and accidental," there is coverage in this case. For, as the district court acknowledged, abrupt, pollution-causing accidents did occur at the Peak Oil Site. Moreover, there is no way to distinguish the property damage that was caused by gradual releases of contaminants from that caused by abrupt releases. Under Florida law, where both excluded and covered events combine to cause an indivisible loss, the entire loss is covered. This is particularly so where, as here, the burden is on the insurer to prove that a policy exclusion applies. Wallach v. Rosenberg, 527 So. 2d 1386 (Fla. 3d DCA

(1988), review denied, 536 So. 2d 246 (1988) (hereinafter "Wallach").

The district court observed that some of the property damage at the Site was from "accidental spills and leaks of used oil and other substances." Crown Auto I, 731 F. Supp. at 1521. The court also quotes from the undisputed affidavit testimony of a former vice president of the Peak Oil Company that "a number of accidental overflows occurred during the filling of the used oil holding tanks, some of which resulted in fairly large spills;" that "accidental spills [occurred] during the transfer of used oil from trucks to storage tanks;" and that "accidental spills occurred when a by-product of the distillate process was pumped to a storage tank." Id. In addition, the record shows that a dike collapsed on the sludge holding pond in 1978, causing a major spill of oily wastewater over a large portion of the Site. Crown Auto II, 935 F.2d at 243. All of these releases of contaminants were no doubt "abrupt" in the sense that they occurred over a very short period of time.

The district court conceded that the contamination at the Site was accidental, even from the perspective of the Site operators: "To be sure, the operators of Peak did not intend to deliberately contaminate the site . . . ." Crown Auto I, 731 F. Supp. at 1521. The court also stated that "the spills and leaks at Peak cannot be considered sudden and accidental simply because they were unintended." Id. at 1522 (emphasis added). The district court's holding, then, turns solely on its

assumption that releases of contaminants at the Site, though accidental, were not "sudden," in the temporal sense of "abrupt."

As noted above, however, the undisputed facts in the record show that abrupt polluting events did occur at the Site. The district court appears to conclude that these abrupt events did not trigger coverage--even under its reading of "sudden and accidental"--because gradual releases also occurred at the Site. Presumably, had a single abrupt event, such as the accidental bursting of the dike noted above, resulted in the Dimmitts' liability, the district court would have held that such liability arose from "sudden and accidental" pollution.[49]

The district court's reasoning might have validity if the EPA were to consider the Dimmitts liable solely for the gradual releases of contaminants that occurred at the Site. The EPA, however, views the Dimmitts' liability under CERCLA as strict, joint, and several. That is, the Dimmitts are liable, as a matter of law, for all releases at the Site, whether gradual or abrupt, large or small, accidental or deliberate.

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[49] Certainly, such a pollution event would constitute a separate "occurrence" for the purpose of determining whether coverage was triggered under the policy in effect at the time, regardless of whether other releases occurred as well. See Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co., 811 F.2d 1180, 1189 (8th Cir. 1987) ("[E]ach exposure of the environment to a pollutant constitutes an occurrence and triggers coverage"); cert. denied sub nom. Missouri v. Continental Ins. Co., 488 U.S. 821, 109 S.Ct. 66, 102 L.Ed.2d 43 (1988); Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 685 F. Supp. 621, 626 (E.D. Mich. 1987) ("Each release caused property damage and each release, consequently, constitutes an occurrence as of the date of the release and the simultaneous damage").

The court concluded in Wallach that where damage results from both covered and excluded causes, the resulting loss is covered. In that case, the policyholder sought coverage for losses incurred from the collapse of a sea wall. The collapse resulted from both the negligent construction of an adjacent wall, an event covered by insurance, and water damage, an event specifically excluded from coverage. The court found coverage for the entire loss, reasoning that

> [t]he jury may find coverage where an insured risk constitutes a concurrent cause of the loss even where "the insured risk [is] not ... the prime or efficient cause of the accident." G. Couch, 11 Couch on Insurance 2d § 44:628 (rev. ed. 1982).

Wallach, 527 So. 2d at 1388. This rule applies with particular force, the court noted, where the burden is on the insurer to prove that an exclusion in an "all-risk" policy precludes coverage. Id. at 1388-1389. See also Fireman's Fund Ins. Co. v. Hanley, 252 F.2d 780, 786 (6th Cir. 1958) (If damage to property resulted from both covered and excluded causes, the insured is entitled to recover, especially under an all-risk policy.).

Many jurisdictions in addition to Florida have cited the concurrent causation doctrine in finding insurance coverage in cases that involve a combination of covered and excluded causes. State Farm Mut. Ins. Co. v. Partridge, 514 P.2d 123, 129 (Cal. 1973) (Where both an insured risk and excluded risk result in a single injury, "the insurer is liable so long as one of the causes is covered by the policy."); Allstate Ins. Co. v. Watts, 811 S.W.2d 883, 886 (Tenn. 1991) (The carrier is relieved from

its responsibilities under a policy only if it can be shown "that the injuries did not result, even in part, from a risk for which it provided coverage and collected a premium."); Mattis v. State Farm & Casualty Co., 454 N.E.2d 1156, 1160 (Ill. Dist. Ct. App. 1983); LeJeune v Allstate Ins. Co., 365 So. 2d 471, 479 (La. 1978); Waseca Mut. Ins. Co. v. Noska, 331 N.W.2d 917, 921 (Minn. 1983); Lawver v. Boling, 238 N.W.2d 514, 521-22 (Wis. 1976).

In sum, the indivisibility of the harm at the Peak Site is the basis of the EPA's determination that the Dimmitts are jointly and severally liable for all of the property damage that occurred. Under the rule established in Wallach and similar cases in other jurisdictions, because both abrupt and gradual releases of contaminants contributed to non-apportionable property damage, the Dimmitts' share of the cleanup costs should be covered under their CGL policies--even under the district court's erroneous reading of "sudden and accidental."

IV. CONCLUSION

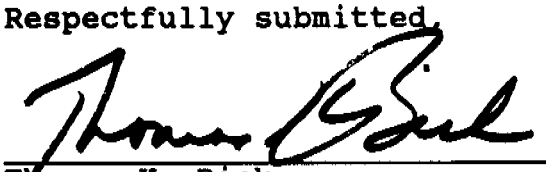
Southeastern's contention that the pollution exclusion bars coverage for all but immediate, unintended pollution is contrary to the weight of the case law, including the decisions of the only two Florida state courts that have addressed this issue. Nor can the district court's reading of the exclusion be reconciled with Florida rules for construction of insurance contracts. When viewed in the context of the insurance industry's contemporaneous statements at the time the pollution exclusion was first introduced in the early 1970's--including the industry's explanations to Florida insurance regulators of the

scope and effect of the exclusion--it is clear that the Dimmitts' reading of this clause is precisely the one intended by the industry. This extrinsic evidence of the industry's intent, especially when viewed in conjunction with the standard dictionary definitions of the word "sudden" and the widely varying judicial interpretations of that word as it has appeared in insurance policies, leaves no doubt that the exclusion is, at the very least, ambiguous. In Florida, such ambiguities must be resolved in favor of coverage.

Finally, even accepting the district court's erroneous conclusion that the word "sudden" can only mean abrupt or immediate in the temporal sense, there is still coverage. There is no dispute that both abrupt and gradual accidental pollution events caused indivisible property damage at the Peak Oil Site. The federal government considers the Dimmitts strictly, jointly, and severally liable for all such damage. Under Florida law, where both covered and excluded events cause such an indivisible loss, there is coverage for the entire loss.

For all of these reasons, the certified question before this Court must be answered in favor of the policyholders.

Respectfully submitted,



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IN THE SUPREME COURT OF FLORIDA

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

Defendants, Appellants,

v.

SOUTHEASTERN FIDELITY
INSURANCE CORPORATION

Plaintiff, Appellee.

APPEAL NO. 78-293

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

USCA NO. 90-3359

APPENDIX TO APPELLANTS' INITIAL BRIEF ON THE MERITS

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Appendix A

SAFE HARBOR ENTERPRISES

IN THE CIRCUIT COURT OF THE
16TH JUDICIAL CIRCUIT IN AND
FOR MONROE COUNTY, FLORIDA

CASE NO.: 90-1099-CA-03

SAFE HARBOR ENTERPRISES, INC.,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY and SOUTHERNMOST INSURANCE AGENCY,

Defendants.

SUMMARY JUDGMENT

THIS CAUSE came before the Court on the motion of Plaintiff, Safe Harbor Enterprises, Inc. ("Safe Harbor"), for partial summary judgment on the issue of duty to defend, the cross motion by Defendant, United States Fidelity and Guaranty Corporation ("USF&G")on the same issue and the motion for summary judgment of USF&G on the issue of liability coverage. Having heard argument of counsel, and having considered the affidavits, the pleadings and other papers in the Court's file, the Court finds there is no genuine issue as to any material fact and Safe Harbor is entitled to partial summary judgment and the cross motion of USF&G is hereby denied as a matter of law. Defendant's Motion for Summary Judgment on the issue of coverage is also denied.

FINDINGS OF FACT

1. The motions for summary judgment before the Court arise out of an action brought by Safe Harbor for declaratory relief pursuant to Section 86.011, Florida Statutes (1989). In Count I of its two count complaint, Safe Harbor seeks a determination that USF&G was obligated under insurance policies it issued to Safe Harbor to defend Safe Harbor in a lawsuit brought by the Florida Department of Environmental Regulation ("DER"). Safe Harbor's motion for summary judgment seeks to resolve that issue as a matter of law in its favor while Defendant's cross motion seeks the opposite result. In Count II, Safe Harbor requests the independent determination that USF&G was obligated under the same policies to indemnify Safe Harbor for losses ultimately suffered as a result of the DER lawsuit. USF&G's motion for summary judgment seeks to resolve this issue in its favor as a matter of law. Although involving the same insurance policies and parties, Count I and Count II are separate and independent legal claims.

2. Safe Harbor owns a parcel of real property located on Shrimp Road, Stock Island, Florida. Commencing sometime before February 1979, Safe Harbor leased the property to Alex Rodriguez, who, at all times since then, has owned and operated Alex's Used Auto Parts ("Alex's") at the site. Alex's can simply be described as a junkyard where used auto parts are sold.

3. From at least February 7, 1979, through February 7, 1987, Defendant USF&G provided Safe Harbor with comprehensive general liability insurance coverage for the property. These insurance policies provided, in part:

> The Company [USF&G] will pay on behalf of the Insured [Safe Harbor] all sums which the

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> Insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies, caused by an occurrence, and the Company shall have the right and duty to defend any suit against the Insured seeking damages on account of such . . . property damage, even if the allegations of the suit are groundless, false or fraudulent . . . .

4. On December 6, 1989, DER brought a civil lawsuit in the Circuit Court for Monroe County, Florida, against Alex Rodriquez and Safe Harbor. DER's complaint, as subsequently amended, alleged that Alex's operations at the property caused pollution of waters and groundwaters of the State of Florida. Safe Harbor, the owner of the property, was also sued as is permitted by Chapter 403, Florida Statutes, on the theory of vicarious statutory liability. Pursuant to Chapter 403, Florida Statutes, DER sought injunctive relief ordering the remediation of the property and monetary relief for damages to the State's natural resources.

5. By letter dated July 9, 1990, Safe Harbor requested USF&G to provide defense and liability coverage under the insurance policies. By letter dated October 10, 1990, USF&G denied defense and liability coverage, claiming: a) there had not been an "occurrence" under the policies, b) the contamination was not the result of a "sudden and accidental" discharge as defined by the policies' pollution exclusion clause, c) any property damage occurred after expiration of the policy period, d) the DER lawsuit was not an action for damages within the meaning of the insurance policies, e) the property damage was only to property owned by the insured, and f) USF&G did not receive timely notice of the DER lawsuit. At no time prior to its denial of defense and coverage did USF&G inspect the property or contact Safe Harbor for information regarding the claim. USF&G declined to provide Safe Harbor a defense to the DER suit and denied coverage for any loss associated with the lawsuit based solely upon the allegations of the DER complaint.

6. On November 14, 1990, Safe Harbor commenced this proceeding with the filing of a complaint for declaratory relief against USF&G and its insurance agent, Southernmost Insurance Agency ("Southernmost"). Safe Harbor alleged that Southernmost had represented that environmental damages, such as were alleged in the DER lawsuit, would be included in the USF&G insurance coverage.

7. After USF&G declined to defend the DER lawsuit, Rodriguez and Safe Harbor settled the case by consenting to a final judgment under which they were found jointly and severally liable for the contamination described in the DER's complaint. By Consent Final Judgment dated December 21, 1990, Rodriguez and Safe Harbor were directed to jointly undertake site assessment and remediation activities in accordance with Chapter 17, Florida Administrative Code.

8. On January 25, 1991, Safe Harbor moved for partial summary judgment on the distinct issue of USF&G's duty to defend under Count I of the complaint. Safe Harbor has not sought summary judgment as to its claims in Count II of the Complaint. On February 28, 1991, USF&G filed a cross motion for summary judgment seeking judgment in its favor as to both its duty to defend (Count

I) and filed a motion for summary judgment as to its duty to indemnify (Count II).

CONCLUSIONS OF LAW

1. Under Florida law, the duty of an insurer to defend its insured is governed by the allegations contained in the underlying complaint against the insured. Tropical Park, Inc. v. United States Fidelity and Guaranty Co., 357 So.2d 253, 256 (Fla. 3d DCA 1978). It is well settled in Florida that the duty to defend of an insurer is broader than, and distinct from, its duty to pay. Florida Insurance Guaranty Assoc. v. Giordano, 485 So.2d 453, 456 (Fla. 3d DCA 1986); Baron Oil Co. v. Nationwide Mutual Fire Insurance Co., 470 So.2d 810 (Fla. 1st DCA 1985). "If the allegations of the complaint leave any doubts regarding the duty to defend, the question must be resolved in favor of the insured requiring the insurer to defend." Florida Insurance Guaranty Assoc. v. Giordano, 485 So.2d 453, 456 (Fla. 3d DCA 1986); see also, Keller Industries, Inc. v. Employers Mutual Liability Insurance Co., 429 So.2d 779 (Fla. 3d DCA 1983)(duty arises if "some allegations in the complaint arguably [fall] within coverage of policy"). Where the complaint contains allegations partially within and partially outside the scope of coverage, the insurer is required to defend the entire suit. Tropical, 357 So.2d at 256; Trizec Properties, Inc. v. Biltmore Construction Co., Inc., 767 F.2d 810, 811-812 (11th Cir. 1985) (applying Florida law).

2. USF&G first argues that the allegations set forth in the DER's Amended Complaint do not demonstrate property damage

resulting from an "occurrence" within the coverage of the insurance policies. An occurrence is defined in the policies as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

As reflected in the first paragraph of DER's Amended Complaint, the soil and groundwater contamination arose out of Alex Rodriguez's operation of his automobile junkyard. Because the contractual definition of "occurrence" includes the "continuous or repeated exposure to conditions," allegations that the pollution resulted from the operations of a scrapyard would fall squarely within this definition.

3. It is equally clear that Safe Harbor's liability is predicated solely upon its ownership of the underlying real property and not as an "operator" of the facility within the ambit of Chapter 403, Florida Statutes. Because Safe Harbor was not alleged to be in the business of salvaging and selling used automobile parts, any release of contaminants into the aquifer from Alex's operations there would, absent allegations to the contrary, be unexpected and unintended from the standpoint of the insured. Significantly, the USF&G insurance policies clearly state that Safe Harbor's business is the owning and renting of property in Monroe County, Florida. Nothing in DER's allegations suggests that Safe Harbor expected or intended the contamination of groundwater.

4. In Pepper's Steel & Alloys, Inc. v. United States Fidelity and Guaranty Co., 668 F.Supp. 1541, 1548 (S.D.Fla. 1987),

the court held that similar allegations of fact fell within the same definition of "occurrence" contained in another USF&G liability policy. In Pepper's Steel & Alloys, the governments' complaints alleged that as a part of the tenant's regular business practices, PCB-laden oil was routinely and openly dumped onto the ground. 668 F.Supp. at 1545-47 n. 2. In this case, the DER's Amended Complaint does allege the presence of saturated soil. Apart from the allegation that the pollution arose from Alex's operations, however, the Amended Complaint is silent as to how the discharges resulting in soil and groundwater contamination took place, whether they were frequent, accidental or intentional, whether they were visible or hidden under debris, or whether a layperson would have comprehended their future significance. Under these circumstances, the Court concludes the events alleged in the Amended Complaint amount to an "occurrence."

5. USF&G's second basis for denying insurance coverage rests upon the pollution exclusion clause found in the policies. This clause excluded coverage for:

> 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 the land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

USF&G contends that the phrase "sudden and accidental" means an abrupt and immediate discharge of pollutants, and therefore the damages alleged in the DER pleadings do not come within the

coverage of the policy. This Court disagrees with both USF&G's suggested construction of the pollution exclusion clause as well as its characterization of the allegations in DER's pleadings.

6. With the exception of several conflicting Florida Federal District Court decisions, the parties have not directed the Court's attention to one Florida state court decision construing the admittedly standard pollution exclusion clause. See, e.g., Annotation, Construction and Application of Pollution Exclusion Clause in Liability Insurance Policy, 39 ALR4th 1047 (1985).

7. This Court is persuaded by the rationale recently adopted by the Georgia Supreme Court in Claussen v. Aetna Casualty & Aetna Casualty & Surety Co., 380 S.E.2d 686 (Ga. 1989). See also, Pepper's Steel & Alloys, Inc. v. United States Fidelity and Guaranty Co., 668 F.Supp. 1541, 1548 (S.D.Fla. 1987); Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wisc. 1990). Although USF&G's suggested meaning for the phrase "sudden and accidental" is not necessarily an incorrect one, the Court concludes that the phrase is equally susceptible to meaning "unexpected and unintended" as suggested by Safe Harbor. Not only do recognized dictionaries differ on the meanings of the words "sudden" and "accidental," but numerous foreign courts and Florida case law tends to support Safe Harbor's proffered interpretation. See, e.g., Zimmer v. Aetna Insurance Co., 383 So.2d 992 (Fla. 5th DCA 1980) ("sudden" construed to mean "unexpected" or "happening without previous notice"); see also, Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wisc. 1990) (dicta suggesting that split in authority "dispels

insurer's contention that the exclusionary language is clear"). "Where the terms of an insurance contract are susceptible of two reasonable constructions, that interpretation that will sustain coverage for the insured will be adopted." Tropical Park, Inc. v. United States Fidelity and Guaranty Co., 357 So.2d 253, 256 (Fla. 3d DCA 1978). This maxim is all the more appropriate in this case because the phrase "sudden and accidental" is not defined in the standard form insurance policies. State Farm Mutual Automobile Insurance Co. v. Pridgen, 498 So.2d 1245, 1247 n.3 (Fla. 1986); accord, Just v. Land Reclamation, Ltd., 456 N.W.2d at n.2. Accordingly, this Court joins numerous other courts in concluding that the phrase "sudden and accidental," contained in the pollution exclusion clause, means unexpected and unintended. See, New Castle County v. Hartford Accident and Indemnity Company, et al., No. 89-3814, slip op. at n.61 (3d Cir. April 30, 1991).

8. The insurance policies themselves also create an inherent ambiguity necessitating a construction of the exclusion clause favorable to Safe Harbor. As indicated supra., the policy definition of "occurrence" provides that an accident may include "continuous or repeated exposure to conditions." Utilizing this definition, along with the temporal definition of "sudden" that USF&G urges, one ends up with a nonsensical pollution exclusion clause that excludes discharges unless they are both "abrupt" and "continuous."

9. Safe Harbor's suggested construction is further supported by the rationale mentioned in Payne v. United States Fidelity and Guaranty Co., 625 F.Supp. 1189 (S.D.Fla. 1985), and Pepper's Steel & Alloys v. United States Fidelity and Guaranty Co., 668 F.Supp. 1541 (S.D.Fla. 1987). These courts and others have examined the history and public policy leading to the drafting of the pollution exclusion clause and concluded that the clause was intended to apply only to active or intentional polluters. Safe Harbor is not accused of "midnight dumping" or otherwise participating in the discharge of pollutants upon its own property. Under these circumstances, a determination that USF&G was obligated to defend its insured will not frustrate the purpose of the exclusion.

10. Given the preceding construction of the pollution exclusion clause, the Court holds that damages alleged in the DER pleadings stated a covered claim obligating USF&G to defend Safe Harbor. A reasonable reading of the Amended Complaint discloses that Safe Harbor was sued solely because it leased property to Alex Rodriguez who, in turn, operated the junkyard which caused the pollution of the environment. See, e.g. Amended Complaint at ¶'s 1, 6, 7, 16 and 41. The Amended Complaint is silent as to the nature, duration, and frequency of any discharges resulting in groundwater contamination - - the complaint does not suggest they were expected or intended. Having paid USF&G premiums for nearly ten years, Safe Harbor was entitled to have its insurance carrier provide a defense to the DER lawsuit.

11. This Court would reach the same conclusion even if it adopted the narrower, temporal construction of the pollution exclusion clause suggested by USF&G. The Amended Complaint does

not allege continuous dumping of contaminants. Nor does it allege that the discharges resulting in the groundwater contamination were intentional. A fair reading of the Amended Complaint reflects that it is entirely possible that the alleged groundwater damage caused by Alex's discharges of pollutants may have been the result of a few discrete polluting events. While they may be eyesores, automobile junkyards are not illegal nor per se sources of pollution.

12. In concluding that USF&G had an obligation to defend, the Court is mindful of the limited pleading and evidentiary burden placed upon the DER in its prior lawsuit. As acknowledged by the parties, under Chapter 403, Florida Statutes, Safe Harbor's liability was strict and vicarious: DER needed only allege one discharge of pollutants while Safe Harbor owned the property.

13. Applying the broad principles of defense coverage discussed supra., the Court also rejects USF&G's third ground for denying coverage, i.e., that the contamination occurred outside the policy period. It is undisputed that Alex Rodriguez has been operating his junkyard on the property since at least 1979. Because DER's pleadings are silent as to when the discharges resulting in the groundwater contamination occurred, USF&G had no basis for denying defense coverage.

14. USF&G's fourth and fifth reasons for denying coverage are also with merit. Because the DER Amended Complaint specifically requested a judgment against Alex's and Safe Harbor for "damages to the environment," a claim for damages within the meaning of the

insurance policies has been made. There is ample authority to support the proposition that the DER enforcement action constitutes a claim for damages. See, e.g., Avondale Industries, Inc. v. Travelers Indemnity Co., 887 F.2d 1200 (2d Cir. 1989); AIU Insurance Co. v. Superior Court of Santa Clara County, 799 P.2d 1253 (Cal. 1990). Garden Sanctuary, Inc. v. Insurance Co. of North America, 292 So.2d 75 (Fla. 2d DCA 1974), relied upon by USF&G, is not persuasive. It does not address the policies and practices under modern environmental protection statutes, and it involved a prophylactic, rather than remedial, injunctive decree.

15. The suggestion that the "owned property" exclusion in the insurance policies precludes coverage overlooks the fact that DER's suit was based not only on contamination of soils, but also on damages to the surface waters and groundwaters of the State of Florida. Only the State of Florida, which owns the groundwater, can maintain a damages action for harm to this resource. Because Safe Harbor does not and cannot privately own the groundwater, the owned-property exclusion does not apply. Pepper's Steel & Alloys v. United States Fidelity and Guaranty Co., 668 F.Supp 1541, 1550 (S.D.Fla. 1987).

16. Finally, USF&G's claim of prejudice arising from the timeliness of Safe Harbor's notice does not create an issue of fact regarding USF&G's obligation to defend. It is undisputed that USF&G denied coverage based solely upon the allegations in the DER pleadings. In its answer, USF&G denies having any knowledge of the facts regarding the DER lawsuit or Alex's or Safe Harbor's

Appendix B

Appendix B

Examples Of Cases Not Cited In The Text In Which Courts Have Interpreted "Sudden and Accidental" To Find Coverage For Property Damage From Pollution That Was Unexpected And Unintended By The Policyholder:

1. Alley v. Great Am. Ins. Co., 287 S.E.2d 613 (Ga. Ct. App. 1981) (insurer has duty to define exclusions clearly and explicitly);

2. Ashland Oil, Inc. v. Miller Oil Purchasing Co., 678 F.2d 1293 (5th Cir. 1982) (upholding coverage for an insured who did not intentionally pollute or did not intend the consequences of pollution activities);

3. Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co., Inc., 477 N.E.2d 146 (Ohio Ct. App. 1985) (upholding coverage for an insured who did not intentionally pollute or did not intend the consequences of pollution activities);

4. CPS Chem. Co. v. Continental Ins. Co., 489 A.2d 1265 (N.J. Super. Ct. Law Div. 1984), rev'd on other grounds, 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985) ("sudden" and "accidental" have been defined in recognized dictionaries to include unintended and unexpected events);

5. Davis v. United Am. Life Ins. Co., 111 S.E.2d 488 (Ga. 1959) (when confronted with alternative interpretations of an undefined term in an insurer-drafted contract, the interpretation that promotes coverage must be adopted);

6. First Georgia Ins. Co. v. Goodrum, 370 S.E.2d 162 (Ga. Ct. App. 1988) (when confronted with alternative interpretations of an undefined term in an insurer-drafted contract, the interpretation that promotes coverage must be adopted);

7. Greer v. IDS Life Ins. Co., 253 S.E.2d 408 (Ga. Ct. App. 1979) (where an insurance contract uses language which is open to more than one construction, it must be construed in favor of the insured);

8. Grinnell Mut. Reinsurance Co. v. Wasmuth, 432 N.W.2d 495 (Minn. Ct. App. 1988) (court reached conclusion that insurer bears the burden of establishing every element of the pollution exclusion);

9. Gulf Ins. Co. v. Mathis, 358 S.E.2d 850 (Ga. Ct. App. 1987) ("In construing an insurance contract the test is not what the insurer intended its words to mean, but rather what a reasonable person in the insured's position would understand them to mean.");

10. Haley v. Georgia Farm Bur. Mut. Co., 305 S.E.2d 160 (Ga. Ct. App. 1983) (where defendants neither expected nor intended any property damage, the damage "would therefore have been sudden and unexpected.");

11. Hybud Equip. Corp. v. Sphere Drake Ins. Co., 574 N.E.2d 1075 (Ohio Ct. App. 1991) ("The phrase 'sudden and accidental' can be interpreted simply as a restatement of the definition of occurrence, that is, that the policy will cover claims where the injury was neither expected nor intended.");

12. Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co., 451 A.2d 990 (N.J. Super. Law Div. 1982) (upholding coverage for an insured who did not intentionally pollute or did not intend the consequences of pollution activities);

13. Jonesville Prods., Inc. v. Transamerica Ins. Group, 402 N.W.2d 46 (Mich. Ct. App. 1986) appeal denied, 428 Mich. 897 (1987) (allegations that discharge of Trichlorethylene had been "continuous" did not preclude finding that insured had duty to defend since the releases could have been "sudden," "i.e., unintended and thus outside the pollution exclusion");

14. Lansco, Inc. v. Dep't of Envt'l Protection, 350 A.2d. 520 (N.J. Super. Ch. Div. 1975), aff'd, 368 A.2d 433 (N.J. Super. App. Div. 1976), cert. denied, 372 A.2d 322 (N.J. 1977) (where spill was neither expected nor intended, it is "sudden and accidental" under exclusion clause);

15. Marotta Scientific Controls, Inc. v. RLI Ins. Co., 4 Mealey's Litigation Report #16, 12, No. 87-4438 (D. N.J. June 5, 1990) (since the contamination was "unexpected and unintended," the facts place the insured's claim "outside the reach of the pollution exclusion clause");

16. Nationwide Mut. Fire Ins. Co. v. Collins, 222 S.E.2d 828 (Ga. Ct. App. 1975) (an insurer bears the burden of establishing each and every element of an exclusion, including the non-applicability of an exception created by the insurer);

17. National Grange Mut. Ins. Co. v. Continental Casualty Ins. Co., 650 F. Supp. 1404 (S.D.N.Y. 1986) (court agreed with Claussen);

18. National Sec. Fire and Casualty Co. v. London, 348 S.E.2d 580 (Ga. Ct. App. 1986) ("Insurance is a matter of contract and it is contract law rather than the underlying motives of the contracting parties that is ultimately controlling.");

19. Nelson v. Southern Guar. Ins. Co., 147 S.E.2d 424 (Ga. 1966) (since an insurance policy is a contract, rules of contract interpretation apply);

20. Richards v. Hanover Ins. Co., 299 S.E.2d 561 (Ga. 1983) (where an insurance contract uses language which is open to more than one construction, it must be construed in favor of the insured);

21. Shapiro v. Public Serv. Mut. Ins. Co., 477 N.E.2d 146 (Mass. App. Ct. 1985), review denied, 482 N.E.2d 328 (Mass. 1985) (upholding coverage for an insured who did not intentionally pollute or did not intend the consequences of pollution activities);

22. Southern Guar. Ins. Co. v. Duncan, 206 S.E.2d 672 (Ga. Ct. App. 1974) (an insurer bears the burden of establishing each and every element of an exclusion, including the non-applicability of an exception created by the insurer);

23. Thrift-mart, Inc. v. Commercial Union Assurance. Cos., 268 S.E.2d 397 (Ga. Ct. App. 1980) (affirms the dictionary definition of "accident" as an unintended happening);

24. Time Oil Co. v. CIGNA Prop. & Casualty Ins. Co., 4 Mealey's Litig. Reps. #11, No. C88-1235R slip op. (W.D. Wash., April 2, 1990) (irrespective of the temporal character of the polluting events, the exclusionary clause only bars coverage for intended and expected pollution);

25. Travelers Indem. Co. v. Whalley Constr., 287 S.E.2d 226 (Ga. Ct. App. 1981) (pollution exclusion will be "liberally construed in favor of the insured and strictly construed against the insurer" unless it is clear and unequivocal);

26. United States Fidelity Co. v. Gillis, 296 S.E.2d 253 (Ga. Ct. App. 1982) (uncertainty of expression cannot be used to negate coverage);

27. United States Fidelity & Guar. Co. v. Wilkin Insulation Co., 550 N.E.2d 1032 (Ill. App. Ct. 1989), aff'd, Nos. 70029, 70030, 70032, 70033, 70036, 1991 WL 80942 (Ill. May 20, 1991) (because pollution exclusion ambiguous, clause should construed against insurers to mean simply "unexpected and unintended").

Appendix C

GENERAL DYNAMICS

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED

AETNA CASUALTY AND SURETY COMPANY,

Plaintiff,

vs.

GENERAL DYNAMICS CORPORATION

Defendant.

No. 88-2220C (A)

MEMORANDUM AND ORDER

This matter is before the Court upon the motion of plaintiff, Aetna Casualty and Surety Company, for entry of summary judgment as to all remaining claims; and upon the motion of defendant, General Dynamics Corporation, for entry of summary judgment as to its Second Counterclaim.

FACTUAL BACKGROUND

The factual background of this case may be summarized as follows:[1] Plaintiff, Aetna Casualty and Surety Company, brought the underlying declaratory judgment action seeking to have the Court declare that it is not liable to defend, pay and/or indemnify defendant, General Dynamics Corporation, under several Commercial General Liability (CGL) insurance policies issued to defendant with respect to liability arising by way of federal statute, state statute and state common law for hazardous waste clean-up and damages to natural resources. Plaintiff contends that the policies do not cover certain claims, demands, notices and suits asserted or to be asserted in the future based on the hazardous waste clean-up and damages to natural resources resulting from the hazardous waste contamination of sixteen sites located in eight states.[2] Plaintiff subsequently brought a motion for partial summary judgment arguing that it has no duty to defend or indemnify defendant with respect to claims for costs of the "clean-up" of certain hazardous waste sites under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq. Prior to ruling on the motion, this Court determined that plaintiff failed to present a "controversy" within the Article III formulation for the Cordage Park site, the Sylvester site, the Maxey Flats site, the Tucson Airport site, the Quincy Shipyard site and the Norwich Iron and Metal site, the Landfills sites (duty to indemnify only) and the Gary, Indiana site (duty to defend only). This Court held that partial summary judgment was proper with respect to plaintiff's obligation to defend and/or indemnify defendant concerning response costs under CERCLA actions involving the Kansas City site and the Review Avenue site respectively involved in the

[1] For a more detailed factual summary, refer to this Court's December 12, 1989; April 9, 1990; and August 24, 1990 Orders.

[2] The Conservation Chemical site in Kansas City, Missouri; five New York City Landfill sites in New York, New York; the Review Avenue site in New York, New York; the Cannons Engineering Corporation sites made up of the Bridgewater, Massachusetts site, the Cordage Park site in Plymouth, Massachusetts, the Tinkham's Garage site in Londonderry, New Hampshire, and the Sylvester site in Nashua, New Hampshire; the Conservation Chemical Company site in Gary, Indiana; The Tucson Airport site in Tucson, Arizona; the Quincy Shipyard site in Quincy, Massachusetts; the Maxey Flats Nuclear site in Morehead, Kentucky; and the Norwich Iron and Metal Company site in Norwich, Connecticut.

litigation styled United States v. Conservation Chemical Company, et al., No. 82-0983-CV-W-5 (W.D. Mo.) and The City of New York v. United Technologies Corp., No. 85 Civ. 4665 (EW). Aetna Casualty and Surety Company v. General Dynamics Corp., No. 88-2220C (A) (E.D. Mo. Dec. 12, 1989) (Order granting partial summary judgment). In addition, the Court entered summary judgment for plaintiff concerning its duty to indemnify defendant for CERCLA settlement costs covering the Gary, Indiana site, the Cannons Engineering sites[3] basing such decision on the Eighth Circuit's recent ruling in Continental Ins. Cos. v. Northeastern Pharmaceutical & Chemical Co., 842 F.2d 977 (8th Cir.), cert. denied, 488 U.S. 821 (1988) (hereinafter referred to as NEPCCO). This Court also denied plaintiff's motion regarding its duty to defend defendant in the pending action entitled The City of New York v. Exxon Corp., No. 85 Civ. 1939 (EW), that involved alleged unlawful hazardous waste disposal in the New York City Landfills sites ("Landfills Sites"). Plaintiff later moved for summary judgment on defendant's First Counterclaim which alternatively sought recovery on the basis that plaintiff was obligated to pay defendant's settlement costs involving the Conservation Chemical litigation pursuant to the parties oral settlement agreement allegedly entered into in 1986, and alternatively, on plaintiff's

[3] The Cannons Engineering Corporation sites include the following, as per the parties April 9, 1990 stipulation: site located in Bridgewater, Massachusetts; the Tinkham's Garage site located in Londonderry, New Hampshire; the Cordage Park site located in Plymouth, Massachusetts; and, the Sylvester site in Nashua, New Hampshire.

duty to defend defendant under the CGL policy and Interim Defense Agreement entered into by plaintiff and Insurance Company of North America ("INA", a co-insurer of defendant). By our August 24, 1990 Order, plaintiff's motion for summary judgment on defendant's First Counterclaim was granted.

CURRENT MOTIONS FOR SUMMARY JUDGMENT

The parties currently move for summary judgment on all remaining issues: whether plaintiff is obligated to pay expenses incurred by defendant in defending and paying as settlement amounts for state statutory clean-up costs for the New York City Landfills sites, Review Avenue site and the Cannons sites; whether plaintiff is obligated to pay expenses incurred by defendant in defending the action involving the Landfills Sites concerning the CERCLA counts; whether plaintiff is obligated to pay expenses incurred by defendant in defending and paying settlement payments pertaining to state common law actions for the Landfills Sites, the Review Avenue sites and the Cannons Engineering Corp. sites ("Cannons sites"); and, whether plaintiff is obligated to pay expenses incurred by defendant in defending and paying settlement amounts pertaining to state and CERCLA actions for damages to natural resources for the Landfills Sites, the Review Avenue sites and the Cannons sites.

A. SUMMARY JUDGMENT STANDARDS

Under Rule 56 of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if it can, "show that there is no genuine issue of material fact and that (it) is

entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1962).

The parties have stipulated that there exists no genuine issue of material fact remaining in the instant action. The parties submitted to the Court documentary evidence and a joint stipulation of fact concerning the actions involving the Landfills Sites and the Review Avenue, as well as the Cannons sites. It was only during the briefing of the current cross motions for summary judgment that the Court was informed that the Landfills Sites litigation was settled. In light of such settlement, the Court may now consider the merits of the parties claims that concern the Landfills Sites litigation.[4]

B. LANDFILLS SITES - CERCLA CLAIMS

As a preliminary matter and in light of our past Orders granting partial summary judgment in favor of plaintiff and holding that NEPCCO controls all decisions with respect to claims for indemnity for response costs incurred and defense costs concerning claims premised on CERCLA, (Memorandums and Orders December 12, 1989 and April 9, 1990), this Court will grant plaintiff's motion for summary judgment concerning its obligation to indemnify and/or pay defendant's defense costs incurred in defense of the Landfills Sites actions concerning CERCLA counts seeking payment of response costs. NEPCCO, 842 F.2d 977 (8th Cir. 1988).

[4] The Court reserved ruling on plaintiff's summary judgment motion based on the parties' assurances that the Landfills litigation was pending.

C. REMAINING SITES - STATE COMMON LAW AND STATUTORY CLAIMS

Turning to the remaining issues: plaintiff's obligation to pay defense costs and settlement expenses for state statutory and common law claims premised on nuisance, abatement of nuisance, negligence, ultrahazardous activity and statutory nuisance concerning the Landfills Sites, the Review Avenue site, and the Cannons sites.[5] In the Landfills Sites action, The City of New York v. Exxon Corp., No. 85 Civ. 1939 (EW), defendant was sued by the defendants/third party plaintiffs named in the action by The City of New York ("City"). The third party plaintiffs sought damages premised upon the following relevant causes of action: damages resulting from the continuation of a public nuisance (Count II); damages resulting from the continuation of a statutory nuisance (Count III); damages resulting from activities labeled as ultrahazardous or abnormally dangerous (Count IV); that defendant is obligated to pay damages arising from a finding in the original action that third party plaintiff owed a duty to abate the public nuisance and that the City is entitled to restitution from the third party plaintiff (Count V); damages arising from third party defendant's breach of their duty to exercise reasonable care in generating, transporting and disposing of wastes (Count VI). In the Review Avenue action, The City of New York v. United Technologies Corp., No. 85 Civ. 4665

[5] Defense costs are not at issue for the Cannons Sites since no "suit" was filed, as determined in the Court's December 12, 1989 Memorandum and Order, page 17.

(EW), defendant was sued by the defendants/third party plaintiffs named in the action by the City. The third party plaintiffs sought damages premised upon the following relevant causes of action: damages resulting from the creation and continuation of a public nuisance (Count IV); damages resulting from the creation a statutory nuisance, § 564.15.0 N.Y. Admin. Code (Count VI); damages resulting from creating an ultrahazardous or abnormally dangerous condition (Count VIII); damages arising from abatement of a public nuisance if the court, in the original action, finds that the third party plaintiffs owe the City the duty to abate and that the City is entitled to restitution (Count X). Defendant was notified, by way of Potentially Responsible Party letters ("PRP letters")[6], of its potential liability to the states of Massachusetts and New Hampshire with respect to hazardous waste generation and disposal at the Cannons Sites. The states based this potential liability upon the following authority: Mass. Oil and Hazardous Material Release Prevention and Response Act, M.G.L. c. 21E, § 1 et seq.; Mass. Clean Water Act, M.G.L. c. 21; M.G.L. c. 12, § 11D; and, state common law concerning clean-up costs on the Cannons Engineering Corp.'s Hazardous Materials sites in Bridgewater and Plymouth, Mass.; New Hampshire statutes R.S.A. Chs. 147-A and 147-B (authority to

[6] March 31, 1986 letter from the Department of Environmental Quality Engineering of the State of Massachusetts (Mass.DEQE) concerning the Cannons Engineering Corp.'s sites located in Bridgewater and Plymouth, Massachusetts. April 1, 1986 letter for the Environmental Protection Bureau of the State of New Hampshire (N.H.EPB) concerning the Cannons Engineering Corp.'s sites in Nashua and Londonderry, New Hampshire.

expend state money to clean up sites) through CERCLA, 42 U.S.C. § 9601 et seq. (authority to seek indemnification for monies spent); and, state common law authorizing site clean up.

Under the policies in effect during all relevant time in the instant case, plaintiff provided coverage to defendant "for all sums which the insured shall become legally obligated to pay as damages because of ... property damage to which this insurance applies, caused by an occurrence...." Plaintiff argues that the Review Avenue action and notification from the Mass. DEQE and N.H.EPB seek only equitable relief indistinguishable from claims under CERCLA for clean-up costs.[7] Plaintiff cites NEPCCO as authority for its position as well as state and United States District Court decisions from other jurisdictions.

Defendant argues, in opposition, that irrespective of this Court's previous ruling on CERCLA clean-up costs constituting equitable damages and therefore not covered under the CGL policies, plaintiff was obligated to defend and investigate because the complaints and PRP letters alleged facts reasonably covered by the policies language. Defendant also argues that plaintiff's agreement to defend and investigate while reserving its right to disclaim coverage, acted as a waiver of any right to deny coverage. Defendant concludes by arguing that plaintiff owes defendant a duty to defend for the period starting

[7] The parallel duty to defend provision of the policies states: "... the company shall have the right and duty to defend any suit against the insured seeking damages on account of such ... property damage, even if any of the allegations of the suit are groundless, false or fraudulent ...."

with the filing of the cases and ending November 16, 1988, when plaintiff filed the instant action.

In MEPCCO, the majority concluded that federal and state government's claims for clean-up costs under CERCLA, § 170(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) and RCRA, § 7003(a), 42 U.S.C. § 6973(a) are equitable actions for monetary relief in the form of restitution or reimbursement of costs and are, therefore, not claims for "damages" under the CGL policies. MEPCCO, 842 F.2d at 987. The court did not, however, rule on private or state government causes of action praying for damages arising by operation of restitution for abatement of a public or statutory nuisance or an ultrahazardous or abnormally dangerous activity.

In the opinion of this Court, the causes of action contained in the Landfills Sites (Counts II, III, IV, V and VI), the Review Avenue complaints (Counts IV, VI, VIII and X) and the Cannons sites PRP letters, as referenced above, seek either reimbursement/restitution or payment of clean-up costs associated with the clean up of the various sites.[8] Although the causes of action are based on state statute or common law, rather than CERCLA, the relief sought is still equitable in nature.

Consequently, being guided by the MEPCCO ruling, such causes of action seek damages that are equitable in nature, not

[8] Counts II, III, IV and VI of the Third Party complaint in the Landfills Sites action and Counts IV, VI and VIII of the Third Party complaints in the Review Avenue action also contain prayers for damages for the destruction of the City of New York's natural resources. The Court considers such claims as seeking distinct relief and as such will consider them separately below.

legal and are, therefore, not covered by the CGL policies. MEPCCO, 842 F.2d at 987; Maryland Casualty Co. v. Ormond, No. 97-3038, slip op. at 12 (W.D.Ark. January 6, 1989). Plaintiff is, therefore, entitled to summary judgment with respect to its duty to defend and/or indemnify defendant for payments made for settlement and in defense of state statutory and common law claims premised on public and statutory nuisance abatement, defendant's negligence, and damages resulting from activities labeled as ultrahazardous or abnormally dangerous.

D. REMAINING SITES - STATE AND FEDERAL CLAIMS FOR NATURAL RESOURCE DAMAGES

In the third party complaint against defendant in the Landfills action, the third party plaintiff generally prayed for reimbursement of any and all costs, damages or equitable relief which the City may seek to recover in its action against the third party plaintiff. The City prayed for damages to its natural resources pursuant to CERCLA § 107(a) (Count III); and for damages for injury to the natural resources of the City among other past and future clean-up costs (Counts II, IV and VI). Defendant was advised by the Mass.DEQE and the N.H.EPB of its potential liability for damaging the state's natural resources on the Cannons Engineering Corp. sites in Massachusetts and New Hampshire.[9] In the third party complaint by certain defendants

[9] Defendant was notified by the PRP letters from the state agencies that as a potentially responsible party it may be liable for costs not limited to, expenditures for investigation, planning, clean up and enforcement activities. Subsequent settlement documents refer specifically to damages to natural resources as a subject which the United States EPA, Mass.DEQE and

in the Review Avenue suit, third party plaintiffs generally prayed for any costs, damages, or equitable relief which the City seeks to recover in its action against third party plaintiffs. The City prayed for damages to its natural resources pursuant to CERCLA § 107(a) (Count II); and for damages for injury to the natural resources of the City among other past and future incurred clean-up costs (Counts IV, VI and VIII).

i. Classifying Damages to Natural Resource

The complaints and PRP letters filed against and sent to defendant seek damages, past and future, for natural resource destruction.[10] The Eighth Circuit in NEPCCO explicitly held that claims premised on damages to natural resources, CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), asserted by private individuals are claims for "damages", not clean-up costs, and are covered within the terms of the CGL policies in the case. NEPCCO, 842 F.2d at 987. The Eighth Circuit court panel previously held and supported by the en banc decision, that "[the court] agree(s) with the position taken in Mraz, Lansco and Kutsher's[11], that the improper release of toxic wastes may cause 'property damages' not only to the actual owner of the land, water, or air, but also to state and federal governments because of their interests in all the earth and air within [their] domain." Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 811 F.2d 1180, 1187 (8th Cir. 1987) citing Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907); see also Travelers Ins. Co. v. Waltham Industrial Laboratories Corp., 722 F.Supp. 814, 823 (D.Mass. 1988), aff'd in part, 883 F.2d 1092 (1st Cir. 1989) (government can sue for property damage when natural resources are damaged and such action is for legal damages); Aetna Casualty & Surety v. Gulf Resources & Chem. Corp., 709 F.Supp. 958, 962 (D.Idaho 1989) (natural resource damage likely to be covered under CGL policy as legal damages).

Defendant has indicated that the Landfills Site action was dismissed with prejudice with respect to it pursuant to a settlement agreement that posed no financial or other duty on defendant. In addition, the parties have stipulated and produced evidence establishing that the Review Avenue site litigation was settled pursuant to a settlement agreement that provided for defendant's payment for its proportionate clean-up costs. In return for defendant's payment, the City of New York dismissed all claims against the third party plaintiffs concerning the damages to the City's natural resources. Consequently, no duty to indemnify defendant arose on the part of plaintiff for damages to the City's natural resources in either the Landfills Sites or the Review Avenue suits. Defendant did, however, incur expenses

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N.H.EPB consented not to sue or take any other action upon the payment of the settlement amounts by defendant.

[10] Although the N.H.EPB PRP letter did not expressly state this, the subsequent settlement documentation so stated.

[11] Mraz v. American Universal Ins. Co., 616 F.Supp. 1173 (D.Md. 1985); Lansco, Inc. v. Department of Environmental Protection, 138 N.J.Super. 275, 350 A.2d 520 (1975), aff'd, 145 N.J.Super. 433, 368 A.2d 363 (1976), cert. denied, 73 N.J. 57, 372 A.2d 322 (1977); Kutsher's Country Club Corp. v. Lincoln Ins. Co., 119 Misc.2d 889, 465 N.Y.S.2d 136 (1983).

attributable to defending the claim of damaging the City's natural resources in both the Landfills Sites and the Review Avenue suits.

With respect to the Cannons sites, the Mass.DEQE and the N.H.EPB were seeking defendant to pay for damages to their natural resources. However, in the settlement documents, the agencies agreed not to sue defendant for damaging the natural resources of their respective states if defendant paid their proportionate clean-up costs for the sites, which was completed. Since no suit was filed, no duty to defend arose on the part of plaintiff. Secondly, since payment under the settlement was made solely for clean-up of the sites and the Mass.DEQE and N.H.EPB agreed not to sue defendant for damages to the states' natural resources, plaintiff's duty to indemnify never arose with respect to defendant's damage to Massachusetts and New Hampshire natural resources at the Cannons sites.

Consequently, plaintiff's duty to defend defendant arose with respect to the City of New York's claims of defendant's damage to the City's natural resources regarding the Landfills Sites and Review Avenue site. The Court is, however, required to consider whether or not any policy provision(s) exempts plaintiff from providing such defense.

ii. Pollution Exclusion

Plaintiff's duty to defend, although arising, may or may not be excluded under the terms of the CGL insurance policies. The policies provided coverage for damages incurred by

the insured for property damage and further excluded coverage under the pollution exclusion clause, as follows:

> This insurance does not apply:
>
> To bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalies, toxic chemicals, liquids, or gases, wastes materials or other irritants, contaminants, all pollutants into or upon land, the atmosphere or any water course or body of water, ...

The Pollution Exclusion further provides that insurance coverage excluded by the pollution exclusion:

> ... does not apply if such discharge, dispersals, release or escape is sudden and accidental.

An insurer's duty to defend and to indemnify are not coextensive; the duty to defend is broader and arises when the underlying complaint, compared with relevant policy provisions, alleges facts covered or potentially covered by the policy. Sipkin v. Freeman, 436 S.W.2d 753, 763 (Mo. 1968); Missouri Terrazzo Co. v. Iowa Nat. Mut. Ins. Co., 740 F.2d 647, 652 (8th Cir. 1984). The standard for determining whether an insurer owes a duty to defend is based on a comparison of the policy language with the allegations of the plaintiff's complaint(s), and when those allegations state a claim which is potentially or arguably within the policies coverage, then the insurer must defend the suit. Howard v. Russell Stover Candies, Inc., 649 F.2d 620, 623 (8th Cir. 1981). An insurer cannot ignore actual facts which it is aware of in determining its obligation to defend. State ex rel. Inter-State Oil v. Bland, 354 Mo. 622, 190 S.W.2d 227, 229

(Mo. 1945). Under Missouri law, provisions designed to restrict coverage are to be construed most strongly against the insurer and to the favor of the insured, Aetna Casualty & Surety Co. v. Haas, 422 S.W.2d 316, 321 (Mo. 1967), and the insurer bears the burden of expressing its intention within such clauses by clear and unambiguous terms. Id.; Giokaris v. Kincaid, 331 S.W.2d 633, 639-640 (Mo. 1960); Citizen Ins. Co. v. Kansas City Commercial Cartage, Inc., 611 S.W.2d 302, 307 (Mo.Ct.App. 1980); Missouri Terrazzo Co. v. Iowa Nat. Mut. Ins. Co., 740 F.2d 647, 652 (8th Cir. 1984).

Plaintiff argues that the only issue remaining is whether the releases on the Landfills Sites and Review Avenue site were sudden and accidental. Plaintiff suggests that the releases were deliberate, while stipulating that between January 30, 1976 and May 25, 1976 defendant contracted with Northeast Oil, a waste disposal company owned by Russell Mahler, to dispose of 300,000 gallons of bilge water from its Electric Boat Facility in Groten, Connecticut in the Review Avenue site. The parties' stipulation states that Russell Mahler pleaded guilty to conspiring to bribe a New York City Department of Sanitation employee for the purpose of unlawfully disposing of the bilge water at the Landfills Sites. In addition, the parties stipulate that the Review Avenue site, utilized by Russell Mahler for waste disposal, was used for storage of toxic wastes and that many of the tanks on the site were leaking or overflowing and spilling their contents onto the ground, that spills occurred during the

transfer of the wastes from the trucks to the tanks and that the tanks were deteriorating.

Plaintiff further argues that the releases on the Landfills Sites and Review Avenue site were not sudden. Plaintiff argues that the term "sudden" as used in the policy is unambiguous and means instantaneous or abrupt, containing a temporal aspect of immediacy, abruptness, suddenness, quickness and brevity, citing numerous federal and state court cases. Plaintiff concedes that no court in Missouri has ruled on this matter.

Defendant argues, in opposition, that plaintiff does not dispute that the releases on the Landfills Sites and Review Avenue site were accidental as to defendant. Defendant suggests, therefore, that the only issues remaining are whether the releases were sudden and whether the term "sudden" is ambiguous, since it is subject to more than one meaning and therefore should be defined as meaning unexpected and unintentional when viewed in light of the case law and extraneous materials offered by defendant. Defendant also cites several federal and state cases supporting its position. Defendant argues that the term "sudden and accidental" restates the definition of "occurrence", which negates any temporal significance implied by the term sudden, relying on Benedictine Sisters of St. Mary's Hospital v. St. Paul Fire & Marine Ins. Co., 815 F.2d 1209, 1211 (8th Cir. 1987). Defendant also argues that the pollution exclusion bars coverage only for intentional pollution events, citing numerous federal

and state court cases in support thereof. Last, defendant argues that Missouri law imposed on plaintiff a duty to defend it in the underlying actions since each arguably stated a claim under the insurance policies.

A. "Occurrence" and "Accident"

Based on the parties' stipulation and attached documentation, defendant contracted with a hazardous waste transporter for the disposal of hazardous waste without any knowledge that the wastes were designated to be disposed of illegally or stored improperly. Consequently, the subsequent releases of toxic or hazardous wastes at the Landfills Sites and the Review Avenue site constituted an "occurrence" as defined in the insurance policies,[12] since the evidence establishes that defendant neither expected nor intended the illegal and improper activity of the hazardous waste transporter that resulted in hazardous waste contamination.

In addition, the Missouri courts have established that the meaning of the term "accidental" is an event that takes place without one's foresight or expectation and is not bounded to an event which occurs suddenly. See Murphy v. Western & Southern Life Ins. Co., 262 S.W.2d 340, 342 (Mo.Ct.App. 1953); St. Paul Fire & Marine Ins. Co. v. Northern Grain Co., 365 F.2d 361, 364 (8th Cir. 1966). Thus, an accident includes that which happens

[12] Occurrence - means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

by chance or fortuitously, without intention or design, and which is unexpected and unforeseen. Id. Consequently, this Court is of the opinion that the releases of toxic or hazardous wastes at the Landfills Sites and the Review Avenue site constituted an accidental event as to defendant.

B. Defining "Sudden"

The Court first notes that the Eighth Circuit, in Benedictine Sisters, 815 F.2d at 1211, did not establish a definition for the term "sudden" as used in CGL insurance policies. The court merely held that applying South Dakota law, a "sudden accident" is an unambiguous term that is defined to mean an event neither expected nor intended by the insured. Id. Consequently, the Eighth Circuit did not render an opinion on the definition of the CGL pollution exclusion exception term "sudden and accidental".

Missouri courts give the terms of an insurance policy their plain meaning. Harrison v. MFA Mutual Ins. Co., 607 S.W.2d 137 (Mo. 1980). In an insurance policy, ambiguity arises when there is duplicity, indistinctness or uncertainty of meaning, or when the policy is reasonably and fairly open to different constructions. Nixon v. Life Investors Ins. Co., 675 S.W.2d 676, 679 (Mo.Ct.App. 1984); Pearce v. Gen. American Life Ins. Co., 637 F.2d 536, 539 (8th Cir. 1980).

The Court finds the insurance policies at issue in the instant case do not define the term sudden within its terms. Further, it appears to this Court that there exists no single

plain meaning of the term "sudden" as used in the instant CGL policies. The Court finds persuasive that each party has placed distinct yet reasonable definitions on the term and the fact that recognized dictionaries differ as to the primary meaning of the term.[13] It is therefore the opinion of this Court that the term "sudden" as used in the CGL policy Pollution Exclusion exception clause is reasonably susceptible to different meanings and is, therefore, ambiguous.

In Missouri, the court's role in interpreting a contract is to determine the intention as manifest by the document, and not by what the parties now say they intended; however, in that inquiry the court is justified in considering more than circumstances at the time of contracting and the positions and actions of the parties are relevant to judicial interpretation of the contract. Press Machinery Corp. v. Smith B.P.M. Corp., 727 F.2d 781, 784-785 (8th Cir. 1984); Tri-Lakes Newspapers, Inc. v. Logan, 713 S.W.2d 891, 893 (Mo.Ct.App. 1986) (Relevant matters outside the insurance contract may be considered when interpreting insurance policies). Ambiguities will be construed against the insurer when interpreting insurance policies. Robin v. Blue Cross Hospital Serv., Inc., 637 S.W.2d 695, 698 (8th Cir. 1982). Interpretation in the insured's favor is particularly appropriate if an ambiguity arises in an

[13] Black's Law Dictionary at 1600 (West Pub., 4th ed. 1968) (That which happenings without previous notice); Webster's Third New International Dictionary (G. & C. Merriam Co. 1976) (That which occurs unexpectedly).

exclusion, since the insurer there attempts to limit/exclude the insured's coverage. See Meyer Jewelry Co. v. General Ins. Co., 422 S.W.2d 617, 623 (Mo. 1968); Greer v. Zurich Ins. Co., 441 S.W.2d 15, 30 (Mo. 1969) (An insurance contract is designed to furnish protection and will, where reasonably possible, be construed to accomplish this object.).

The Pollution Exclusion clause has been the subject of a significant number of recent judicial holdings and comments in other jurisdictions. There is a sharp division between the various courts that have ruled on the issue of whether the term "sudden", as used in the Pollution Exclusion, is or is not ambiguous. Courts generally have taken one of three approaches in interpreting the clause: 1) finding the clause ambiguous and holding that the insurance company has a duty to defend and/or indemnify the insured as a matter of law; Lansco, Inc. v. Department of Environmental Protection, 350 A.2d at 524-525 (Pollution Exclusion clause ambiguous and since the pollution event was neither expected nor intended by the insured, the pollution event caused by a third party was sudden and accidental)[14]; 2) defining "sudden and accidental" as meaning unintended injury or harm and that coverage should be excluded if the insured knew or should have known that its activities were

[14] Farm Family Mutual Ins. Co. v. Bagley, 64 A.D.2d 1014, 409 N.Y.S.2d 294 (4 Dep't 1978) (Pollution Exclusion clause ambiguous and pollution event could have been unintended); Allstate Ins. Co. v. Klock Oil Co., 73 A.D.2d 486, 426 N.Y.S.2d 603 (4 Dep't 1980) (Pollution Exclusion clause ambiguous and regardless of initial intent of lack thereof, unintended damage constitutes an accident covered by the insurer.).

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causing or could cause the injury alleged; Jackson Township Municipal Utilities Authority v. Hartford Accl. & Indem. Co., 186 N.J.Super. 156, 451 A.2d 990 (1982) (Pollution Exclusion clause ambiguous and is a restatement of the definition of occurrence);[15] or, 3) finding that the clause is unambiguous and so long as the insured did not intend the pollution event which caused injury, the pollution event was not "sudden and accidental" as defined by a temporal meaning, and therefore, the insurer is not obligated to defend and/or indemnify the insured. Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 696-701, 340 S.E.2d 374, 381-383, reh'g denied, 316 N.C. 386, 346 S.E.2d 134 (1986).[16] In addition, recognized dictionaries differ in the primary meaning of the word, and the insurance industry itself has allocated different meanings to the word at different times.[17]

This Court is of the opinion that plaintiff failed to establish that the parties intended that the term "sudden" mean anything other than all accidental pollution occurrences causing injury where the pollution event was neither expected nor intended by defendant. In addition, the drafting history of the Pollution Exclusion clause evidences that the Insurance Rating Board and plaintiff drafted the clause intending to exclude coverage only from accidental pollution occurrences. Such a definition reaffirms the principal that coverage will not be provided for intended acts and intended results of such acts, but will be extended for unintended results of an intentional act, without reference to a temporal component of such occurrences, even if such act was performed by a third party. See Jackson Township, 451 A.2d at 994. Coverage, therefore, under CGL policies should be extended so long as the insured did not intentionally injure or damage a third party with the pollution activity, or cause injury and/or damage to the third party when the insured should have known that the polluting activity could likely result in such an outcome. Plaintiff did not claim or establish that defendant was willfully negligent or knowledgeable of its contracted waste transporter's dumping and improper storage of the hazardous wastes with respect to the Landfills Sites and Review Avenue site. Further, the Court finds that plaintiff's decision to defend while reserving its right to

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[15] See United States Fidelity & Guar. Co. v. Thomas Solvent Co., 683 F.Supp 1139 (W.D.Mich. 1988); Pepper's Steel & Alloys v. United States Fidelity & Guaranty Co., 668 F.Supp. 1541 (S.D.Fla. 1987); United States v. Conservation Chem. Co., 653 F.Supp. 152 (W.D.Mo. 1986); Prima v. State Farm Fire & Casualty Co., 426 So.2d 356 (La.App.2d Cir. 1983); Shapiro v. Public Serv. Mut. Ins. Co., 19 Mass.App.Ct. 648, 477 N.E.2d 146 (1985); Transamerica Ins. Co. v. Bunnas, 77 Or.App. 136, 711 P.2d 212 (1985); Buckeye Union Ins. v. Liberty Solvent & Chemicals Co., 17 Ohio App.3d 127, 477 N.E.2d 1227 (1984); United Pacific Ins. Co. v. Van's Westlake Union, Inc., 34 Wash.App. 708, 664 P.2d 1262 (1983).

[16] Other courts have begun to hold that the Pollution Exclusion clause is unambiguous: United States Fidelity & Guaranty Co. v. Morrison Grain Co., 734 F.Supp. 437 (D.Kan. 1990) (quoting C.L. Hathaway & Sons, 712 F.Supp. 265, 268 (D.Mass. 1989); International Minerals & Chemical Corp. v. Liberty Mut. Ins. Co., 168 Ill.App.3d 361, 522 N.E.2d 758 (1988); Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 702 F.Supp. 1317 (E.D.Mich. 1988); American Motorists Ins. Co. v. General Host Corp., 667 F.Supp. 1423 (D.Kan. 1987).

[17] See footnote 13.

withdraw coverage in the Review Avenue and Landfills sites litigation satisfied its initial duty under Missouri law to participate in defendant's defense and did not waive its right to withdraw coverage. Brenner & Assoc. Constr., Inc. v. Western Casualty & Surety Co., 760 S.W.2d 445, 446-447 (Mo.Ct.App. 1988) (Liability insurer providing timely notice of reservation of rights to assert non-liability and expressing reasons therefor does not waive its right to claim that it would not be liable for payment of any judgment against the insured.).

The Court is also of the opinion that the frequency of dumping or leakage is not dispositive of the issue of whether the occurrence was sudden and accidental, regardless of how many deposits or dispersals or spills may have occurred. Although the permeation of pollution into the ground damaging the natural resources may have been gradual rather than instantaneous, the behavior of the pollutants or their seepage into the ground is accidental if the permeation was unexpected. See Jackson Township, 451 A.2d at 994. It is contrary to reason to find that a CGL policy would cover a waste generator contracting with a waste transporter if the waste transporter dumped the entire load of waste onto the ground which destroyed natural resources, while excluding coverage for a waste generator that had no knowledge of the destruction of natural resources occurring on a storage site over a period of time. As far as the insured is aware in either case, the waste was to be disposed of in a proper manner. Each drop of waste hitting the ground at the storage or dumping site,

of which the waste generating insured is not aware, that results in the damaging natural resources, would be sudden to the waste generating insured. The continued gradual leakage, therefore, would speak only to degree and not to liability. Consequently, defendant's liability for natural resource destruction attached when the first drop of waste hit the ground and damaged the natural resources. The relative degree or quantity of the release and subsequent natural resource destruction did little to alter the already ripened CERCLA and/or state common law natural resource destruction liability.

Consequently, defendant is entitled to summary judgment with respect to plaintiff's duty to defend it in the Landfills Sites and Review Avenue litigation for damages to the natural resources of the City of New York.

Accordingly, the motion of plaintiff, Aetna Casualty and Surety Company, for summary judgment with respect to its duty to defend and/or indemnify defendant, General Dynamics Corp., for liability arising by way of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 at seq. for hazardous waste clean-up costs concerning the The City of New York v. Exxon Corp., No. 85 Civ, 1939 (EW) action, is GRANTED.

Further, the motion of plaintiff, Aetna Casualty and Surety Company, for summary judgment with respect to its duty to defend and/or indemnify defendant, General Dynamics Corp., for liability arising by way of state statute for hazardous waste

clean-up costs concerning the The City of New York v. United Technologies Corp., No. 85 Civ. 4665 (EW); The City of New York v. Exxon Corp., No. 85 Civ. 1939 (EW) actions; and, the Cannons Engineering Corp. sites, is GRANTED.

Further, the motion of plaintiff, Aetna Casualty and Surety Company, for summary judgment with respect to its duty to defend defendant, General Dynamics Corp., for liability arising by way of state common law claims premised on nuisance, abatement of nuisance, negligence, ultrahazardous and/or abnormally dangerous activity, and statutory public nuisance contained in the The City of New York v. United Technologies Corp., No. 85 Civ. 4665 (EW); The City of New York v. Exxon Corp., No. 85 Civ. 1939 (EW) actions, is GRANTED.

Further, the motion of plaintiff, Aetna Casualty and Surety Company, for summary judgment with respect to its duty to indemnify defendant, General Dynamics Corp., for liability arising by way of state common law claims premised on nuisance, abatement of nuisance, negligence, ultrahazardous and/or abnormally dangerous activity, and statutory public nuisance contained in the The City of New York v. United Technologies Corp., No. 85 Civ. 4665 (EW); The City of New York v. Exxon Corp., No. 85 Civ. 1939 (EW) actions; and, the Cannons Engineering Corp. sites, is GRANTED.

Further, the motion of defendant, General Dynamics Corp., for summary judgment with respect to plaintiff, Aetna Casualty and Surety Company's, duty to defend General Dynamics

Corp., in the The City of New York v. United Technologies Corp., No. 85 Civ. 4665 (EW) and The City of New York v. Exxon Corp., No. 85 Civ. 1939 (EW) actions concerning claims for damaging the City's natural resources, is GRANTED.

Further, the motion of defendant, General Dynamics Corp., for summary judgment with respect to plaintiff, Aetna Casualty and Surety Company's, duty to indemnify General Dynamics Corp., in The City of New York v. United Technologies Corp., No. 85 Civ. 4665 (EW), The City of New York v. Exxon Corp., No. 85 Civ. 1939 (EW) and the Cannons Engineering Corp. sites notices, concerning claims for damaging the City's and states' natural resources, is DENIED.

Further, the motion of plaintiff, Aetna Casualty and Surety Company, for summary judgment with respect to all remaining issues is DENIED.

Last, the motion of defendant, General Dynamics Corp., for summary judgment with respect to all remaining issues is DENIED.

Peter Hayes
U.S. District Judge

January 23, 1991.

Appendix E

1ST CASE of Level 1 printed in FULL format.

Carey Canada, Inc., appellant v. Columbia Casualty Company, et al. The Celotex Corporation, appellant v. Columbia Casualty Company, et al .

Nos. 89-7266, 89-7267

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

1991 U.S. App. LEXIS 17891

April 16, 1991, Argued
August 9, 1991, Decided

PRIOR HISTORY: [*1] Appeals from the United States District Court for the District of Columbia. Civil Action Nos. 83-1105, 86-1142.

COUNSEL: Jerold Oshinsky, with whom Nicholas J. Zoogman and Karen L. Bush were on the brief, for appellants.

James P. Schaller, with whom M. Elizabeth Medaglia was on the brief, for appellees National Union Fire Insurance Company of Pittsburgh, Pennsylvania.

James W. Greene was on the brief for appellee Columbia Casualty Company.

JUDGES: Before Edwards, D. H. Ginsburg, and Sentelle, Circuit Judges. Opinion for the Court filed by Circuit Judge Sentelle.

OPINIONBY: SENTELLE

OPINION: Sentelle, Circuit Judge:As Lord Mansfield propounded, "most of the disputes in the world arise from words." Morgan v. Jones, 98 Eng. Rep. 587, 596 (K.B. 1773) (citing Vide Essay on Human Understanding, c. 9, 10, 11). Courts agonize over the prospect of rendering judgment of far-reaching effect based on the construction of a single word. This is such a case.

Carey Canada, Inc. ("Carey Canada"), an asbestos mining company, and its parent company, The Celotex Corporation ("Celotex") (collectively, "the insureds" or "appellants"), are co-defendants in thousands of lawsuits alleging [*2] injury due to exposure to asbestos. During the period October 1, 1977 through April 12, 1983, Carey Canada and Celotex were sued in 22,490 asbestos -related disease claims. Carey Canada, Inc. v. Cal. Union Ins. Co., 720 F. Supp. 1018, 1023 (D.D.C. 1989). They here appeal a final judgment of the District Court in two consolidated cases denying a declaration that three excess liability insurance policies with Columbia Casualty Company ("Columbia Casualty") and National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") (collectively, "defendant insurance carriers" or "appellees") provide coverage for all claims alleging personal injury from exposure to asbestos except those alleging exclusively the distinct, non-cancerous disease of asbestosis, which the policies expressly exclude from coverage. We are called upon to decide whether the District Court, after reviewing thousands of pages of materials, evaluating the testimony of a multitude of witnesses, and applying the laws of Florida and Illinois nl governing the admissibility of parol evidence, properly determined that the parties, in using the term

" asbestosis, " intended to exclude all [*3] asbestos -related claims and not only the single disease asbestosis. We affirm the District Court's judgment in part, and vacate and remand in part for consideration not inconsistent with this opinion.

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n1 The substantive law of either Florida or Illinois would govern the use of extrinsic evidence to construe the contract terms because both Florida, the principal place of business and place of incorporation of Celotex's parent Jim Walter Corporation, and Illinois, the situs of much of the parties' negotiations of the excess liability policies, have substantial interests in the resolution of this case. Carey Canada, Inc., v. Cal. Union Ins. Co., 708 F. Supp. 1, 3-4 (D.D.C. 1989). The District Court concluded that the laws of Florida and Illinois governing the use of extrinsic evidence to construe ambiguous contract terms were not inconsistent, and thus it did not need to choose between Florida and Illinois substantive law. Id. at 4. Accordingly, we review the District Court's application of both Florida and Illinois law on appeal.

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[*4]

I. Background

A. The Parties and the Asbestosis Exclusions

Carey Canada, a wholly-owned subsidiary of Celotex organized under the laws of the Province of Quebec, has its principal place of business in Quebec, Canada. Celotex, a privately-owned Delaware corporation with its principal place of business in Florida, manufactures and sells building materials. Celotex is a wholly-owned subsidiary of the Jim Walter Corporation ("Jim Walter" or "JWC"). JWC (not a party to this action), through its in-house insurance company, Best Insurors, Inc., its agent, Rollin Burdick Hunter Co., and other brokers, purchased the three policies at issue to cover Jim Walter, Celotex, Carey Canada, and most of Jim Walter's subsidiaries.

Appellees Columbia Casualty and National Union are two of the insureds' excess liability insurance carriers. Aetna Casualty & Surety Company ("Aetna") is the primary carrier. Aetna's policies for the relevant period exclude all asbestos -related disease claims. Specifically, the Aetna policy excludes:

All bodily injury which arises in whole or in part, either directly or indirectly, out of asbestos, whether or not the asbestos is airborne as a fiber or particle, contained [*5] in a product, carried on clothing or transmitted in any fashion whatsoever.

Carey Canada, 708 F. Supp. at 2 n.2. Aetna is no longer a party to this action.

In 1983 and 1986, the insureds brought declaratory judgment actions to determine the scope of coverage of policies they purchased from the defendant insurance carriers. See id. at 2. Appellants sought a declaration that the " asbestosis" exclusion in each policy "is limited to an exclusion for a distinct medical disease known as asbestosis and that other diseases that occur as a result of exposure to asbestos, such as mesothelioma and other forms of cancer, are not excluded from coverage." Id. (emphasis in original).

The defendant insurance carriers maintain that the parties intended the asbestosis exclusion to exclude all bodily-injury claims arising out of exposure to asbestos and not to restrict the exclusion to the single disease asbestosis. Id.

The liability insurance policies at issue are three policies the insureds purchased from the defendant insurance carriers to cover the three-year period between October 1977 and October 1980. National Union issued two policies to [*6] JWC; policy no. 1189777 (10/1/77 - 10/1/78) ("1977 National Union Policy"), and policy no. 1226411 (10/1/79 - 10/1/80) ("1979 National Union Policy"). Columbia Casualty issued a single policy, no. RDX 416-93-97 (10/1/78 - 10/1/79) ("Columbia Casualty Policy"), to JWC. Prior to 1977, none of the policies issued to appellants by the defendant insurance carriers contained asbestos exclusions of any kind. Beginning in October 1977, however, and in the face of thousands of lawsuits, the defendant insurance carriers issued policies with variously worded asbestos -related exclusions.

The 1977 National Union Policy exclusion states, " 'it is understood and agreed that any bodily injury or property damage claim or claims arising out of all asbestosis operations is excluded from the policy.' " Carey Canada, 708 F. Supp. at 3 (emphasis in original). The 1979 National Union Policy contained no asbestos -related exclusion. Rather, this policy incorporated or "followed form" to the asbestos -related exclusion of the umbrella policy sold to appellants by another insurance company, United States Fire Insurance Company ("U.S. Fire"). Id. The applicable U.S. Fire exclusion [*7] provides, " 'this policy shall not apply to any liability imposed upon the insured arising out of ASBESTOSIS. ' " Carey Canada, 720 F. Supp. at 1019 (emphasis in original).

The Columbia Casualty Policy contains an exclusion which provides that the policy " 'shall not apply to liability imposed upon the insured arising out of asbestosis, ' " id., adopting the exact wording of the exclusion contained in the U.S. Fire Policy.

B. The District Court Proceedings

Carey Canada and Celotex each filed separate actions against nine insurance companies that sold excess liability policies to Jim Walter between October 1, 1977 and October 1, 1982. n2 In 1986, the District Court consolidated the actions after Celotex's case before the District of Columbia Superior Court had become diverse and Columbia Casualty, among others, had removed the case to the United States District Court for the District of Columbia.

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n2 National Union and Columbia Casualty are the only defendants on this appeal. Two defendants, Northbrook Excess and Surplus Company, and the Home Insurance Company, settled with the insureds. Carey Canada, 720 F.Supp. at 1019. The other five defendants, including U.S. Fire and First State Insurance Company ("First State"), joined the "Wellington Agreement," under which the parties litigated certain outstanding disputes concerning coverage for asbestos -related injury claims in binding, alternative dispute resolution proceedings. Id. at 1019 n.2, 1026; see also Carey-Canada, Inc. v. Cal. Union Ins. Co., 118 F.R.D. 242, 243 n.1 (D.D.C. 1986).

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Prior to consolidation, Carey Canada moved for partial summary judgment on the ground that the meanings of the policies' asbestos -related exclusions and the term " asbestosis" were clear and unambiguous. The District Court denied the motion. Carey Canada, Inc. v. Cal. Union Ins. Co., Civ. No. 83-1105, Memorandum Opinion (D.D.C. May 7, 1985) ("Memorandum Opinion"). In reaching its conclusion, the District Court reviewed two policies sold to a non-party insured, H.K. Porter Co., in which Columbia Casualty and First State had "used asbestosis in a narrow sense" to refer only to asbestosis. Id. at 8-9. The court reasoned that "although this evidence is not dispositive, it does strongly support [Carey Canada's] position that the insurance companies knew that asbestosis was a distinct disease, independent of mesothelioma." Id. at 9.

During discovery, the insureds filed motions to compel the defendant insurance carriers to produce other documents related to "policies sold by the defendants to non-party insureds," which contained asbestos -related exclusions. Carey-Canada, 118 F.R.D. at 243-44. Although the court found the documents relevant, see id. at 244, [*9] it restricted appellants' discovery to documents relating to policies with an asbestos -related exclusion which were written or referred to by the individual underwriters of the policies at issue, prior to the sale of those policies. Id. at 245. Under the District Court's order, the defendant insurance carriers produced no new non-party insured documents. Appellants complained to the court. The court consequently modified its original order. Again, the defendant insurance carriers produced no new non-party insured evidence.

On March 31, 1988, one month before the close of discovery, appellants again filed a motion to compel the defendant insurance carriers to produce the non-party insured documents sought in appellants' new discovery request. The District Court denied appellants' request because "this motion, filed on the eve of the discovery cutoff in this action, is long out of time, and hence must be denied." The Celotex Corp. v. Cal. Union Ins. Co., Civ. No. 86-1142, Memorandum Order at 3 (D.D.C. July 26, 1988).

In response to appellees' motion in limine, the court excluded all of appellants' non-party insured documents, including the H.K. Porter Policies, [*10] because they did not comport with the court's prior discovery orders. Moreover, when appellants proffered the non-party insured exhibits at trial, the court precluded appellants from cross-examining the defendant insurance carriers' underwriters with the exhibits.

After the close of discovery, the parties filed motions for summary judgment on the scope of the exclusions. The court held that all of the asbestos -related exclusions at issue were ambiguous, and that the court would review extrinsic evidence at trial to determine the parties' intent. Carey Canada, 708 F. Supp. at 7.

The District Court held trial for seven days in February of 1989. On June 1, 1989, the court issued its findings and conclusions. Carey Canada, 720 F. Supp. 1018. The court found, inter alia, "that asbestosis is a medical term and, when correctly used, makes reference to a specific, single disease caused by the inhalation of asbestos fibers." Id. at 1020. The court nonetheless held that the defendant insurance carriers

have produced clear and convincing evidence that, in the context of the situation existing in 1977 when asbestos manufacturers [*11] were inundated with thousands of lawsuits, the parties used the term " asbestosis" to exclude such risks in the generic sense. We further find in using the term " asbestosis" that it was objectively intended by all the parties that the exclusion of " asbestosis" should be interpreted to mean the exclusion of "all asbestos -related disease claims."

Id. at 1025.

Appellants then filed this appeal.

II. Discussion

A. Review of the District Court's Findings of Fact

The District Court's findings of fact, including the finding that the parties intended to exclude all asbestos -related disease claims, may be reversed only if they are clearly erroneous. Salve Regina College v. Russell, 111 S.Ct. 1217, 1222 (1991) (citation omitted); Robinson v. American Airlines, Inc., 908 F.2d 1020, 1022 (D.C. Cir. 1990). Alternately stated, we will not reverse " 'if the district court's account of the evidence is plausible in light of the record viewed in its entirety,' " or unless, after reviewing the entire record, we are " 'left with the definite and firm conviction that a mistake has been committed.' " Cuddy v. Carmen, 762 F.2d 119, 124 [*12] (D.C. Cir.) (citations omitted), cert. denied, 474 U.S. 1034 (1985). Significantly, the District Court found that all parties knew and understood that the " asbestosis" exclusions applied to all asbestos -related disease claims. The court supported this finding with subsidiary findings, reciting substantial and probative evidence, including, inter alia:

Jim Walter and Rollin Burdick Hunter Co. used the terms " asbestosis" and "asbestos claims" interchangeably. Carey Canada, 720 F. Supp. at 1022, no. 18.

Jim Walter used the term " asbestosis" to mean all asbestos -related disease claims when it provided loss data to insurance carriers. Id., no. 19.

Appellants treated the Aetna exclusion, which excluded all asbestos -related claims, as equivalent to an " asbestosis exclusion." Id. at 1022-23, no. 20.

Appellants did not notify the insurance carriers of any of the thousands of asbestos -related disease claims over a five and one-half year period, until the week before they filed this lawsuit. Id. at 1023, nos. 21, 22.

Jim Walter and appellants acknowledged that the policies at issue do not cover any asbestos -related [*13] disease claims in Annual Reports to shareholders and in sworn interrogatory answers submitted in other insurance coverage litigation. Id., nos. 23, 24.

Based on this and other evidence, we are not "'left with the definite and firm conviction that a mistake has been committed.'" Cuddy, 762 F.2d at 124. Hence, we cannot say the District Court's findings of fact are clearly erroneous. We therefore do not disturb these factual findings.

B. Review of the District Court's Legal Conclusions

The District Court decided three questions of law in determining that the parties intended the asbestosis exclusions contained in the insurance policies at issue to exclude coverage for all asbestos -related disease claims: (1) the three asbestosis exclusions contained in the National Union and Columbia Casualty Policies were ambiguous; (2) the ambiguity in the exclusions required the court to consider extrinsic evidence of the parties' intent rather than construing the terms against the drafters (the defendant insurance carriers) as a matter of law; and (3) the 1979 National Union Policy was not governed by the alternative dispute resolution ("ADR") construction of the U.S. [*14] Fire asbestosis exclusion to which the 1979 National Union Policy followed form or incorporated by reference. We review the District Court's conclusions of law de novo. Salve Regina College, 111 S.Ct. at 1221; Harbor Ins. Co. v. Omni Constr., 912 F.2d 1520, 1522 (D.C. Cir. 1990). We affirm the District Court with regard to its conclusions that the 1977 National Union Policy was ambiguous and that extrinsic evidence was properly considered to determine the intent of the parties. We conclude, however, that the District Court erred in its ultimate legal conclusion with regard to the 1979 National Union Policy and the Columbia Casualty Policy because the court failed to determine that the term " asbestosis" is ambiguous based on objective evidence external to the pre-contractual views of the parties themselves, that in a broader context, e.g., the insurance industry, public records, medical definitions, and the post-contractual course of performance, the term was used to mean more than the single non-cancerous disease asbestosis at the time the parties contracted. Accordingly, we remand the case for the District Court to determine whether " asbestosis" objectively was ambiguous.

1. The 1977 National Union Policy

The 1977 National Union Policy provided:

[*15]

It is understood and agreed that any bodily injury or property damage claim or claims arising out of all asbestosis operations is excluded from the policy.

Carey Canada, 708 F. Supp. at 3 (emphasis in original). The Dsitrict Court considered the evidence and determined that there is no such recognized term as an " asbestosis operation." Id. at 5 & n.12. Indeed, as the court noted, the insureds conceded that the asbestosis exclusion language contained in the 1977 National Union Policy for "all asbestosis operations" is ambiguous on its face. Id. at 5 & n.9. See also Appellants' Brief at 9 (the 1977 National Union Policy, "unlike the other two policies at issue, contains an ambiguous exclusion which uses ' asbestosis' as an adjective"); id. at 23, 31. Accordingly, the court considered extrinsic evidence to ascertain the intent of the parties. Based on the trial evidence, the court resolved that the parties intended to exclude all asbestos -related disease claims from coverage under the 1977 National Union Policy.

The insureds, however, maintain that the District Court should have construed the contracts [*16] against the defendant insurance carriers, as a matter of law, under the rule of contra proferentum, whereby the court construes ambiguous contract terms against the drafter. Appellants also argue that a special, and particularly stringent, version of the contra proferentum rule applies to insurance contracts. See Appellants' Brief at 32-34. We disagree.

Under Illinois law, the contra proferentum rule applies only if the intent of the parties cannot be ascertained from any other source. Contra proferentum is

"'at best . . . a secondary rule of interpretation, a "last resort" which may be invoked after all of the ordinary interpretative guides have been exhausted.'" Farwell Constr. Co. v. Ticktin, 84 Ill.App.3d 791, 405 N.E.2d 1051, 1057 (1980) (citations omitted). Moreover, contra proferentum "is inferior . . . to extrinsic proof of the parties' agreement, or to other authority revealing that understanding." Chicago v. Dickey, 146 Ill.App.3d 734, 497 N.E.2d 390, 393 (1986). Similarly, Florida law provides that "only when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after [*17] resort to the ordinary rules of construction is the rule [of contra proferentum] apposite." State Farm Mutual Automobile Ins. Co. v. Pridgen, 498 So.2d 1245, 1248 (Fla. 1986) (citation omitted).

Indeed, the authorities relied upon by appellants establish that the court must consider extrinsic evidence to clarify ambiguous contract terms. See Dora Township v. Indiana Ins. Co., 78 Ill.2d 376, 400 N.E.2d 921, 922 (1980) (in order to ascertain the intent of the parties the court should not examine the policy in a vacuum but should look to the circumstances surrounding the issuance of the policy"); Stuyvesant Ins. Co. v. Butler, 314 So.2d 567, 569 (Fla. 1975) (meaning of the term "minor" should be "determined in the context within which the word is used"). With respect to the 1977 National Union Policy, the District Court properly considered extrinsic evidence to determine the scope of the policy exclusion upon finding the term " asbestosis operations" ambiguous. Carey Canada, 708 F. Supp. at 6.

2. The 1979 National Union Policy and the Columbia Casualty Policy

In its January 17, 1989 decision, [*18] the District Court made extensive findings of fact with respect to the 1979 National Union Policy and the Columbia Casualty Policy. Carey Canada, 720 F. Supp. at 1019. Specifically, the court concluded:

Asbestosis is a medical term and, when correctly used, makes reference to a specific, single disease caused by the inhalation of asbestos fibers.

Id. at 1020, 1021-22. Additionally, the court found that appellants' position "is supported by medical definitions, by the compensation statutes of certain states and by legal decisions." Id. at 1021. The court also concluded that the meaning of asbestosis was a matter of public record based on congressional hearings, newspaper and magazine articles, and insurance industry trade journals. Id.

To counter this evidence regarding the proper use of the term " asbestosis, " n3 the court cited the parties' negotiations to suggest that they intended to use the term generically to cover all asbestos -related diseases. Id. at 1022-25. The court, however, cited little evidence external to the parties' negotiations to demonstrate that the term " asbestosis" was ever [*19] used ambiguously by anyone other than the parties in this case.

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n3 Although the District Court mentioned that one medical expert appearing for the defendant insurance carriers testified that "the term ' asbestosis' was occasionally used generically, to cover related diseases caused by asbestos, " it nonetheless found that "the medical meaning of the term is not in serious dispute." See id. at 1020-21 (emphasis added).

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In using the term " asbestosis" . . . it was objectively intended by all the parties that the exclusion of " asbestosis" should be interpreted to mean the exclusion of "all asbestos -related disease claims."

Id. at 1025. The court apparently assumed that it could consider evidence of the parties' subjective pre-contractual intent in order to find a latent ambiguity.

It does not appear to us that either Florida or Illinois law permits this approach. Under Florida and Illinois law, as in other states, a court construing a contract must give effect to the parties' intent [*20] as expressed in the contract. See Towne Realty, Inc. v. Safeco Ins. Co., 854 F.2d 1264, 1267 (11th Cir. 1988) ("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") (emphasis in original) (citing Durham Tropical Land Corp. v. Sun Garden Sales Co., 106 Fla. 429, 138 So. 21, 23 (1931)); Conway Corp. v. Ahlemeyer, 754 F. Supp. 596, 599 (N.D. Ill. 1990) (court's "'primary objective in construing a contract is to ascertain the intent of the parties and to give effect to that intent'") (quoting United Airlines, Inc. v. City of Chicago, 116 Ill.2d 311, 318, 507 N.E.2d 858, 861 (1987)). If the language used in the contract is ambiguous or vague and does not in itself disclose the parties' intent, then the court must resort to usage or other surrounding circumstances existing at the time the contract was made to divine the intent of the parties. See Conway, 754 F. Supp. at 599.

Evidence of surrounding circumstances is admissible only where the written contract is ambiguous. See Chicago Bd. of Options Exchange, Inc. v. Conn. Gen. Life Ins. Co., 713 F.2d 254, 258 (7th Cir. 1983) [*21] ("In construing ambiguous contract the court must consider any evidence that sheds light upon the intentions of the parties, including the situation of the parties, the purpose of the contract, and the circumstances surrounding the formation of the contract") (citations omitted); Indemnity Ins. Co. v. Du Pont, 292 F.2d 569, 574 (5th Cir. 1961) (unless there is an ambiguity in the contract terms, extrinsic evidence is inadmissible); Ace Electric Supply Co. v. Terra Nova Electric, Inc., 288 So.2d 544, 547-48 (Fla.App. 1973) (same). Ambiguity exists in an insurance policy only when its terms make the policy reasonably susceptible to different constructions and interpretations, one resulting in coverage and one resulting in exclusion. See Thompson v. Amoco Oil Co., 903 F.2d 1118, 1120 (7th Cir. 1990); Towne Realty, 854 F.2d at 1267; Gulf Tampa Drydock Co. v. Great Atlantic Ins. Co., 757 F.2d 1172, 1174-75 (11th Cir. 1985); Fabrica Italiana Lavorazione Materie Organiche, S.A.S. v. Kaiser Aluminum & Chemical Corp., 684 F.2d 776, 780 (11th Cir. 1982); see also Papago Tribal Utility Authority v. FERC, 723 F.2d 950, 955 (D.C. Cir. 1983), [*22] cert. denied, 467 U.S. 1241 (1984).

The court may not create ambiguity where none exists. Simmons Refining Co. v. Royal-Globe Ins. Co., 543 F.2d 1195, 1197 (7th Cir. 1976). Significantly, neither the mere absence of a policy definition nor the presence of a dispute as to meaning of the provision necessarily renders the policy or term ambiguous. Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1360 (11th Cir. 1988), cert. denied, 488 U.S. 1041 (1989); Keyser v. Conn. Gen. Life Ins. Co., 617 F. Supp. 1406, 1410 (N.D. Ill. 1985). If the language found in the policy is not ambiguous or otherwise susceptible of more than one meaning, the court's duty is to apply the plain meaning of the words and phrases used to the facts

before it. The court is without authority to rewrite the policy or add meaning to it that is not there. National Union Fire Ins. Co. of Penn. v. Carib Aviation, Inc., 759 F.2d 873, 876 (11th Cir. 1985); see also FDIC v. W.R. Grace & Co., 877 F.2d 614, 620-21 (7th Cir. 1989) ("the 'four corners' rule, which excludes extrinsic evidence [*23] if the contract is clear 'on its face'" shows that there "is ancient wisdom as well as ancient prejudice"), cert. denied, 110 S.Ct. 1524 (1990); Orkin, 849 F.2d at 1362 (where party seeks to prove latent ambiguity, interpretation urged must be reasonable and resolve actual ambiguity, not create one). Courts determine whether a party's construction of a term is reasonable from objective circumstances, not merely by looking at the course of dealing between the parties or other internal evidence of the parties' understandings. See FDIC, 877 F.2d at 621. Otherwise, the contract would not protect the parties. Id. (nature of the offer of proof to demonstrate ambiguity is critical determination).

Where the terms of the contract are ambiguous, vague, or indefinite, where the words have, by the usage of trade, acquired a particular meaning, or where the words are technical or are applicable to a certain trade and require an explanation or interpretation in order to determine what the parties meant, parol evidence of usage is admissible to explain them. Standard Oil Co. v. United States, 340 U.S. 54, 58-60 (1950) [*24] (Supreme Court resorted to extrinsic evidence to clarify phrase "predominantly and determining" in relation to causation in insurance policy); accord Nationwide Mutual Ins. Co. v. Jones, 414 So.2d 1169, 1171 (Fla. App. 1982) (extrinsic evidence of industry and individual practices admissible to clarify ambiguity) ; English & American Ins. Co. v. Swain Groves, Inc., 218 So.2d 453, 456 (Fla.App. 1969) (court allowed extrinsic evidence of industry practice to ascertain meaning of term "value of the crop"); Wilson v. Resolute Ins. Co., 132 Ill.App.2d 174, 267 N.E.2d 720, 723 (1971) ("Industry practice is relevant, and indeed may be determinative, in suits between members of the industry"). Thus, the court must interpret the contract in view of the usages and customs affecting the agreement, where the terms used are of doubtful meaning otherwise. Standard Oil Co., 340 U.S. at 60 ("in interpreting insurance contracts reference should be made to considerations of business and insurance practices") (citation omitted).

We emphasize that such evidence is admissible only where the contract language is in [*25] fact ambiguous. For example, in Wilson v. Resolute Ins. Co., supra, the Appellate Court of Illinois found no ambiguity where an automobile liability policy contained an omnibus clause but had therein a rating symbol "1" used when the premium charged was for a policy which excluded drivers under age 25, but no such exclusion endorsement was attached to policy. The appellate court held that the trial court acted properly in holding that the insureds' 18 year-old son driving with the insureds' permission was covered by the policy. The court held that there was no reason to resort to extrinsic evidence or to admit evidence as to the acknowledged industry practice in construing the unambiguous policy language, and therefore the court correctly applied the plain meaning of the policy's terms to the particular facts of the case. Wilson, 267 N.E.2d at 723.

The defendant insurance carriers contend that FDIC, supra, allows the admission of evidence of the parties' negotiations whenever a party raises an ambiguity claim. We disagree. Under the FDIC court's analysis, objective extrinsic evidence, not evidence of the [*26] parties' dealings, is admissible to show that "although the agreement itself is a perfectly lucid and apparently complete specimen of English prose, anyone familiar with the

real-world context of the agreement would wonder what it meant with reference to the particular question that has arisen." FDIC, 877 F.2d at 620.

In FDIC, the Seventh Circuit Court of Appeals reviewed Illinois precedent. In deciding that objective extrinsic evidence was required to determine if an ambiguity existed, the court reviewed the facts involved in Rakowski v. Lucente, 104 Ill.2d 317, 472 N.E.2d 791 (1984). See FDIC, 877 F.2d at 621-22. Significantly, the appellant in Rakowski sought to introduce subjective evidence in the form of an affidavit containing appellant's assertion that he did not intend to include his right to seek contribution in a settlement releasing a party from liability. Rakowski, 104 Ill.2d at 324, 472 N.E.2d at 794. The FDIC court dismissed this evidence as insufficient to create an ambiguity. FDIC, 877 F.2d at 621-22. "The fact that the parties to a contract [*27] disagree about its meaning does not show that it is ambiguous, for if it did, then putting contracts into writing would provide parties with little or no protection." Id. at 621. Thus, a party's self-serving statement is insufficient to establish ambiguity.

Rather, objective evidence - a showing that anyone who understood the context of the contract would know it could not mean what an unskilled reader would suppose it to mean - is required. FDIC, 877 F.2d at 622. See also Conway Corp., 754 F.Supp. at 601 & n.12; Harris Bank Naperville v. Morse Shoe, Inc., 716 F. Supp. 1109, 1112 (N.D. Ill. 1989). We thus read FDIC to authorize a court assessing a claim of ambiguity to consider extrinsic evidence of an agreement's "commercial context," i.e., the industry or trade practices milieu within which the parties executed a particular agreement.

Florida law also requires objective evidence of ambiguity. In Durham Tropical Land Corp. v. Sun Garden Sales Co., 106 Fla. 429, 138 So. 21 (1931), the Florida Supreme Court rejected a trial court finding that an insurance policy was [*28] ambiguous because concurrent execution of insurance policies created an ambiguity as to which insurer had primary liability. The Florida Supreme Court held: "The intention of the parties to a contract is to be deducted from language employed, and such intention, when expressed, is controlling, regardless of intention existing in the minds of parties." 138 So. at 23 (emphasis and citations omitted).

Moreover, in Orkin Exterminating Co., Inc. v. FTC, supra, the Eleventh Circuit, construing Florida law, concluded that "'an ambiguity in a contract cannot be created by the mere assertion of a party to it.' The fact that the meaning of a contract term is disputed likewise reveals no ambiguity. " 849 F.2d at 1360 (quoting Vreeland v. Federal Power Comm'n, 528 F.2d 1343, 1351 (5th Cir. 1976)).

Thus, we read both Florida and Illinois law to require more than a subjective showing that a contract term is ambiguous. Furthermore, we find persuasive Judge Posner's reasoning in FDIC that objective evidence of an ambiguity is necessary to find a contract term ambiguous. Accordingly, we reject the defendant insurance [*29] carriers' suggestion that FDIC allows the court to find the term " asbestosis" ambiguous solely upon examining the parties' course of dealings. On the contrary, absent a showing of an external ambiguity - one which would cause "anyone cognizant of the commercial setting," FDIC, 877 F.2d at 622, to find the term " asbestosis" ambiguous - the term " asbestosis, " as found by the District Court, unambiguously would seem to refer to a "separate disease caused by asbestos and is distinct from plaques, mesothelioma and

bronchogenic carcinoma." Carey Canada, 720 F. Supp. at 1021-22.

To hold otherwise, without objective evidence of ambiguity, could defeat the intent of the parties to abide by the terms of the contract and to indemnify theinsureds for asbestos -related claims other than those for the specific disease asbestosis, allowing one party to create ambiguity where none exists. We therefore remand the case for further findings to determine whether the term " asbestosis" was used ambiguously in the public record and the insurance industry at the time the parties concluded the 1977 National Union Policy and the Columbia Casualty Policy. n4

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n4 We remand the case to the Distrcit Court rather than reverse outright because, although the trial judge cited little objective evidence of ambiguity in his decision, defendants' claim that the record contains some objective evidence which could support a finding that " asbestosis" was used in a broader sense in the commercial context at the time when the 1978 Columbia Casualty Policy and the 1979 National Union Policy were written. See Defendant's Joint Opposition to Plaintiffs' Motion for Partial Summary Judgment that the Asbestos -Related Exclusions to Defendants' Policies Exclude Coverage Only for the Single, Distinct Disease Asbestosis, at 22-23 (citing expert testimony and medical journals), 42-45 (citing court decisions, congressional testimony, and insurance industry periodicals). See also Carey Canada, 708 F.Supp. at 6 (citing Illinois and Florida decisions in which the parties used the term " asbestosis" broadly). We offer no opinion as to the viability of defendants' claims on this point. Rather, we remand for the trial court, applying the standards we have set forth, to determine the sufficiency of this record evidence and any other evidence which may exist to establish that " asbestosis" was objectively susceptible to more than one fixed usage and hence was ambiguous in the insurance industry at the time of the making of the contracts.

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3. The Binding Effect of the Alternative Dispute Resolution Interpretation of the "Arising Out of Asbestosis" Exclusion Upon the 1979 National Union Policy

Appellants contend that the trial court erred in not finding National Union bound under the doctrines of collateral estoppel and "following form" based on the result of an ADR construction of the U.S. Fire exclusion incorporated into the 1979 National Union Policy. The District Court concluded that the following form doctrine and collateral estoppel did not preclude National Union from asserting that the term " asbestosis" was ambiguous despite the decision of an ADR arbitrator to the contrary. In the ADR proceeding, U.S. Fire and appellants agreed that the policies only excluded the single disease asbestosis. The District Court nevertheless reasoned that the arbitration did not have binding effect on National Union because: (1) it was the result of a private contractual arrangement between appellants and U.S. Fire; (2) National Union was not a party to the ADR proceeding and no evidence was taken from National Union; (3) the ADR arbitrator did not have access to the voluminous documentary evidence presented in this case; (4) [*31] the ADR arbitrator based his conclusion on the fact that U.S. Fire signed the Wellington Agreement and thereby waived its right to assert that its policies excluded more than " asbestosis; " and (5) the ADR arbitrator's determination that the term " asbestosis" was unambiguous and

that extrinsic evidence to determine the intent of the parties was inadmissible was contrary to the District Court's findings. Carey Canada, 720 F. Supp. at 1026.

Whether National Union is bound by the ADR proceeding involving U.S. Fire is not a question of collateral estoppel, but of contract interpretation. See Keith v. Aldridge, 900 F.2d 736, 741 (4th Cir.) (whether parties intend to foreclose through agreement litigation of claim is a matter of contract interpretation), cert. denied, 111 S.Ct. 257 (1990). Thus, the principal inquiry is whether National Union's decision to "follow form" to the U.S. Fire asbestosis exclusion means that National Union's liability is inextricably tethered to that of the insurer whose form it followed. As the court did not address this issue, we remand the case and direct the court to ascertain whether as a matter [*32] of contract interpretation the form-following provisions of the 1979 National Union Policy yoke National Union's fate to that of U.S. Fire, rendering National Union equally liable under the 1979 National Union Policy.

C. The District Court's Discovery and Evidentiary Rulings

The District Court acted within the broad discretion afforded trial courts when it limited the scope of discovery of non-party insured evidence. We may reverse the District Court's discovery and evidentiary rulings only if these rulings are an abuse of discretion. Viles v. Ball, 872 F.2d 491, 494 (D.C. Cir. 1989); Brune v. IRS, 861 F.2d 1284, 1288 (D.C. Cir. 1988). Thus, we review the court's discovery ruling to determine if the court's "'actions were clearly unreasonable, arbitrary, or fanciful.'" Hull v. Eaton Corp., 825 F.2d 448, 452 (D.C. Cir. 1987) (quoting Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C. Cir. 1984)).

In the present case, appellants sought discovery of other policies issued by the defendant insurance carriers to other policy holders that contained asbestos -related exclusions. The District [*33] Court found these documents relevant, but concluded that "the enormity of the discovery sought and the heavy burden such would impose on the defendants," Carey-Canada, 118 F.R.D. at 245, warranted restricting the scope of discovery. Consequently, the court limited appellants' discovery "to documents relating to the policies defendants sold to non-party insureds that contain an asbestos -related exclusion and which were written or referred to by the underwriters of the policies at issue in the instant case prior to the issuance of the policies before the court." Id. at 245 (emphasis omitted).

On April 8, 1987, appellants again sought discovery of other policies. Appellants waited, however, until March 31, 1988 - one month before the close of discovery and five years after the action commenced - to file a motion to compel. Thus, the District Court denied the motion on July 26, 1988, in part because appellants did not seek modification of the court's earlier order in a timely fashion. The Celotex Corp. v. Cal. Union Ins. Co., Civ. No. 86-1142, Memorandum Order (D.D.C. July 26, 1988). Against this background, we cannot conclude that the trial [*34] court's handling of discovery in this case was an abuse of discretion or clearly unreasonable. Accordingly, we hold the court's rulings reasonable and not arbitrary.

Appellants also claim that the District Court's refusal to allow them to introduce evidence within the scope of the court's discovery order at trial is reversible error. We do not address this question with respect to the 1979

National Union Policy and the Columbia Casualty Policy since we are remanding for further consideration and the District Court will want to determine anew the admissibility of the evidence in light of this opinion. Any error committed by the District Court when it prevented appellants from introducing evidence consistent with the court's discovery orders, n5 is harmless and thereby not reversible under this Circuit's precedents. See Carter v. Distrcit of Columbia, 795 F.2d 116, 132 (D.C. Cir. 1986) (harmless error rule applies if defects do not affect parties' substantial rights); United States v. Hernandez, 780 F.2d 113, 119 (D.C. Cir. 1986) (same). The test for determining whether a trial courts evidentiary ruling is harmless is clear: "If (1) the case is [*35] not close, (2) the issue not central, or (3) effective steps were taken to mitigate the effects of the error, the error is harmless." Id. (citing Gaither v. United States, 413 F.2d 1061, 1079 (D.C. Cir. 1969)). Here, the District Court, after reviewing 1400 exhibits and hearing seven days of testimony, found "clear and convincing evidence that all parties to these insurance contracts understood and interpreted them to exclude all asbestos -related disease claims." Carey Canada, 720 F. Supp. at 1026. Thus, the case is not close with respect to the 1977 National Union Policy.

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n5 Appellants contend the court committed reversible error when it excluded evidence of the First State and H.K. Porter Policies upon which the court itself relied in its summary judgment decision. See Memorandum Opinion, Civ. No. 83-1105 at 8-9 (May 7, 1985).

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III. Conclusion

The District Court's judgment that the 1977 National Union Policy was ambiguous on its face was not clearly erroneous. We [*36] therefore affirm these findings and conclusions. The District Court, however, erred in not finding whether objective extrinsic evidence demonstrated that the Columbia Casualty Policy and the 1979 National Union Policy exclusions for claims "arising out of asbestosis" are ambiguous. Accordingly, we vacate and remand the case for findings on the question whether the term " asbestosis" was used ambiguously in the insurance industry at the time the Columbia Casualty Policy and 1979 National Union Policy were written. Additionally, we direct the District Court to determine whether the form-following provisions of the 1979 National Union Policy ties National Union's fate to that of U.S. Fire, rendering National Union equally liable under the 1979 policies as determined in the ADR proceeding involving U.S. Fire.

So Ordered.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to counsel for the Appellee by overnight mail this 3rd day of October, 1991, addressed as follows:

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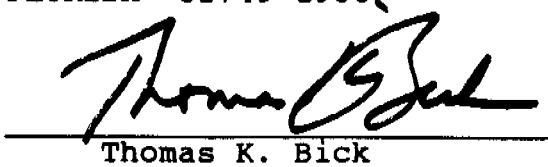

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